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## The Case for Downsizing the Corporate Attorney-Client Privilege

Elise Bernlohr Maizel

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# The Case for Downsizing the Corporate Attorney-Client Privilege

ELISE BERNLOHR MAIZEL<sup>†</sup>

*Privilege is a choice. In crafting evidentiary privileges, courts and policymakers have fashioned a rule that concedes that some things are more important than getting to the truth. Indeed, our entire law of privilege stems from the fact that society deems certain relationships important enough to protect their communications even from the truth-seeking process of litigation. The attorney-client relationship is a paradigmatic example. But something has gone seriously wrong with the law's attempts to transplant protections for an intimate, confessional space for communications between an individual and their attorney onto "artificial creatures of the law": the modern corporation.*

*Today's corporate attorney-client privilege now shields communications across entire constellations of relationships among corporate agents. And as the lines between business and legal advice blur and lawyers become ubiquitous in all aspects of corporate life, an even greater universe of documents and communications may fall outside the bounds of litigation. Privilege logs often obscure the true nature of withheld communications and only moneyed litigants may be able to call an over-withholder's bluff.*

*This Article proposes a sea change in the corporate privilege by arguing that courts should restrict recognition of the corporate attorney-client privilege to communications that take place in the context of a Privileged Communications Committee. While some scholars have called for the complete elimination of the privilege for corporate clients, this Article takes a more nuanced view, recognizing that some of the needs underlying the original impetus for the privilege still exist in the corporate context. The problem is that courts have landed on the wrong corporate analog for a human client. The use of a Privileged Communications Committee would serve to*

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*reset the balance, drawing the reality of the corporate privilege closer to the judicially articulated justifications for its existence.*

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## INTRODUCTION

The corporate attorney-client privilege has gotten out of hand. In theory, it is built as much on unspoken assumptions and corporate lawyer folkways as actual legal principles. In practice, it is unworkable. Its scope, scale, and myriad exceptions and waiver doctrines across a mismatched body of state and federal law make the privilege, at best, conditional. The time has come, not to excise the corporate attorney-client privilege, but to downsize it.

History reveals that an interest in preserving the honor and dignity of a human client and their counsel compelled the creation of the attorney-client privilege in the first place.<sup>1</sup> English courts of the eighteenth and nineteenth centuries protected and cultivated the development of an individual attorney-client privilege because:

[T]he meanness and the mischief of prying into a man's confidential consultations with his legal advisor, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place . . . are too great a price to pay for the truth itself.<sup>2</sup>

The inherent intimacy of these important consultations with human clients made revealing them a tawdry betrayal.<sup>3</sup> The corporate client followed along as an afterthought. Transplants can cause mischief,<sup>4</sup> and this was no exception. The evidentiary rules protecting a sacred space for consultation between a client and their counsel were inelegantly grafted onto the corporate form using imprecise assumptions and post hoc justifications. Indeed, though the attorney-client privilege is one of American law's oldest legal traditions, federal courts were not certain to what extent it existed in the corporate context until the United States Supreme Court decided *Upjohn v. United States* in 1982.<sup>5</sup> The now predominant justification for allowing lawyers to keep the secrets of inanimate corporations is that keeping these secrets promotes "full and frank" conversations with lawyers that, in turn, encourage compliance with the law.<sup>6</sup>

Corporate law is fueled by formalities. Corporations are "artificial creatures of the law" and exert their existence through their reliance on customs

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1. *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1455 (1985); John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 445 (1982).

2. *Pearse v. Pearse* (1846) 63 Eng. Rep. 950 (V.C.).

3. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (1961).

4. Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 652 (2002) ("As is often the case with legal transplants, whether inter-doctrinal or cross border, transplants can cause mischief. When a legal concept is taken from one context and incorporated into a fundamentally different setting, it may carry with it implications and characteristics that do not serve anyone's interests. The logic of legal concepts has a momentum of its own.").

5. *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981); see also *Radiant Burners, Inc. v. Am. Gas Ass'n*, 209 F. Supp. 321, 324 (N.D. Ill. 1962) (concluding there was no corporate attorney-client privilege); Sexton, *supra* note 1, at 443 ("For decades [before *Upjohn*] the Court had accepted tacitly the proposition that the attorney-client privilege available to individuals also was available to corporations, but . . . never had delineated the scope and meaning of the corporate attorney-client privilege.").

6. Sexton, *supra* note 1, at 459.

and convenient fictions.<sup>7</sup> But many features of corporate personhood provide poor analogies to a human client, rendering elements of the corporate attorney-client privilege absurdly expansive or conceptually incoherent. These mismatches have led a number of scholars to question whether the attorney-client privilege is justifiable at all in the corporate context and even to call for it to be abolished.<sup>8</sup> Meanwhile, every day in state and federal courts, millions of documents are shielded from discovery under justifications that are sloppy at best.<sup>9</sup>

This Article proposes a middle path that preserves the corporate attorney-client privilege but confines it to a space that more closely mimics the act of a human being consulting with counsel: the Privileged Communications Committee.<sup>10</sup> A Privileged Communications Committee of the corporate client's board could serve as the designated corporate agent to consult with counsel on matters that necessitate "full and frank" conversations. Confining corporate consultations with counsel to a particular universe of agents and a particular context serves several important aims. First, a Privileged Communications Committee provides a formal mechanism to meet the essential components of the attorney-client privilege in basically every jurisdiction: (1) a confidential communication; (2) between a lawyer acting in his capacity as such; (3) and a client; (4) for the purposes of seeking or providing legal advice.<sup>11</sup> Second, by communicating within the context of service on or consultation with a Privileged Communications Committee, the parties make clear the communication is of a

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7. See generally Jonathan R. Macey, *Corporate Law as Myth*, 93 S. CAL. L. REV. 923, 925 (2020) (identifying four "myths" underpinning corporate law theory that make American corporate law "more politically and culturally acceptable and more apparently consistent with societal values").

8. Elizabeth Thornberg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 158, 159 (1993) (arguing that the corporate attorney-client privilege "does great harm to the truth-seeking function of litigation and imposes tremendous transaction costs on litigants and on the judicial system as a whole"); Norman W. Spaulding, *Compliance, Creative Deviance, and Resistance to Law: A Theory of the Attorney-Client Privilege*, 2013 PROF. LAW. 135, 154-58 (2013) (arguing that the privilege actually serves to protect "creative deviance" and resistance to the law, rather than compliance with the law, and asserting that the "compliance justification" for the attorney-client privilege is duplicitous); Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 414 (1989) (conducting empirical research to conclude that "the circumstances in which the privilege plays a major role in influencing candor seem to be relatively rare"); Paul R. Rice, *The Corporate Attorney-Client Privilege: Loss of Predictability Does Not Justify Crying Wolf*, 55 BUS. LAW. 735, 741 (2000) (questioning the utility of the privilege in the corporate context); *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 473 (1977) (arguing for a "balancing" model of the corporate attorney-client privilege due to theoretical weaknesses in arguments for the existence of the attorney-client privilege that are "especially striking in the corporate context").

9. See, e.g., Resol. Tr. Corp. v. Adams, No. 93-389-CIV-ORL-18, 1994 WL 315646, at \*1 (M.D. Fla. Apr. 14, 1994) ("[T]his Court is troubled by the apparent inability of certain parties to conduct meaningful discovery in this case. The combination of poorly thought-out and very broad discovery requests, millions of documents, and the aggressive assertion of privileges appear to be some of the causes.").

10. Such a committee is narrower and more finite than the "control group" rejected by *Upjohn* and still applied by some states. See *infra* Part III.B.

11. See Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 868 (1998) (collecting privilege definitions under federal law and the laws of various states).

legal, rather than business, nature. Third, by carefully monitoring any potential conflicts of the members sitting on a Privileged Communications Committee, counsel could ensure that privileged information would not be shared with individual corporate agents whose interests are adverse to the corporate client. Finally, and most importantly, these factors combine to cut a corporation's attorney-client privilege down to size, rendering it predictable, workable, and consistent with its historical and current justifications.

This Article proceeds in three parts. Part I examines the theoretical flaws in the corporate attorney-client privilege, including inconsistencies in its justification and conceptual challenges raised by agency and confidentiality. Part II looks to how these flaws have borne out in practice and how the complexity of the modern corporation throws the privilege into confusion. Part III makes a case for the Privileged Communications Committees as a way to downsize the corporate attorney-client privilege and bring it in line with its supposed justification.

## I. PROBLEMS IN THEORY

### A. SHIFTING AND SHAKY JUSTIFICATIONS

Like so many other American legal traditions, the attorney-client privilege is drawn from English common law.<sup>12</sup> In response to the development of compulsory process in sixteenth century, English courts began to recognize an attorney-client privilege as early as 1577.<sup>13</sup> The attorney-client privilege, along with the spousal privilege, were widely accepted by English courts by the eighteenth century<sup>14</sup> and by American courts by the early nineteenth century.<sup>15</sup> The rationale for the privilege was originally to protect the honor of the attorney, who should not be forced to betray their client.<sup>16</sup> Despite its broad acceptance

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12. *Developments in the Law*, *supra* note 1, at 1455.

13. *Id.* Courts at the time did not strictly limit the application of this privilege to lawyers, but instead extended the exception from compelled testimony to all "gentlemen" if such testimony would violate a promise of secrecy. Thornberg, *supra* note 8, at 160.

14. See Norman W. Spaulding, *The Privilege of Probity: Forgotten Foundations of the Attorney-Client Privilege*, 26 GEO. J. LEGAL ETHICS 301, 312 (2013) (surveying the inconsistencies in Wigmore's telling of the origins of the privilege); see also *Pearse*, 63 Eng. Rep. at 957 (1846) ("Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And surely . . . the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, [is] too great a price to pay for truth itself."); see generally Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1070–85 (1978) (surveying early English case law on privilege).

15. See e.g., *McTavish v. Denning*, Ant. N.P. Cas. 113, 113 (N.Y. Sup. Ct. 1809); *State v. Hazleton*, 15 La. Ann. 72, 72 (1860) ("The prisoner has the privilege to prevent the disclosure of communications which he may have made to his counsel in the course of professional employment; and if papers have, under such circumstances, been placed by the former in the possession of the latter, they are considered as privileged."); see also Spaulding, *supra* note 14, at 322.

16. See JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2290 (1905) (arguing that privilege is justified by "consideration for the oath and the honor of the attorney, rather than for the apprehensions of his client"); see also Melanie B. Leslie, *The Costs of Confidentiality and the Purpose*

by courts, the attorney-client privilege was not without its detractors. Notably, philosopher and theorist Jeremy Bentham argued against the recognition of the attorney-client privilege, claiming that it reduced the law's deterrent effect by allowing lawbreakers to reveal their secrets to their counsel without fear of those secrets being revealed in a court of law.<sup>17</sup> Bentham thought attorneys in possession of a client's confession of lawbreaking would, without the attorney-client privilege, be an accessory to the crime.<sup>18</sup>

The attorney-client privilege grew up alongside several other common law privileges that protect highly personal and intimate communications.<sup>19</sup> First was the spousal testimonial privilege, which grew out of a similar concern with coerced betrayal as did the attorney-client privilege.<sup>20</sup> Additional privileges were eventually extended to other close or private relationships, such as priest and penitent and doctor and patient.<sup>21</sup> The preeminent evidence scholar John Henry Wigmore created a four-prong test for identifying the particular contextual dynamics that must be present in order for a particular communication to qualify for privilege protection:

- The communications must originate in a confidence that they will not be disclosed.

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*of Privilege*, 2000 WIS. L. REV. 31, 48 (2000) (explaining that the early rationale for the privilege rested upon concerns for attorney professional considerations; in other words, "the law should not force professionals to betray their clients").

17. Ronald J. Allen, Mark F. Grady, Daniel D. Polsby & Michael S. Yashko, *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUDS. 359, 370-71 (1990). It bears noting that Bentham was opposed, generally, to evidentiary privileges of all sorts. *Id.*

18. WIGMORE, *supra* note 3, at 551 (quoting JEREMY BENTHAM, *Rationale of Judicial Evidence*, in THE WORKS OF JEREMY BENTHAM 473, 479 (Bowring ed. 1842)) ("A rule of law which, in the case of the lawyer, gives an express license to that willful concealment of the criminal's guilt, which would have constituted any other person an accessory in the crime, plainly declares that the practice of knowingly engaging one's self as the hired advocate of an unjust cause, is, in the eye of the law, or (to speak intelligibly) in that of the law-makers, an innocent, if not a virtuous practice. But for this implied declaration, the man who in this way hires himself out to do injustice or frustrate justice with his tongue, would be viewed in exactly the same light as he who frustrates justice or does injustice with any other instrument.").

19. *Developments in the Law*, *supra* note 1, at 1497 ("Privilege law seems to be founded on a social vision that encompasses a variety of factual and normative beliefs: belief in the strength of the marital bond, belief in the sanctity of religious counseling, belief in the necessity of a free press, and belief in the importance of the legal and medical codes of ethics.").

20. EDWARD J. IMWINKELRIED, 2 THE NEW WIGMORE: A TREATISE ON EVIDENCE § 2.3, at 109 (2002) ("As in the case of an attorney's divulgence, a spouse's revelation was considered a betrayal—akin to treason against the sovereign.").

21. In *Totten v. United States*, a case concerning whether a secret agent acting on behalf of Abraham Lincoln could bring an action on his wartime contract with the late President, the U.S. Supreme Court explained that respect for certain relationships, as matter of public policy, requires allowing communications within those relationships to remain secret.

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose.

*Totten v. United States*, 92 U.S. 105, 107 (1875) (dictum).



- This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- The relation must be one which in the opinion of the community ought to be sedulously fostered.
- The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.<sup>22</sup>

Wigmore's third and fourth prongs reveal the theoretical underpinnings of the test and the privilege itself. Under its original rationale, privilege should protect trusted custodians of a person's deepest secrets from the ugly and untoward act of revealing them. The law should not force confidants to be turned into gossips or traitors. Eventually, as the attorney-client privilege hardened into an established principle of American law, the generally accepted justification for that privilege shifted. Rather than serving the honor of the attorney, courts and scholars eventually reasoned that the privilege was justified by a need to facilitate open communications between attorney and client.<sup>23</sup> "That purpose, of course, requires that clients be free to 'make full disclosure to their attorneys' of past wrongdoings, in order that the client may obtain the 'aid of persons having knowledge of the law and skilled in its practice.'"<sup>24</sup>

Courts have sporadically extended the attorney-client privilege to corporations since at least the early twentieth century, but the existence of a corporate attorney-client privilege was an open question until much later.<sup>25</sup> In 1962, in *Radiant Burners v. American Gas Association*, the U.S. District Court for the Northern District of Illinois reasoned it would be impossible for a corporation to comply with the privilege's confidentiality requirement because shareholders are entitled to inspect a corporation's books and records.<sup>26</sup>

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22. WIGMORE, *supra* note 3, § 2285. It was Wigmore's third prong, which requires that "the relation . . . be one which in the opinion of the community ought to be sedulously fostered" that has led scholars and practitioners to argue for privileges in a variety of other close personal relationships and professional relationships where high-stakes or highly private communications take place. *Id.*; see Michael D. Moberly, *Must a Friend Indeed Reveal a Friend's Misdeed? Exploring the Merits of a Friendship Privilege*, 51 ST. MARY'S L.J. 909, 915 (2020) (arguing for a testimonial privilege against testifying against one's friends); Sande L. Buhai, *Toward a Parent-Inclusive Attorney-Client Privilege*, 53 GA. L. REV. 991, 1011 (2019) (arguing for privilege over communications between parent and child); Michael D. Moberly, *Am I My Brother's Secret-Keeper? Contemplating the Recognition of a Sibling Testimonial Privilege*, 41 AM. J. TRIAL ADVOC. 239, 248 (2017) (arguing for a testimonial privilege between siblings); Sean A. Devlin, *Union Communications Privilege: Is It Time for Ohio to Protect Union Representative-Member Communications?*, 45 CAP. U. L. REV. 677, 678 (2017) (arguing for privilege between union representatives and members); Thomas J. Reed, *The Futile Fifth Step: Compulsory Disclosure of Confidential Communications Among Alcoholics Anonymous Members*, 70 ST. JOHN'S L. REV. 693, 694 (1996) (arguing for a privilege against disclosure of communications made in the context of alcoholics anonymous meetings).

23. Leslie, *supra* note 16, at 47–49.

24. *United States v. Zolin*, 491 U.S. 554, 562 (1989) (internal citations omitted).

25. See, e.g., *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915).

26. *Radiant Burners*, 209 F. Supp. at 324 ("[I]t is next to impossible for a corporation to comply with the confidentiality requirement of the privilege. . . . Surely one who voluntarily places [books and records] in a position where it is subject to inspection by other persons can hardly be said to have reasonable intended to retain the secrecy of the document.").

Accordingly, that court held that corporations were not entitled to assert the attorney-client privilege.<sup>27</sup> That same year, the U.S. District Court for the Eastern District of Pennsylvania was confronted with the same question of whether a corporation may be entitled to assert the attorney-client privilege. In *City of Philadelphia v. Westinghouse Electric Corporation*, the court did allow for a corporate attorney-client privilege, but confined that privilege to communications between the corporation's attorney and a "control group" in whom the decision-making authority for the corporation was vested.<sup>28</sup> It was not until *Upjohn v. United States* that the United States Supreme Court weighed in on the scope and meaning of the corporate attorney-client privilege, albeit imprecisely.<sup>29</sup> In *Upjohn*, the Supreme Court blessed the existence of a corporate attorney-client privilege and rejected the "control group" approach to its application, holding that communications between any corporate employee and corporate counsel may be protected.<sup>30</sup> Corporations are "artificial creatures of the law" and, thus, must communicate with counsel through their agents.<sup>31</sup> The Court reasoned that restricting privilege to just a control group "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."<sup>32</sup>

This basic articulation of the justification for the attorney-client privilege—that it serves to promote the facilitation of "full and frank legal advice" to corporate clients—has been the subject of sharp scholarly criticism since the time *Upjohn* was decided.<sup>33</sup> Nevertheless, in those intervening years since *Upjohn*, the United States Supreme Court has repeated the "full and frank" justification for privilege generally, and corporate privilege specifically, so

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27. *Id.*

28. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962) ("[I]f the employee making the communication . . . is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.")

29. Sexton, *supra* note 1, at 443 ("[*Upjohn* is] an opinion largely characterized by unexplicated conclusory language.")

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

31. *Id.* at 389–90.

32. *Id.* at 392.

33. Shortly after *Upjohn* was decided, John Sexton criticized its "unexplicated conclusory language" and vague reasoning. Sexton, *supra* note 1, at 444 ("Justice Rehnquist's opinion for eight Justices *does* manifest a firm commitment to the notion that the attorney-client privilege is available to corporations, but it *does not* attempt to justify that commitment."). In the years since, other scholars have focused on the flaws in *Upjohn*'s underlying justification for the privilege—that it promotes "full and frank" legal advice in service of compliance with the law. See Thornberg, *supra* note 8, at 218 ("In the great majority of cases, the privilege is needed neither to encourage the client to talk nor to encourage the lawyer to listen. The corporate privilege protects no moral interest in privacy or autonomy. Additionally, it imposes tremendous costs not only on the litigants but also on the entire judicial system."); Spaulding, *supra* note 8, at 154–58 (arguing that the privilege actually serves to protect "creative deviance" and resistance to the law rather than compliance with the law and that the "compliance justification" for the attorney-client privilege is duplicitous).

many times that it is clear it has won the day at the federal level.<sup>34</sup> So, too, the highest courts of at least thirty-two states have articulated a version *Upjohn's* “full and frank” justification for the attorney-client privilege.<sup>35</sup> Most importantly for corporate law, Delaware courts have embraced and expanded upon *Upjohn's* rationale, refusing to set aside the privilege in cases where a finding of waiver would “constrict the flow of information between attorney and client.”<sup>36</sup>

## B. THE CONFIDENTIALITY PUZZLE

An essential ingredient for privilege is confidentiality. This requirement is, at its core, about an adversarial relationship. Eighteenth and nineteenth century cases describe an attorney's duty to keep his clients' “secrets.”<sup>37</sup> Under the “attorney honor” rationale that underpinned earlier iterations of the privilege,

34. *See, e.g.*, *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 (2011); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009); *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996); *CFTC v. Weintraub*, 471 U.S. 343, 348 (1985).

35. *Ex parte Alfa Ins. Corp.*, 284 So. 3d 891, 904–05 (Ala. 2019); *Roberts v. City of Palmdale*, 853 P.2d 496, 506 (Cal. 1993); *Neusteter v. District Court of Denver*, 675 P.2d 1, 5 (Colo. 1984); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 60 (Conn. 1999); *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1278 nn.46–47 (Del. 2014); *Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18, 24 (Fla. 2017); *St. Simons Waterfront, L.L.C. v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 103 (Ga. 2013); *Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.*, 727 N.E.2d 240, 243 (Ill. 2000); *State v. Gonzalez*, 234 P.3d 1, 12 (Kan. 2010); *Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1142 (La. 1987); *Harris Mgmt., Inc. v. Coulombe*, 151 A.3d 7, 15–16 (Me. 2016); *CR-RSC Tower I, L.L.C. v. RSC Tower I, L.L.C.*, 56 A.3d 170, 197–98 (Md. 2012); *Suffolk Const. Co. v. Div. of Cap. Asset Mgmt.*, 870 N.E.2d 33, 38 (Mass. 2007); *In re Panel File No. 41310*, 899 N.W.2d 821, 826 (Minn. 2017); *Hewes v. Langston*, 853 So. 2d 1237, 1244 (Miss. 2003); *Am. Zurich Ins. Co. v. Mont. Thirteenth Jud. Dist. Ct.*, 280 P.2d 240, 245 (Mont. 2012); *Tekni-Plex, Inc. v. Meyner & Landis*, 674 N.E.2d 668, 671 (N.Y. 1996); *In re Miller*, 584 S.E.2d 772, 782 (N.C. 2003); *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 937 N.E.2d 533, 537 (Ohio 2010); *State ex rel. Or. Health Scis. Univ. v. Haas*, 942 P.2d 261, 265–66 (Or. 1997); *Pittsburgh Hist. & Landmarks Found. v. Ziegler*, 200 A.3d 58, 80 (Pa. 2019); *Mortg. Guar. & Title Co. v. Cunha*, 745 A.2d 156, 159 (R.I. 2000); *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.*, 813 S.E.2d 696, 699 (S.C. 2018), *opinion after certified question answered*, 723 F. App'x 224 (4th Cir. 2018); *Bertelsen v. Allstate Ins.*, 796 N.W.2d 685, 702–03 (S.D. 2011); *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314, 319 (Tenn. 2019); *In re XL Specialty Ins.*, 373 S.W.3d 46, 56 (Tex. 2012); *Baisley v. Missisquoi Cemetery Ass'n*, 708 A.2d 924, 929 (Vt. 1998); *Walton v. Mid-Atl. Spine Specialists, P.C.*, 694 S.E.2d 545, 549 (Va. 2010); *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188, 1191 (Wash. 2016); *West Virginia ex rel. Allstate Ins. v. Madden*, 601 S.E.2d 25, 33 (2004); *Harold Sampson Child.'s Tr. v. Linda Gale Sampson 1979 Tr.*, 679 N.W.2d 794, 802–03 n.33 (Wis. 2004).

36. *Davenport Grp. v. Strategic Inv.*, No. 14426, 1995 WL 523591, at \*1 (Del. Ch. Aug. 24, 1995) (“To vitiate unnecessarily the attorney-client privilege would have a chilling effect on counsel's ability to speak frankly with clients. If the attorney-client privilege becomes vulnerable, the truthfulness and extent of disclosure will decrease correspondingly.”); *see also Rembrandt Techs., L.P. v. Harris Corp.*, No. 07C-09-059, 2009 WL 402332, at \*5 (Del. Super. Ct. Feb. 12, 2009) (stating “strict adherence” to a rule of “absolute and complete protection from disclosure” is necessary to protect the privilege under the “full and frank” rationale); *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, No. 2017-0486, 2020 WL 3171373, at \*1 (Del. Ch. June 15, 2020) (“The privilege is meant to preserve a bedrock principle of our system of jurisprudence; that for that system to operate justly a lawyer and her client must be able to communicate freely, without the threat of disclosure of those communications, even when relevant to issues in litigation.”).

37. *See, e.g.*, *Baker v. Arnold*, 1 Cai. 258, 272 (N.Y. Sup. Ct. 1803) (“The right which clients have to the secrecy of their counsel produces confidence and a full disclosure of every fact necessary to the latter's forming a just estimate of their several cases . . .”); *see also Rice, supra* note 11 at 869–74 (describing the role of secrecy in eighteenth and nineteenth century privilege case law).

the concern was that an attorney would be forced to “betray” his client by sharing his secrets with an adversary.<sup>38</sup> Under the now-established “open communication with counsel” rationale, the same logic is present. Open communication is only possible when a client knows the information they share with their attorney will not be used against them. Because the privilege requires that communications be confidential, otherwise privileged communications shared with a third party typically waive the privilege. Normally, “disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed.”<sup>39</sup>

However, disclosures to some third parties do not carry a risk of disclosure to an adversary, and as a result, certain doctrines have developed to expand the circle in which privileged information stays privileged.<sup>40</sup> The law recognizes that, in some cases, it is expedient for multiple clients to jointly consult a single lawyer, and the law typically allows for a lawyer to simultaneously represent multiple clients so long as those clients have nearly identical interests.<sup>41</sup> In the context of a joint representation, co-clients or joint clients may consult their lawyer together without effecting a waiver of the attorney-client privilege.<sup>42</sup> The other common form of shared privilege frequently seen in the corporate space is the “common interest” or “community of interest” privilege.<sup>43</sup> The “common interest” exception to the third-party waiver rule provides that attorneys for different clients may share information without waiving the attorney-client privilege so long as the parties share a similar legal interest.<sup>44</sup> This exception owes its origin to the “joint defense” privilege established in criminal law to allow attorneys to coordinate co-defendants’ criminal defense strategies.<sup>45</sup>

Confidentiality presents a baseline conceptual issue in the corporate context. Corporations cannot speak for themselves but must act through agents, who each have a separate legal identity from the corporation itself. Under the *Upjohn* rule, applied in the federal courts and most states, communications between counsel to the corporation and even the lowest level employee do not

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38. *Andrews v. Solomon*, 1 F. Cas. 899 (C.C.D. Pa. 1816) (“An attorney is not permitted to disclose as a witness, the secrets of his client, because in doing so, he would betray a confidence, which from necessity the client must repose in him.”).

39. *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973); *accord Ciel Sci. & Tech. Co. v. Misonix, Inc.*, 2019 WL 1574806, at \*5 (E.D.N.Y. Apr. 11, 2019) (“[V]oluntary disclosure of privileged communications to a third party results in waiver of the attorney-client privilege.”) (internal alterations omitted).

40. By way of example, translators and other similar professionals who help lawyers and clients to communicate are generally not found to break privilege.

41. RESTATEMENT (THIRD) OF L. GOVERNING LAWS, § 128–31 (AM. L. INST. 2000).

42. *See id.* § 75(1) (“If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that . . . relates to matters of common interest is privileged as against third persons . . .”).

43. IMWINKELRIED, *supra* note 20, § 6.8.1 n.159 (collecting cases using the terms “common interest” and “community of interest” to refer to a privilege shared between parties with a common legal interest).

44. *See, e.g., In re Mortg. & Realty Tr.*, 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997) (applying the common interest exception to prevent disclosure of communications among company executive, company’s bankruptcy counsel, and counsel for the creditors’ committee).

45. *See Chahoon v. Commonwealth*, 62 Va. (21 Gratt) 822, 839 (1871).

break the privilege.<sup>46</sup> This is because these agents fall broadly within the definition of the client so long as they are acting in their capacity as corporate employees.<sup>47</sup> As the Benjamin Franklin saying goes, “three people can keep a secret if two of them are dead.”<sup>48</sup> And yet, theoretically, an unlimited number of agents could receive a privileged communication from corporate counsel without effecting a privilege waiver.<sup>49</sup>

### C. COMPLICATED CHARACTERS: DIRECTORS AND SHAREHOLDERS

Courts assessing whether the attorney-client privilege has been created between corporate counsel and a corporate employee ask a version of what Admiral James Stockdale famously asked in his opening remarks in the 1992 Vice Presidential Debate: “who are you and why are you here?”<sup>50</sup> The first question probes identity: what role does the corporate actor play? In what capacity is she acting? The second assesses the corporate actor’s action.<sup>51</sup> If, for example, a communication is for business purposes rather than legal purposes, it would not be protected by the attorney-client privilege.<sup>52</sup>

Privilege law has not quite known where to put two important players in the corporate landscape: directors and shareholders. These two important players can have shifting entitlement to the privilege of the company they purportedly serve or own, respectively.<sup>53</sup> Shareholders are not presumptively entitled to privileged materials belonging to the corporations in which they are

46. A small number of states have retained the “control group” test. *See, e.g.*, *Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992); *Langdon v. Champion*, 752 P.2d 999, 1002 (Alaska 1988); *Coulombe*, 151 A.3d at 15. As discussed, *infra* Part II.B, this does little to resolve the issue because corporations whose reach goes beyond a single state can hardly predict with certainty where they will be haled into court and, if they are, which state’s privilege law will apply.

47. *In re Maxus Energy Corp.*, No. 16-11501, 2021 WL 856040, at \*1 (Bankr. D. Del. Mar. 8, 2021).

48. BENJAMIN FRANKLIN, *Poor Richard, 1934*, in *THE PAPERS OF BENJAMIN FRANKLIN* (Leonard W. Labaree ed., Yale Univ. Press 1961) (1735).

49. Extraordinarily, the U.S. District Court for the Northern District of California refused to order the production of “document retention notices” sent to approximately 600 employees of eBay because the notices “were drafted by in-house counsel in consultation with outside counsel and were expressly labeled as ‘Attorney-Client Privileged & Confidential.’” *In re eBay Seller Antitrust Litig.*, No. C 07-01882, 2007 WL 2852364, at \*2 (N.D. Cal. Oct. 2, 2007); *cf.* *Opinion & Order, United States ex rel. Barko v. Halliburton Co.*, No. 05-CV-1276, at \*34–35 (D.D.C. Nov. 20, 2014), ECF No. 205 (ordering production of litigation hold notices distributed to all company employees).

50. 1992: ‘*Who am I? Why am I here?*’, CNN DIGITAL (June 9, 2011), <https://www.cnn.com/videos/politics/2011/06/09/vault.debate.stockdale.who.cnn>.

51. *See, e.g.*, *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984); *see also* *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 474–75 (N.D. Tex. 2004) (“Where an attorney is functioning in some other capacity—such as an accountant, investigator, or business advisor—there is no privilege.”) (citation omitted).

52. *TVT Records v. Island Def Jam Music Grp.*, 214 F.R.D. 143, 145 (S.D.N.Y. 2003).

53. The assertion that shareholders “own” the company is often attributed to an influential and oft-cited 1970 essay by economist Milton Friedman. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N. Y. TIMES MAG., Sept. 13, 1970, at 32. In the fifty-plus years since that claim was made, it has become the prevailing view among courts and scholars and, in turn, the subject of considerable critique. *See generally* LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* (2012).

invested.<sup>54</sup> Indeed, only under certain circumstances may shareholders gain access to a corporation's privileged materials. In *Garner v. Wolfenbarger*, a shareholder derivative suit, the Fifth Circuit held:

[W]here the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.<sup>55</sup>

The *Garner* court looked to Wigmore, who posited that privilege protections were only justified where the benefits from the correct disposal of the litigation were outweighed by the injury that would result from the disclosure of privileged materials.<sup>56</sup> The court reasoned that in the case of alleged corporate improprieties, shareholders' interests can be aligned with the corporate client, such that, upon a showing of good cause, the balance tips in favor of disclosure and the privilege must yield.<sup>57</sup> *Garner* gets at a central complication in transplanting the privilege onto the corporate form. Shareholders in the context of successful shareholder derivative suits can speak for the corporation.<sup>58</sup> This kind of client shapeshifting makes privilege access and ownership conditional *ex post*.

Directors, on the other hand, are presumptively entitled to a corporation's privileged documents and communications. Indeed, as Professor Stephen Bainbridge has posited, the directors on a company's board serve as the "platonic guardians" of that company and are entrusted with significant discretionary authority over its affairs.<sup>59</sup> Courts mostly agree that when a director receives a privileged communication in his capacity as an employee of the corporation he serves, the corporation is the sole privilege holder.<sup>60</sup>

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54. See, e.g., *In re Omnicom Grp., Inc. Secs. Litig.*, 233 F.R.D. 400, 410 (S.D.N.Y. 2006) (denying shareholders access to corporate documents protected by the attorney-client privilege).

55. *Garner v. Wolfenbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970).

56. *Id.* at 1100.

57. *Id.* at 1103.

58. Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 55-56 (2011) ("In a derivative suit, the corporation is the functional plaintiff . . . the allegations are typically that the corporation's current or former officers and directors breached their fiduciary duties to the corporation. The law gives shareholders this power because corporate officers and directors . . . are often implicated in the alleged wrongdoing.")

59. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550-51 (2003) ("[T]he board of directors is not a mere agent of the shareholders, but rather is a sui generis body—a sort of Platonic guardian—serving as the nexus for the various contracts comprising the corporation.")

60. See *Escue v. Sequent, Inc.*, No. 2:09-CV-765, 2012 WL 220204, at \*5 (S.D. Ohio Jan. 25, 2012); *Davis v. PMA Cos.*, No. CIV-11-3559, 2012 WL 3922967, at \*5-6 (W.D. Okla. Sept. 7, 2012); *Fitzpatrick v. Am. Int'l Grp., Inc.*, 272 F.R.D. 100, 107 (S.D.N.Y. 2010); *Lane v. Sharp Packaging Sys., Inc.*, 640 N.W.2d 788, 802-03 (Wis. 2002).

However, a number of cases in Delaware and federal courts have held that a director and the corporation he serves are considered “joint clients” and each independently own the privilege.<sup>61</sup> This theory rests on the assumption that “officers and directors of a corporation share common legal interests with the corporation.”<sup>62</sup> While it may be true that they share interests, the assertion is puzzling. When officers and directors receive privileged information on behalf of a corporation, they are acting on that corporation’s behalf. Indeed, they are “the corporation” for all intents and purposes. Corporations are “artificial creatures of the law” who can only act through their agents. An attorney who renders advice to a corporate client is not, implicitly, also representing the officer or director who happens to be the recipient of that information by virtue of his role as agent.<sup>63</sup> If it were so, a corporation could never be a sole client because corporations must act through their agents.

This piece of corporate privilege theory reflects both the complication of confidentiality in the corporate privilege as well as another related analytical tension. When a corporation is the sole client and privilege owner, it is the only party entitled to invoke or waive that privilege.<sup>64</sup> And yet, those human beings who act as corporate agents can themselves face legal peril in their individual capacity.<sup>65</sup> This is why lawyers are ethically required to give “*Upjohn* Warnings” to company employees to make clear they represent the corporation and not the individual employee.<sup>66</sup> So, too, when corporate ownership or management changes, subsequent management can choose to waive the privilege.<sup>67</sup> Sometimes new management will choose to waive the privilege for

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61. See, e.g., *Kirby v. Kirby*, No. 8604, 1987 WL 14862, at \*7 (Del. Ch. July 29, 1987); *Gottlieb v. Wiles*, 143 F.R.D. 241, 250 (D. Colo. 1992); *Moore Business Forms, Inc. v. Cordant Holding Corp.*, Nos. 13911, 14595, 1996 WL 307444, at \*8 (Del. Ch. June 4, 1996). In *Moore Business Forms*, then-Vice Chancellor Jacobs formulated the director-corporation “joint client” rationale slightly differently, explaining that “a more accurate description of the relationship is that there was a single “client,” namely, the entire board, which includes all its members.” *Id.*

62. *Buttonwood Tree Value Partners, L.P. v. R. L. Polk & Co.*, No. 9250, 2021 WL 3237114, at \*8 (Del. Ch. July 30, 2021).

63. See *United States v. Graf*, 610 F.3d 1148, 1159, 1160–61 (9th Cir. 2010).

64. *United States v. Ghavami*, 882 F. Supp. 2d 532, 544 (S.D.N.Y. 2012) (“[A] corporate employee without authority cannot effect waiver of a privilege that belongs to the corporation.”).

65. At the time of this Article, it is an unsettled matter of law as to whether a corporation’s right to maintain the attorney-client privilege may defeat an employee’s right to present an advice of counsel defense in a civil case. *United States v. Wells Fargo Bank N.A.*, No. 12-CV-7527, 2015 WL 3999074, at \*3 (S.D.N.Y. June 30, 2015) (noting, but not deciding, that a defendant’s right to make out a defense could “conceivably overcome Wells Fargo’s right to maintain its privilege”); cf. *United States v. W.R. Grace*, 439 F. Supp. 2d 1125, 1145 (D. Mont. 2006) (holding that a company’s attorney-client privilege must “yield where its invocation is incompatible with a criminal defendants’ Sixth Amendment right” to present a defense).

66. See, e.g., *United States v. Connolly*, No. 16 Cr. 0370, 2019 WL 2120523, at \*4 n.1 (S.D.N.Y. May 2, 2019); see also Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73, 115 (2013) (“These warnings, referred to as *Upjohn* warnings, fail to negate the fact that the corporation will still try to secure information from its employees that may ultimately be harmful to them.”).

67. *Weintraub*, 471 U.S. at 349 (“New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect

the express purpose of pursuing claims against past management.<sup>68</sup> This strikes right at the heart of the “full and frank” justification. The very nature of the corporate form means that those who have the ability to communicate on the company’s behalf under the protection of the company’s privilege may only be candid at their own peril.<sup>69</sup> Though this is, in some ways, a fairly commonplace agency cost, it undermines the stated reasons for the existence of the corporate privilege, which is to facilitate “open client and attorney communication” by creating a “seal of secrecy.”<sup>70</sup> The corporation has no voice without speaking through individuals. However, those individuals who are expected to speak freely cannot expect secrecy in return. Therefore, the secrecy afforded by the privilege cannot serve to incentivize communications in the aspirational way that *Upjohn* envisioned.

#### D. CHANGES IN CONTROL

It is black-letter law that sharing privileged communications with an adversary constitutes a waiver.<sup>71</sup> In the corporate context, the identity of the “adversary” is not straightforward or static. Parties who were once adversaries to the company may later become the agents who are entrusted with the custody of the corporation’s privilege. A significant body of Delaware law concerns itself with the permissible scope of takeover defenses and so-called “poison pills.”<sup>72</sup> Implicit in the theory of the poison pill is the understanding that certain shareholders may be considered “hostile” or a “threat” to a corporation under certain circumstances.<sup>73</sup> However, if, for example, an activist who was once considered a hostile adversary is ultimately successful and wins a board seat, that former adversary is now an agent presumptively entitled to access and control the firm’s privileged materials without effecting a waiver.<sup>74</sup> In other words, communications between corporate counsel and management about defense against an outside hostile actor can easily fall into the hands of that very

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to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.”).

68. See, e.g., *In re Avado Brands, Inc.*, 358 B.R. 868, 884 (Bankr. N.D. Tex. 2006) (finding that litigation trustee has standing to bring claims against former officers and directors of bankrupt entity).

69. Green & Pogor, *supra* note 66 (“These *Upjohn* warnings should not be accepted as alleviating the direct conflict that the corporation has with its constituents.”).

70. *Zolin*, 491 U.S. at 562–63.

71. IMWINKELRIED, *supra* note 20, § 6.8.1.

72. See Jennifer Arlen & Eric Talley, *Unregulable Defenses and the Perils of Shareholder Choice*, 152 U. PA. L. REV. 577, 593–99 (2003) (describing the various forms takeover defenses may take).

73. Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1064 (2002) (“I developed the poison pill to protect against tender offers structured by raiders with terms that were inimical to the interests of shareholders, or which under certain circumstances would become inimical to shareholders.”); Marcel Kahan & Edward Rock, *Anti-Activist Poison Pills*, 99 B.U. L. REV. 915, 917–20 (2019) (analyzing the use of poison pills against hedge fund activists).

74. *In re WeWork Litig.*, 250 A.3d 901, 910–11 (Del. Ch. 2020) (“[D]irectors of a Delaware corporation are presumptively entitled to obtain the corporation’s privileged information as a joint client of the corporation and any curtailment of that right cannot be imposed unilaterally by corporate management untethered from the oversight and ultimate authority of the corporation’s board of directors.”).



hostile actor if he is successful in a battle for control. Corporate law resolves this simply—once an activist gains control, they are no longer “hostile.” However, for the human actors who are charged with managing the affairs of the corporation and engaging in purportedly privileged communications on its behalf, this reality of corporate law could serve to undermine the candor between attorney and client.<sup>75</sup>

Competing factions within the governance structure of a corporation can also create tensions that turn loyal agents into enemies whose presence presumptively waives the privilege. Indeed, courts have explicitly found that the interests of particular board members or factions of the board can diverge from the interests of the company and its shareholders. For example, in *In re PLX Technology Inc. Stockholders Litigation*, Vice Chancellor Laster of the Delaware Court of Chancery noted that technology company PLX and the activist investor who served on its board of directors “had a divergent interest” because the latter was interested in “achieving quick profits by orchestrating a short term sale” to the detriment of longer-term interests.<sup>76</sup> In a similar vein, in the same year, the Delaware Court of Chancery found that Shari Redstone, the daughter of famed media mogul Sumner Redstone and chair of National Amusements, was, in essence, adverse to a Special Committee of CBS’s Board of Directors, despite the fact that she served as the Vice Chair of the Board.<sup>77</sup> Because of a factional dispute about the future strategic direction of the company, the Chancery Court held that Redstone was not entitled to privileged documents related to the Special Committee to which she was adverse.<sup>78</sup>

These interpersonal, factional disputes highlight the tension created by borrowing assumptions about a privilege designed for people and uncritically applying those assumptions to the corporate form. Human beings die and may carry their privileged secrets to the grave—the attorney-client privilege

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75. While in many cases the personal liability of officers and directors is limited and corporate managers are often indemnified, personal liability is not the only concern. Consider the sale of Twitter to Elon Musk in the summer of 2022. Following Musk’s acquisition of the social media company, he chose to publish a number of internal communications revealing corporate decision-making around controversial topics in the so-called “Twitter Files.” Cat Zakrzewski & Faiz Siddiqui, *Elon Musk’s ‘Twitter Files’ Ignite Divisions, but Haven’t Changed Minds*, WASH. POST (Dec. 3, 2022, 6:39 PM), <https://www.washingtonpost.com/technology/2022/12/03/elon-musk-twitter-files>. The release of these communications subjected the former Twitter executives who made them to online harassment and abuse. *Id.* Beyond personal liability, non-monetary factors such as a fear of embarrassment or retribution could also serve to undermine candor. *Id.*

76. *In re PLX Tech. Inc. S’holders Litig.*, No. 9880, 2018 WL 5018535, at \*42 (Del. Ch. Oct. 16, 2018). Professor Ann Lipton has expressed skepticism with Vice Chancellor Laster’s finding that the activist’s interests diverged from those of the other shareholders, noting “[o]nly eight months earlier, the shareholders of PLX had made it very clear by voting to seat Potomac’s nominees that they *rejected* the incumbent board’s long-term plans and preferred a short-term sale of the company.” Ann M. Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W. RES. L. REV. 863, 864 (2019). Professor Lipton argues “true” shareholder preferences, as described by courts and some scholars, are hypothesized and imagined; the mechanisms that prioritize them represent a “façade of private ordering” for what ultimately amounts to state control. *Id.* at 892–93.

77. *See, e.g., In re CBS Corp. Litig.*, No. 2018-0342, 2018 WL 3414163, at \*7 (Del. Ch. July 13, 2018).

78. *Id.* at 6–7.

continues after death.<sup>79</sup> By contrast, the corporate privilege carries a possibly infinite life, and the only inevitability is that it will change hands.<sup>80</sup> Though the privilege was initially developed to protect trusted counselors from the ugly act of betraying confidences made in intimate circumstances—attorney and individual client, spouses, a sinner and a priest—the privilege’s transplantation onto the corporate form has allowed it to grow to cover a wide swath of communications involving a diffuse and sometimes warring collection of characters. The corporation’s agents cannot typically invoke the protection of the privilege for themselves as individuals. Their privileged communications may be used against them or passed along to adverse factions depending on who prevails in the battle for corporate control. All the while, courts have repeated the “full and frank” justification without grounding this assertion in anything more than a wish that “full and frank” communications between corporate clients and their counsel take place.

## II. PROBLEMS IN PRACTICE

### A. GAMESMANSHIP AND JUDICIAL ANIMOSITY

Discovery is, in theory, a “cooperative and self-regulating process managed between the parties.”<sup>81</sup> In practice, it can be a knock-down-drag-out battle between litigation adversaries and even third parties.<sup>82</sup> It is no wonder that courts are not eager to wade into messy discovery battles. Indeed, there is ample evidence that judges hate handling disputes over the attorney-client privilege.<sup>83</sup> This judicial animus towards resolving discovery questions, including privilege disputes, can lead parties to avoid raising them for fear of annoying the judge who will later decide substantive issues in their case.<sup>84</sup> As such, civil discovery

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79. *Swidler & Berlin*, 524 U.S. at 406 (“[T]he general rule is that the attorney-client privilege continues after death.”).

80. Indeed, some entities, such as Special Purpose Acquisition Companies or “SPACs,” are formed for the express purpose of entering into a corporate transaction. See Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 *YALE J. ON REG.* 228, 235 (2022) (offering an overview of SPACs); see also *S’holder Representative Servs. L.L.C. v. RSI Holdeo, L.L.C.*, No. 2018-0517, 2019 WL 2290916, at \*4 (Del. Ch. May 29, 2019) (concerning the ownership of transactional privileged materials post-merger).

81. *Cartanza v. Cartanza*, No. 7618, 2013 WL 1615767, at \*2 (Del. Ch. Apr. 16, 2013).

82. See, e.g., Transcript of Status Conference, *Stati v. Republic of Kazakhstan*, No. 14-1638, 2020 WL 3259244 (D.D.C. June 5, 2020) (“The magistrate judge should not have to waste her time pulling adults apart on the playground. The level of effort on the part of the attorneys, the time, the paper, the judicial resources that have all been devoted to the discovery dispute . . . have long since passed the point where they can be considered to be reasonable justified by the nature and scope of the dispute itself.”).

83. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 *GEO. WASH. L. REV.* 461, 521 n.150 (2007) (“Judges’ distaste for discovery disputes is widespread and well known.”); Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 *FORDHAM L. REV.* 709, 723 (1998) (“[J]udges . . . dislike discovery disputes, treating them as quarrels between bickering children . . .”).

84. Robin J. Efron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 *B.U. L. REV.* 127, 143 (2018) (“The rules do not encourage or reward parties for bringing their discovery disputes directly to the judge’s attention. In fact, parties that eschew these rather obvious cues can be subject to judicial ridicule.”).

takes place largely outside of the oversight of courts and is the focus of little academic scholarship.<sup>85</sup> Lawyers largely govern themselves.<sup>86</sup> Often, privilege disputes only tend to make it in front of a judge as a matter of last resort, following significant back and forth between the parties.<sup>87</sup> The lack of regular formal judicial guidance on matters of privilege can lead a handful of published decisions regarding privilege to have ripple effects across thousands—or perhaps even millions—of individual privilege calls made every day by litigators in practice. When the parties do choose to seek judicial intervention, fact-intensive privilege disputes in the federal courts can require labor intensive *in camera* review and are frequently referred to magistrates.<sup>88</sup> In the Delaware Chancery Court, these types of disputes are typically referred to Special Masters.<sup>89</sup> Both at the state and federal level, magistrates and special masters are overburdened.<sup>90</sup>

Nor do the magistrates and special masters have a wealth of specific legal guidance from the higher courts. Appellate court decisions on issues of the attorney-client privilege are rare. District court privilege decisions are not

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85. Edith Beerdsen, *Discovery Culture*, 57 GA. L. REV. 981, 998 (2023) (“The primary responsibility for running the discovery process lies with the parties and their legal representatives, and discovery negotiations generally take place without the court’s involvement.”); see also Charles Yablon & Nick Landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 CARDOZO L. REV. 719, 720 (2012) (“No subject in law is of more practical importance yet garners less theoretical attention than discovery in civil actions.”).

86. Attorney disciplinary authorities do little to deter the kind of discovery misconduct described herein. Indeed, lawyers largely see only the most egregious cases as being likely to result in the attention and sanction of bar discipline. See Veronica Root Martinez & Caitlin-Jean Juricic, *Toward More Robust Self-Regulation Within the Legal Profession*, 69 WASH. U. J.L. & POL’Y 241, 269 (2022) (“[L]awyers believe that disciplinary authorities are uninterested in aggressively overseeing the full scope of requirements contained within the Rules of Professional Conduct. These views are solidified when members of the profession see their colleagues continually violate Rules of Professional Conduct without sanction . . .”).

87. See, e.g., *Geomatrix Sys., L.L.C. v. Eljen Corp.*, No. 3:20-CV-1900, 2022 WL 4585546, at \*1 (D. Conn. Sept. 29, 2022) (motion to compel only filed after months-long dispute between the parties); *CommonSpirit Health v. HealthTrust Purchasing Grp., L.P.*, No. 3:21-0460, 2022 WL 19403855, at \*2 (M.D. Tenn. Oct. 17, 2022) (granting motion to compel after party had refused to produce privilege log for over nine months); *SEC v. Yorkville Advisors, L.L.C.*, 300 F.R.D. 152, 154–55 (S.D.N.Y. 2014) (defendant moved to compel after nearly a year of dispute between the parties regarding the sufficiency of privilege logs).

88. See, e.g., *TVT Records*, 214 F.R.D. at 149 (discovery dispute referred to magistrate for labor intensive *in camera* review for privilege determinations as to individual documents).

89. See *Buttonwood Tree*, 2021 WL 3237114, at \*1 (“Special Masters are a blessing, but like all blessings in this imperfect world, mixed. For litigants, there is a time and expense burden. For the Court, using Special Masters requires reviewing their findings de novo. . . . I must now pay the piper in the form of the following de novo review.”).

90. See, e.g., Roman Battaglia, *Increasing Court Cases Call for More Support Staff in Delaware Courts*, DEL. PUB. MEDIA (Feb. 21, 2022, 12:33 PM) <https://www.delawarepublic.org/politics-government/2022-02-21/increasing-court-cases-call-for-more-support-staff-in-delaware-courts> (reporting on Delaware Chief Justice Collins Seitz’s request to the Delaware legislature for another Special Master in the Court of Chancery because “they work at an unhealthy and unsustainable pace”).

immediately appealable absent an extraordinary case that warrants mandamus or an interlocutory appeal.<sup>91</sup>

These factors come together to create an environment that incentivizes parties to massively over-withhold documents in discovery under a claim of privilege.<sup>92</sup> Though, theoretically, the burden is on the party who invokes the privilege to prove its applicability, once a document is withheld as privileged, the burden on an opponent to get access to it is quite high. As an initial matter, identifying dubious privilege assertions requires combing through privilege logs which may or may not provide sufficient information to even assess a claim of privilege.<sup>93</sup> Once overbroad claims of privilege are identified, a litigant must then decide—without seeing the documents—whether they are worth the financial and time costs of bringing a motion to compel and potentially annoying a judge in the process. Because of these systemic obstacles to challenging suspect privilege assertions, one can imagine that many go unopposed, especially in cases of resource asymmetry.<sup>94</sup> So, too, a lack of clear judicial guidance leaves the scope of the corporate privilege only vaguely defined.<sup>95</sup> In this vacuum, law firm and corporate policies often dictate the scope of discoverable materials in litigation.<sup>96</sup> These internal policies can be ludicrously expansive because the burden in challenging them rests almost entirely with the litigation opponent.<sup>97</sup> As noted, this burden can be particularly lopsided where

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91. *Mohawk Indus.*, 558 U.S. at 103; *Cheney v. District Court. for District of Columbia*, 542 U.S. 367, 369 (2004) (“[Mandamus] is a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’”) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)); *Union County v. Piper Jaffray & Co.*, 525 F.3d 643, 646 (8th Cir. 2008) (“Permission to allow interlocutory appeals should thus be granted sparingly and with discrimination.”) (internal citation omitted).

92. Though over-withholding is hardly exclusive to corporations, the many theoretical and practical problems specific to corporate clients create an environment especially conducive to over-withholding. See Elise Bernlohr Maizel, *In Re Grand Jury, Quantifying Purpose, and the “Lawyer in the Room” Problem in Corporate Attorney-Client Privilege*, YALE J. REG. (Mar. 19, 2023), <https://www.yalejreg.com/nc/in-re-grand-jury-quantifying-purpose-and-the-lawyer-in-the-room-problem-in-corporate-attorney-client-privilege-by-elise-bernlrohr-maizel>. Critically, per *Upjohn*, a corporation’s privileged communication could theoretically involve a multitude of parties who could engage in or be present for a privileged communication. See *Upjohn*, 449 U.S. at 391–92.

93. The scope of electronic discovery has led to the customary practice that parties provide one another with massive and vague privilege logs, or even categorical logs, with minimal context to ground the basis for an assertion of privilege. See, e.g., *In re Aenergy, S.A.*, 451 F. Supp. 3d 319, 326 (S.D.N.Y. 2020) (assessing challenge to vague and opaque categorical privilege log); *In re Imperial Corp. of Am.*, 174 F.R.D. 475, 478 (S.D. Cal. 1997) (allowing a categorical privilege log where the documents range in the “hundreds of thousands, if not millions”); *AM Gen. Holdings L.L.C. v. Renco Grp., Inc.*, Nos. 7639 & 7668, 2013 WL 1668627, at \*2 (Del. Ch. Apr. 18, 2013) (noting the problem of the “inevitable cryptic nature of document descriptions in a privilege log”).

94. See also Jessica Erickson, *Bespoke Discovery*, 71 VAND. L. REV. 1873, 1908 (2018) (describing the way cost asymmetries impact discovery practice).

95. See *Upjohn*, 449 U.S. at 386 (“We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so.”).

96. See Beardsen, *supra* note 85, at 1038 (“Law firms play an important role in the maintenance and propagation of cultural norms that apply in the practice of civil discovery.”).

97. See, e.g., *Spread Enters., Inc. v. First Data Merch. Servs. Corp.*, No. CV 11-4743, 2013 WL 618744, at \*1 (E.D.N.Y. Feb. 19, 2013). In *Spread Enterprises*, the defendant refused to produce any emails that included

the party seeking to compel purportedly privileged documents has fewer resources than the party defending the applicability of the privilege.

#### B. UNPREDICTABILITY AND CHOICE OF LAW

The corporate attorney-client privilege is said to be justified by the need for “full and frank” conversations between attorney and client, which will only happen, courts and privilege proponents say,<sup>98</sup> if both parties are secure in the knowledge that their conversations will not be later revealed. And yet, in the current legal landscape, it is nearly impossible to know for certain, at the time a communication is made, what rules might govern an eventual challenge to the privilege. Lawsuits can be brought in many places and many court systems. At the time a communication takes place, it is challenging to predict that a related lawsuit might be brought.

Choice-of-law analysis for privilege questions is complex and murky.<sup>99</sup> In the federal courts, federal common law applies in all criminal cases, cases involving solely federal claims, or cases involving both federal claims and state claims brought under pendant or supplemental jurisdiction.<sup>100</sup> In a case in federal court based on diversity jurisdiction, however, Federal Rule of Evidence 501 requires that a district court apply the law of privilege that would be applied by the courts of the state in which it sits.<sup>101</sup> When claims are brought in state court, the body of privilege law to be applied is a matter of the forum state’s choice of law principles, which can vary widely. Some states simply apply the law of the forum state, while others apply the “most significant” relationship test, a multifactor balancing test.<sup>102</sup>

There are major substantive differences in the scope of privilege protection across different bodies of privilege law. For example, attorneys for a Delaware corporation and attorneys for that corporation’s controlling shareholder might engage in what they believe are privileged communications in considering a potential acquisition of a New York company. Were the acquisition to later be challenged in Delaware federal court, and the privilege over those communications challenged, the court could easily find that the communications fell within the scope of the “common interest” or “community of interest” privilege, which the Third Circuit has found to apply in purely transactional

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in-house counsel on the “to” or “cc” line, arguing that the defendant had a policy that the inclusion of in-house counsel implied a request for legal advice. *Id.*

98. *See supra* Part I.A.

99. While choice of law questions may also plague individual clients, they are especially pronounced for corporate clients, whose reach across multiple jurisdictions is far more likely. *See, e.g.,* BNSF Ry. Co. v. Tyrrell, 581 U.S. 402, 413 (2017) (explaining that courts may assert general jurisdiction over corporate defendants anywhere they are “at home,” which may include a principal place of business, place of incorporation, or a location where operations are substantial enough to render the defendant “at home”).

100. *See* FED. R. EVID. 501; *see also* United States v. Gillock, 445 U.S. 360, 368 (1980); Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367 n.10 (9th Cir. 1992).

101. FED. R. EVID. 501; Samuelson v. Susen, 576 F.2d 546, 549 (3d Cir. 1978).

102. *See* Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 121–25 (2002) (explaining state law choice of law principles as applied to privilege questions).

contexts.<sup>103</sup> However, if the same transaction were challenged in New York state court, and the privilege over the same communications were challenged, the privilege would be found to be waived. This is because New York state courts only allow common interest privilege to apply to communications made in anticipation of litigation.<sup>104</sup>

With these broad discrepancies in privilege law from jurisdiction to jurisdiction, and the unpredictability of which body of law might actually apply, it is difficult to imagine that the privilege is serving its purpose.<sup>105</sup> Either parties are engaging in communications they believe will be privileged and risk later having the rug pulled out from under them, or they are aware of the uncertainty and the privilege does nothing to facilitate the “full and frank” communications that supposedly justify shielding communications from being exposed in litigation. In the former situation, the privilege is a mirage. In the latter, it is pointless.

### C. LAWYERS IN EVERY ROOM

In the modern corporation, lawyers are everywhere. In an amicus brief filed in *Upjohn v. United States* by the United States Chamber of Commerce, the organization argued for a broad privilege because:

The corporation, has grown from a small, highly centralized entity to a highly divisionalized one with decision making dispersed both horizontally and vertically; and, governmental bodies, at all levels, have imposed increased regulations on all forms of business, virtually guaranteeing the need for greater involvement by lawyers in the corporate decision making process.<sup>106</sup>

In other words, the corporation is enormous and there are lawyers in every room. In the years since the Supreme Court agreed with the U.S. Chamber of Commerce that the enormity of the modern corporation and its legal problems counseled in favor of a broad privilege in *Upjohn*, the role of corporate lawyers has only grown.<sup>107</sup> Commentators have noted the growing prominence of the general counsel in the corporate governance structure, describing an ideal general counsel as a “lawyer-statesman” with involvement in a broad array of

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103. See *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (noting that common interest privilege “applies in civil and criminal litigation, and even in purely transactional contexts”).

104. See *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 620 (2016) (holding common interest only applies where parties communicate regarding “pending or reasonably anticipated litigation”).

105. The unpredictability of what body of privilege law might apply and the major substantive differences among different bodies of privilege law have led a number of scholars to propose the adoption of a uniform rule of privilege to be adopted across all jurisdictions. See Glynn, *supra* note 102, at 64 (proposing that Congress adopt a uniform law of privilege that preempts state law); Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 BOS. U. PUB. INT. L.J. 49, 86 (2005) (proposing the adoption of a uniform rule of common interest privilege).

106. Brief for the Chamber of Commerce of the United States as Amici Curiae Supporting Petitioners, *Upjohn v. United States*, 449 U.S. 383 (1981), (No. 79-886), 1979 WL 199520, at \*3–4.

107. Riaz Tejani, *Moral Convergence: The Rules of Professional Responsibility Should Apply to Lawyers in Business Ethics*, 35 GEO. J. LEGAL ETHICS 33, 42 (2022) (“Starting in the 1980s, lawyers began to take greater responsibility in corporate organizations.”).

both business and legal decisions.<sup>108</sup> In large corporations, inside and outside counsel are involved in a wide range of day-to-day corporate functions.<sup>109</sup>

As the role of the corporate counsel has grown, the lines between business and legal advice have blurred.<sup>110</sup> General counsels have seen their roles expand from a narrow, purely legal advisor to a high-ranking member of corporate management with a broad range of responsibilities.<sup>111</sup> So, too, what constitutes “business advice” and what constitutes “legal advice” are often inseparably intertwined.<sup>112</sup> Theoretically, communications falling into the former category must be produced while communications falling into the latter category may be withheld. In practice, separating what may be permissibly withheld as privileged from what must be produced as primarily business-focused in nature involves a kind of hair-splitting that is confusing, unworkable, and allows for a tremendous amount of over-withholding.<sup>113</sup> Because of the fuzzy nature of what might be categorized as “business advice” or “legal advice,” it may well be permissible zealous advocacy for corporate counsel to err on the side of withholding communications with in-house or outside counsel that have any legal component. This leads to either of two bad outcomes. Either the production would go unchallenged because, on the face of a privilege log, the presence of lawyers would appear to satisfy the prima facie requirements, or the party challenging such a log would be forced to expend resources litigating whether the withheld documents listed on a privilege log actually qualify as privileged.<sup>114</sup>

The near impossibility of creating a workable standard under the status quo—and the corporate desire to over-withhold—was laid bare in the United

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108. See, e.g., Ben W. Heineman, Jr., *The General Counsel as Lawyer-Statesman*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 5, 2010), <https://corpgov.law.harvard.edu/2010/09/05/the-general-counsel-as-lawyer-statesman/>; see also Garry W. Jenkins & Jon J. Lee, *Leadership Evolution: The Rise of Lawyers in the C-Suite*, 96 TUL. L. REV. 695, 727 (2022).

109. In a 2015 interview, Verizon general counsel Randy Milch reported that Verizon employed over 350 in-house lawyers as well as outside counsel across public policy, compliance, M&A, tax, patent law, security, real estate, antitrust, and other issue areas. In-House Legal, *Verizon's Randy Milch on Being General Counsel and Running the In-House Legal Department*, LEGAL TALK NETWORK (Feb. 25, 2015), <https://legaltalknetwork.com/podcasts/in-house-legal/2015/02/verizons-randy-milch-general-counsel-running-in-house-legal-department>.

110. See *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002) (“[I]n-house attorneys are more likely to mix legal and business functions.”).

111. Deena Williamson, *GC Is the New CEO: The Rise and Rise of General Counsel*, ACC DOCKET (Dec. 14, 2020), <https://docket.acc.com/gc-new-ceo-rise-and-rise-general-counsel> (“GCs are increasingly thought of as business leaders with a legal perspective.”).

112. See also Ben Smith & Max Tani, *Top Fox Lawyer's "Big Screw Up" Could Reveal Lachlan Murdoch's Secrets*, SEMAFOR (Oct. 23, 2022, 5:08 PM PST), <https://www.semafor.com/article/10/23/2022/fox-top-lawyer-license-lachlan-murdoch> (noting that the blended business and legal role of Fox News's chief legal officer, who was also unlicensed in the jurisdiction where he practiced, raised questions about privilege in defamation case involving the company).

113. See, e.g., *Klig v. Deloitte L.L.P.*, No. 4993, 2010 WL 3489735, at \*6 (Del. Ch. Sept. 7, 2010) (“Too frequently counsel default to a rule of invoking privilege whenever an attorney appears on a document.”).

114. *Id.* (“Just as you can't hit what you can't see, you can't challenge what the other side hasn't described. Presented with pages of inscrutable descriptions, the adversary must first undertake the burden of fighting for a usable log. This builds another round of multi-stage decisions, increasing the payoff for the party that broadly and vaguely asserts privilege.”).

States Supreme Court's recent oral arguments in *In re Grand Jury*.<sup>115</sup> There, petitioners challenged the current prevailing test to determine whether a “dual-purpose” communication concerning both business and legal considerations is discoverable or permissibly withheld as privileged.<sup>116</sup> At oral argument, the justices and advocates alike struggled to articulate precisely how the ostensible current test works or how the alternate test urged by the petitioners would be any better.<sup>117</sup> The government urged that courts continue to apply the “primary purpose test” but struggled to quantify exactly what it would mean for a legal purpose to be “primary.”<sup>118</sup> Petitioners, on the other hand, asked that the court sweep an even broader universe of communications under the blanket of the privilege by allowing parties to withhold anything that involved a “legitimate legal purpose.”<sup>119</sup> The Court—and the government purportedly representing the “status quo”—had tremendous trouble even articulating a workable statement of current law.<sup>120</sup> A month after oral argument, without an answer to any of these questions, the Court dismissed *In re Grand Jury* as improvidently granted.<sup>121</sup>

Under either framework urged by the parties in *In re Grand Jury*, the contemplated scope of documents<sup>122</sup> and communications that may be permissibly withheld under a claim of the privilege is enormous. Lawyers play a role in nearly every facet of modern corporate life, cloaking much of the day-to-day affairs of a corporation in the privilege.<sup>123</sup> Under the prevailing framework, which is left undisturbed by the Supreme Court, it is up to litigators, charged with engaging in zealous advocacy, to determine whether the primary

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115. Transcript of Oral Argument at 3–4, *In re Grand Jury*, 598 U.S. \_\_\_\_, 143 S. Ct. 543 (2023) (No. 21-1397) (mem.).

116. Petition for Writ of Certiorari at 1, 7, *In re Grand Jury*, 598 U.S. \_\_\_\_, 143 S. Ct. 543 (2023) (No. 21-1397) (mem.).

117. See generally Transcript of Oral Argument, *In re Grand Jury*, 598 U.S. \_\_\_\_, 143 S. Ct. 543 (2023) (No. 21-1397) (mem.).

118. *Id.* at 51–54.

119. *Id.* at 6.

120. Illustrating the slipperiness of this exercise, counsel for the government was forced to reverse herself multiple times at oral argument. First, the government retracted a concession to the Chief Justice regarding the percentage of a communication's purpose required to be considered “primary.” *Id.* at 53. In a lengthy discussion with Justice Jackson and Justice Barrett about whether a “tie” between two competing purposes—one legal and one non-legal—would be decided in favor of the privilege or in favor of disclosure, she first took the position that “a tie goes for the runner in favor of the legal purpose.” *Id.* at 61. Later, in discussing the privilege proponent's burden with Justice Barrett, the government offered, “if [the party invoking the privilege] can't meet the burden because the district court is hopelessly confused, one reasonable approach in that case would be to deny the privilege because, of course, our basic default is every man's evidence rule.” *Id.* at 68–69.

121. *In re Grand Jury*, 598 U.S. \_\_\_\_, 143 S. Ct. 543 (2023) (per curiam) (mem.); see also Maizel, *supra* note 92 (describing the theoretical challenges presented at oral argument in *In re Grand Jury*).

122. I use the term “documents” here because, though pre-existing documents and other non-privileged attachments cannot be made privileged by attaching them to a privileged communication, parties in litigation sometimes withhold an entire email family, including both the parent email and any attachments, so long as that parent email is privileged. See, e.g., *City of Roseville Emps.' Ret. Sys. v. Apple Inc.*, No. 19-CV-02033, 2022 WL 3083000, at \*2 (N.D. Cal. Aug. 3, 2022) (describing counsel for Apple's practice of withholding attachments along with privileged parent emails); *In re Application of Chevron Corp.*, No. 10-371, 2013 WL 11241413, at \*4 (D.D.C. Apr. 22, 2013) (describing the same practice).

123. Tejani, *supra* note 107 (describing the ubiquity of lawyers in both legal and non-legal roles within the modern corporation).



purpose of a communication is a legal one.<sup>124</sup> Accordingly, the bounds of “primary purpose” can be pushed to the point of absurdity and are rarely checked.<sup>125</sup> Under the framework urged by the petitioners in *In re Grand Jury*, nearly any communication involving a lawyer could be arguably withheld.<sup>126</sup> Though the “primary purpose” test is supposedly the prevailing framework, the reality in practice may well look more like the “significant purpose” test urged by *In re Grand Jury*’s petitioners. When enough lawyers are around, withholding in the first instance and waiting for a challenge may seem a prudent approach for a zealous advocate.

#### D. EVERYBODY’S TALKING

Directors owe fiduciary duties to the entities they oversee.<sup>127</sup> Directors “must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.”<sup>128</sup> When directors sit on multiple boards and consequently owe duties to multiple entities, it is assumed that they can effectively wear two hats and honor a duty of loyalty to both.<sup>129</sup> This kind of dual fiduciary role is the norm.<sup>130</sup> It is not at all uncommon for directors to serve on multiple boards and most publicly traded firms share at least one director.<sup>131</sup> The growing body of scholarship considering director interlocks—connections between companies that share a director—assumes that information will be shared across the interlock.<sup>132</sup> Indeed, this is a feature, not a bug.<sup>133</sup> Director interlocks have been linked to the spread of a variety of good governance practices such as improvements in reporting, director independence, and the separation of CEO and Chairman of the Board roles.<sup>134</sup> However, the informational leakages associated with director interlocks have also raised concerns, including conflicts of interest and antitrust concerns.<sup>135</sup>

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124. Maizel, *supra* note 92.

125. Once an overinclusive privilege call is made, challenging it can be a tremendous burden. *See supra* Part II.A.

126. *See generally* Transcript of Oral Argument, *In re Grand Jury*, 598 U. S. \_\_\_\_, 143 S. Ct. 543 (2023) (No. 21-1397) (mem.).

127. PRINCIPLES OF CORP. GOVERNANCE § 4.01 (AM. L. INST. 1994).

128. *Weintraub*, 471 U.S. at 349.

129. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) (“There is no dilution of [a director’s fiduciary duties] where one holds dual or multiple directorships, as in a parent-subsidary context.”).

130. Michal Barzuza & Quinn Curtis, *Board Interlocks and Corporate Governance*, 39 DEL. J. CORP. L. 669, 670 (2015) [hereinafter *Corporate Governance*].

131. *Id.*

132. *See, e.g., id.* at 672 (“Most obviously, interlocks spread information, including information about governance practices.”).

133. Michal Barzuza & Quinn Curtis, *Board Interlocks and Outside Directors’ Protection*, 46 UNIV. CHI. L.J. LEGAL STUD. 129, 129 (2017) [hereinafter *Outside Directors’ Protection*].

134. Barzuza & Curtis, *Corporate Governance*, *supra* note 130, at 671–72.

135. Jeremy McClane & Yaron Nili, *Social Corporate Governance*, 89 GEO. WASH. L. REV. 932, 986 (2021) (discussing conflict of interest “network” issues that arise based on interlocking directorships); Yaron Nili, *Horizontal Directors*, 114 NW. U. L. REV. 1179, 1240 (2020) (analyzing the potential antitrust concerns stemming from interlocking directorships on the boards of multiple companies within the same industry).

Board interlock scholarship also assumes that legal information will bleed across interlocking boards.<sup>136</sup> This makes perfect sense. A director who serves on the board of two companies does not stop knowing information he learned in the boardroom of Company A when he enters the boardroom of Company B. This is the same whether Company B is a publicly traded company or an activist hedge fund. If the director learns of a legal issue in connection with his service on Company A that could impact Company B, logic dictates that he might share that information with Company B unless there is some sort of formal mechanism preventing him from doing so.<sup>137</sup>

In practice, it is not clear that even where fiduciary duties or other obligations counsel against sharing privileged information, that officers and directors can be expected to maintain confidentiality.<sup>138</sup> Corporate executives do not necessarily have a sophisticated knowledge or understanding of the bounds of the attorney-client privilege.<sup>139</sup> Shortly after *Upjohn* was decided, Professor Vincent Alexander conducted an empirical study surveying corporate lawyers and business executives about the impact of privilege protection on communications between corporate attorneys and their clients.<sup>140</sup> That survey indicated that non-lawyer corporate clients were largely unaware of important exceptions to the attorney-client privilege, such as the crime-fraud exception or the *Garner* doctrine.<sup>141</sup> Without a nuanced understanding of what might be covered by the attorney-client privilege, and what might constitute a waiver, to expect corporate board members and other interconnected executives to actually maintain confidentiality may be assuming too much.<sup>142</sup> And if directors know

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136. Barzuza & Curtis, *Outside Directors' Protection*, *supra* note 133, at 155–56 (“Since some directors would likely have known about *Schoon* and many others would not, it’s quite plausible that a director may have learned about *Schoon* from their service on another board and transmitted this knowledge via an interlock.”).

137. Jennifer Arlen, *Evolution of Director Oversight Duties and Liability under Caremark: Using Enhanced Information-Acquisition Duties in the Public Interest* 3 (Eur. Corp. Governance Inst., Working Paper No. 680, 2023) (describing directors’ oversight duties under Delaware law as the duty to take steps to detect and deter illegal misconduct and arguing for the imposition of more precise and exacting oversight duties on directors in order to deter corporate misconduct).

138. Vice Chancellor Laster of the Delaware Court of Chancery, in a case concerning a director who was also a partner in a venture capital firm, observed that the director “could not avoid sharing information about the Company with the funds, because [the director] (like all humans) has only one brain. Humans cannot partition their brains so that they only use particular knowledge for particular purposes. [The director] . . . drew on a unitary store of knowledge when carrying out his dual roles as corporate director and fund manager.” *Hyde Park Venture Partners Fund III, L.P. v. FairXchange, L.L.C.*, 292 A.3d 178, 183 (Del. Ch. 2023).

139. *See, e.g., In re Grand Jury Procs.*, 219 F.3d 175, 180–81 (2d Cir. 2000) (corporate officer inadvertently and accidentally revealed privileged information immediately after being directed to avoid discussing counsel’s advice); *In re Grand Jury Procs.*, Oct. 12, 1995, 78 F.3d 251, 254 (6th Cir. 1996) (corporate president inadvertently waived privilege by discussing attorney’s advice with third parties).

140. Alexander, *supra* note 8, at 193.

141. *Id.* at 388.

142. A recent study assessing the impact of activist investor board membership found that “[o]nce a fund-nominated director goes on the board, an abrupt ‘information leakage’ follows, with the result that the target corporation’s stock price begins to anticipate future public disclosures.” John C. Coffee, Jr., Robert J. Jackson, Jr., Joshua R. Mitts & Robert E. Bishop, *Activist Directors and Agency Costs: What Happens When an Activist Director Goes on the Board?*, 104 CORNELL L. REV. 381, 382 (2019).

information, privileged or not, may be passed across an interlock, the privilege does nothing to promote candor.

#### E. EXCESSIVE FORMALISM AND TRAPS FOR THE UNWARY

With an expansive swath of corporate communications potentially falling under the protection of the attorney-client privilege, parties in discovery must wade through lengthy, often vague privilege logs in search of items to challenge.<sup>143</sup> Privilege logs are often quite opaque, so litigants' only choice may be to poke the most obvious holes.<sup>144</sup> As a result, despite the complexity and nuance of the corporate form, there is often a stunning shallowness to the resolution of privilege questions in the corporate context.

A recent privilege dispute in the Delaware Chancery Court provides an illustration of how the expansive scope of the corporate privilege has led privilege battles to focus on superficial "foot faults." In *In re WeWork Litigation*, Chief Operating Officer of Softbank Group Corporation ("SBG"), Marcelo Clare, wore many hats.<sup>145</sup> In addition to his role with SBG, he served as the Chairman of The We Company ("WeWork"), and the Chairman of Sprint, Inc. ("Sprint").<sup>146</sup> SBG and its affiliate Vision Fund had invested in WeWork and were actively negotiating a transaction to take control of an even greater stake in the company.<sup>147</sup> As a result, Clare's direct reports, Sprint CEO Michael Combes, and Sprint employee Christina Sternberg also found themselves working on behalf of the same three entities: SBG, WeWork, and Sprint, simultaneously.<sup>148</sup> While wearing their SBG hats, but using Sprint email accounts, Combes and Sternberg exchanged privileged communications with SBG counsel regarding WeWork.<sup>149</sup> When the contemplated transaction between SBG and WeWork failed, and SBG and former WeWork CEO Adam Neumann found themselves battling over the wreckage in Delaware Chancery Court, Neumann sought those emails.<sup>150</sup> SBG claimed privilege.<sup>151</sup> Neumann countered that, because Combes and Sternberg had used their Sprint email accounts, the privilege was waived.<sup>152</sup> Chancellor Andre Bouchard of the Delaware Court of Chancery agreed.<sup>153</sup>

To find this waiver, Chancellor Bouchard applied a four-factor test first articulated by the U.S. Bankruptcy Court for the Southern District of New York

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143. *Klig*, 2010 WL 3489735, at \*6 ("Vapid and vacuous descriptions interfere with the adversary's decision-making process.")

144. *Id.*

145. *In re WeWork Litig.*, No. 2020-0258, 2020 WL 7624636, at \*1 (Del. Ch. Dec. 22, 2020).

146. *Id.*

147. *In re WeWork Litig.*, No. 2020-0258, 2020 WL 7343021, at \*3 (Del. Ch. Dec. 14, 2020).

148. *In re WeWork Litig.*, 2020 WL 7624636, at \*1.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at \*1-2.

153. *Id.* at \*1.

in *In re Asia Global Crossing, Ltd.*<sup>154</sup> Under *Asia Global*, courts look to the following factors to determine whether a party had a reasonable expectation of privacy in a third-party corporation's email account:

(1) [D]oes the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?<sup>155</sup>

By applying *Asia Global*, the court shifted focus away from the identities and interests of the actual recipients of the privileged information and instead placed the focus on what might be deemed "email hygiene." Chancellor Bouchard noted that both of the email custodians at issue had access to alternate WeWork or SBG email accounts, the implication being that the cardinal sin causing the waiver of privilege was that people who were otherwise perfectly entitled to receive privileged information in their capacities as agents of SBG did so using an account that, if they had closely read an employee handbook, they would know could potentially be monitored.<sup>156</sup> The opinion made no mention of the fact that any such email monitoring would be answerable to Sprint CEO Michael Combes, one of the two custodians whose emails were sought.

The message corporate bar took from these cases was to demand a kind of performative separateness. "Don't risk your privilege by directors using their employer's email account," warned Kirkland & Ellis's client alert following the issuance of the WeWork decision.<sup>157</sup> The standard large law firm advice to outside directors was to use a designated director email account or a personal email account to avoid inadvertently granting an employer access to privileged board materials.<sup>158</sup> Months after *WeWork*, that guidance was made explicit by Vice Chancellor Travis Laster in *In re Dell Technologies Inc. Class V Stockholders Litigation*.<sup>159</sup>

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154. *Id.* at \*2 (citing *In re Asia Glob. Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005)).

155. *Id.* at \*2.

156. *Id.* at \*2-3.

157. Daniel E. Wolf, Peter Martelli & Stefan Atkinson, *Don't Risk Your Privilege by Directors Using Their Employer's Email Account*, KIRKLAND & ELLIS (Dec. 23, 2020), <https://www.kirkland.com/publications/kirkland-manda-update/2020/12/directors-using-their-employers-email-account>.

158. *See, e.g., id.*; Doug Raymond & Deanna J. Hayes, *Protecting Email Privilege: Directors' Use of External Work Email Leaves the Correspondence Vulnerable*, DIRECTORS & BOARDS (2021), [https://www.faegredrinker.com/-/media/files/insights/raymond-directors-and-boards/dbar21\\_raymond\\_reprint.pdf](https://www.faegredrinker.com/-/media/files/insights/raymond-directors-and-boards/dbar21_raymond_reprint.pdf); Noah Kressler & Lacey Rochester, *Rethink How You Communicate With Outside Directors*, BAKER DONELSON (Mar. 9, 2021), <https://www.bakerdonelson.com/rethink-how-you-communicate-with-outside-directors-certain-communications-may-not-be-protected>.

159. Transcript of Oral Argument at 37-38, *In re Dell Techs. Inc. Class V S'holders Litig.*, 2023 WL 4864861 (Del. Ch. 2021) (No. 2018-0816) ("So I guess why isn't that just the easy and simply policy solution and, in fact, better board hygiene, and a rationale where a monitoring policy effectively leads to a lack of reasonable expectation of privacy, in fact, has this beneficial policy consequence of creating an incentive to engage in a better hygiene practice by separating out your emails?").

An uncertain privilege is said to be no privilege at all.<sup>160</sup> And yet, under a formalistic approach, superficial details dictate whether a corporation's privileged secrets must be disclosed in litigation. Delaware has repeatedly offered the "full and frank" justification for the privilege, and yet it strains reason to suggest that corporate agents are encouraged to engage in "full and frank" discussions with counsel when the fate of those communications might be dictated by the contents of a third-party corporation's employee handbook. Delaware's *Asia Global* cases are a symptom of the larger problem: the corporate attorney-client privilege lacks a coherent theoretical framework, so in practice it is a mess.

### III. THE CASE FOR A PRIVILEGED COMMUNICATIONS COMMITTEE

#### A. THE REASON FOR RETAINING A CORPORATE PRIVILEGE

It is no accident that the United States Supreme Court, the lower federal courts, and nearly every state court in the country has repeated, like an incantation, the "full and frank" justification for the attorney-client privilege.<sup>161</sup> There is social value in creating an intimate space to allow certain communications to take place. The archetypical example contemplates someone who has done wrong approaching a trusted counselor, whispering a confession, and asking for advice as to how to make it right.<sup>162</sup> One can imagine this scenario playing out across each of the traditionally recognized privileges: the attorney-client privilege, the spousal privilege, the priest-penitent privilege, and the more recently recognized therapist-patient privilege. The problem with the application of this principle to the corporate attorney-client privilege is not that this value fails to exist for corporations, but that courts fashioning the scope of that privilege have failed to locate the correct corporate analog for an individual consulting with his counsel. In the post-*Upjohn* era, the privilege has stretched to cover an incredible amount of conduct as lawyers play an ever-increasing role in day-to-day corporate life.<sup>163</sup> The mechanics of asserting and challenging privilege mean that unreasonable privilege assertions often go undetected and unchallenged.<sup>164</sup> The privilege assertions that are easiest to challenge are frequently superficial and shallow—foot faults and traps for the unwary.

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160. *Upjohn*, 449 U.S. at 393 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application.").

161. See *supra* note 35 for a list of cases in more than 30 states endorsing the "full and frank" justification.

162. See *Jaffee*, 518 U.S. at 10 (describing privilege as protecting the ability for candor in relationships "rooted in the imperative need for confidence and trust") (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)); *Totten*, 92 U.S. at 107 ("[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.").

163. See generally Garry W. Jenkins & Jon J. Lee, *Leadership Evolution: The Rise of Lawyers in the C-Suite*, 96 TUL. L. REV. 695 (2022).

164. See *supra* Part II.A.

With all that is wrong with the corporate privilege, there is still reason to protect the space that was originally intended to be protected—an intimate, confessional space for communications with an attorney.<sup>165</sup> In true moments of “bet the company” peril, the stewardship of the company may well be served by a context where officers and directors are not forced to carefully select their words for fear of use in future litigation. These circumstances, however, are far rarer than the average, day-to-day use of the corporation’s attorney-client privilege. This problem stems from the fact that courts have landed on the wrong corporate analog for a human client. The *Upjohn* court construed the corporate “client” so broadly as to create a corporate privilege entitlement so far beyond the kind of rights afforded to individuals that it is hardly recognizable. Privilege is always about balancing needs—the very existence of the privilege reflects a need for secrecy that outweighs the need to divulge those secrets in litigation.<sup>166</sup> In the corporate context, the balance is off.

#### B. PROPOSING A PRIVILEGED COMMUNICATIONS COMMITTEE

Courts have failed to identify the appropriate corporate equivalent for the confidence that takes place between an individual and their lawyer. This Article proposes that the fitting corporate analog for such intimate conversations to occur is within the context of a special committee of the board of directors specifically designated for consultations with counsel, which this Article calls a Privileged Communications Committee. Such a committee would serve as the “client” for purposes of creating and maintaining the attorney-client privilege.<sup>167</sup> This change would dramatically narrow the scope of a corporation’s attorney-client privilege due to the time and attention constraints of a board committee. Corporations would be forced to be efficient about the use of the attorney-client privilege and to confine its use to where it truly has the effect of promoting “full and frank” communications. Day-to-day legal and regulatory decision-making and advice would largely fall outside the realm of a corporation’s privileged communications. For some entities, a multi-million-dollar contract is so important that a conversation about a risk to it might be a delicate one where the privilege fosters a fuller conversation with a lawyer. For another company, a few million dollars is so minor that privilege has no impact on the level of candor when speaking about such an issue. For each, the Privileged Communications Committee would be a venue to selectively discuss the issues that rise to the

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165. See *supra* Part I.A.

166. Norman W. Spaulding, *The Privilege of Probity: Forgotten Foundations of the Attorney-Client Privilege*, 26 GEO. J. LEGAL ETHICS 301, 307 (2013) (“Reading [early American privilege] cases outside Wigmore’s synthesis draws into relief the delicacy of reconciling clients’ interests, the rule of law, and personal and professional integrity.”).

167. The move from a broad, *Upjohn*-style corporate privilege to the narrower privilege this Article proposes could either come from the courts or via a change to the Federal Rules of Evidence. Further, such a change could be shaped and standardized through the implementation of a NASDAQ and NYSE listing requirement mandating a board committee as a designated agent to consult with counsel under the protection of the attorney-client privilege.

level where the parties to the conversation might choose their words carefully or avoid conversations entirely in the absence of privilege.

The use of a Privileged Communications Committee also serves to solve the problems presented by the “control group” approach that the *Upjohn* court rejected.<sup>168</sup> There, the court found the “control group” to be unworkable precisely because its membership was unpredictable.<sup>169</sup> By contrast, a Privileged Communications Committee makes clear who is entitled to engage in privileged communications. An additional benefit of this predictability is that a Privileged Communications Committee, when acting in that capacity, would know their communications would be considered “legal” rather than “business” communications, such that they would fall within the umbrella of the privilege. In short, this proposal provides a predictably privileged group and context, which in turn would help to foster the kind of candor that justifies the privilege in the first place.

In many communications involving lawyers, there is little need for the attorney-client privilege. There are independent business reasons to engage in day-to-day legal communications, as well as, in the case of officers and directors, a duty to manage the affairs of the corporation in a manner consistent with the law.<sup>170</sup> Therefore, there is no need for the privilege to incentivize these communications.<sup>171</sup> In the case of much higher stakes conversations, in which there is a risk of a lack of candor, a Privileged Communications Committee could speak directly with either in-house or outside counsel in a predictably privileged context. Once legal advice is considered, and the resulting business decision is made, communications to disseminate the decision would not be privileged. If made in writing and prepared in anticipation of litigation, those communications may be protected by the attorney work product doctrine, but they would not be privileged. Once a decision is made and a course of action is set, those things are facts. Facts are not protected by the privilege. For example,

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168. See *Upjohn*, 449 U.S. at 393, 397.

169. *Id.* at 393 (“The very terms of the test adopted by the court below suggest the unpredictability of its application.”).

170. See *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967–970 (Del. Ch. 1996) (directors must implement and monitor compliance programs to ensure that the companies they serve meet their obligations under law); see also Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885, 1887 (2021) (describing *Caremark* as part of a “much older requirement that corporations conduct only lawful business by lawful means”); Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 257–64 (2020) (offering a conceptual overview of the compliance function).

171. Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Calotti & Jeffrey M. Gorris, *Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 651 (2010) (“[T]he corporation’s existence is premised on the nondefeasible promise that it will conduct only lawful business through lawful activities.”); Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing A Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 976–77 (2018) (“For instance it may be profitable for a firm to provide financial services to a drug cartel, servicing this client is averse to the public interest (e.g., against the public’s moral norms and disruptive to public security). In return for the privilege of operating within a jurisdiction, firms agree to abide by certain rules and regulations or else face punishment.”).

if a trading firm's Privileged Communications Committee consulted with counsel and decided not to engage in a particular kind of trade anymore, the fact that the firm's policy around that type of trade changed would not be privileged.

In modern corporate governance, the board of directors serves as the key corporate decision-maker and power center.<sup>172</sup> Boards are duty-bound to “[inform] themselves . . . of all material information reasonably available to them.”<sup>173</sup> Scholars have described the evolving role of the board of directors as one of “information governance.”<sup>174</sup> Boards use committees to delegate authority to develop expertise and act on certain governance matters.<sup>175</sup> A number of such committees—for example, audit committees, nomination and governance committees, and compensation committees—are required by or regulated by federal and state statutes and NYSE or NASDAQ listing rules.<sup>176</sup> Beyond the required committees, boards of directors employ special committees for discrete purposes such as assessing threatened derivative litigation, conducting internal investigations, or weighing transactions where there is an actual or potential conflict of interest.<sup>177</sup> Members of special committees may be obligated to meet independence requirements in order to be empowered to take certain corporate actions.<sup>178</sup>

Courts should restrict the corporate attorney-client privilege to communications that take place in the context of Privileged Communications Committees. The structure of a board committee or special committee readily lends itself to consultations with counsel. Operationally, the function of a Privileged Communications Committee could function as the legal equivalent to an audit committee. Like an audit committee, a Privileged Communications Committee could require the independence of its members and at least one

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172. Yaron Nili, *Board Gatekeepers*, 72 EMORY L.J. 91, 101 (2022) (“At the core of these [large corporations] sits the board of directors, meant to manage, monitor, and guide the corporation.”).

173. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

174. Sarah Haan & Faith Stevelman, *Boards in Information Governance*, 23 U. PA. J. BUS. L. 179, 182 (2020) (“Consistent with their *Caremark* duties, boards engage in information governance in the deliberative construction of the firm’s internal data gathering, reporting, and communications architecture—harnessing that architecture to board level action.”).

175. BRUCE F. DRAVIS, *THE ROLE OF INDEPENDENT DIRECTORS IN CORPORATE GOVERNANCE* 99, 102 (2010).

176. *Id.* at 99–105.

177. *See, e.g., In re Oracle Corp. Derivative Litig.*, 808 A.2d 1206, 1207–08 (Del. Ch. 2002) (special litigation committee formed to determine whether to bring action against corporate insiders alleged to have engaged in malfeasance); *In re Woolworth Corp. Sec. Class Action Litig.*, No. 94 CIV. 2217, 1996 WL 306576, at \*1 (S.D.N.Y. June 7, 1996) (special committee formed to investigate accounting irregularities); *In re Ampal-Am. Isr. Corp.*, No. 12-13689, 2020 WL 5242956, at \*1 (Bankr. S.D.N.Y. Sept. 1, 2020) (special committee formed to assess related party transactions); *see also* Elizabeth Pollman, *Strengthening Special Committees*, 9 U.C. DAVIS BUS. L.J. 137, 141 (2009) (describing the typical uses of special committees).

178. *See, e.g., In re MFW S’holders Litig.*, 67 A.3d 496, 510 (Del. Ch. 2013) (assessing the independence of special committee of the board that negotiated and recommended a merger).



member with special expertise.<sup>179</sup> A Privileged Communications Committee would control and manage the firm's relationship with outside counsel and provide oversight over the internal legal function. Most importantly, when circumstances warrant, a Privileged Communications Committee could engage in the kinds of intimate and protected communication contemplated by the original proponents of the attorney-client privilege.

Certain theoretical issues presented by the application of the attorney-client privilege to corporations simply cannot be resolved because of the nature of the corporate form.<sup>180</sup> Corporations will always be forced to act through agents, who themselves will change while a corporation has a potential indefinite life. These facts mean that the corporate privilege will always rely on legal fictions around confidentiality since, unlike with individual clients, privileged communications originate with agents rather than the client itself. So, too, the individuals entitled to enjoy and exercise the corporation's privilege will be highly likely to change. To have a corporate privilege, this dissonance must be tolerated.

However, a Privileged Communications Committee creates a kind of discipline and predictability around the privilege that resolves many of the practical problems resulting from the current breadth of the corporate attorney-client privilege. Most importantly, shrinking the corporate privilege begins to resolve the analytical mismatch between the "full and frank" justification and the corporate form.<sup>181</sup> First, doing so creates a clear and narrow category of communications that falls within the definition of the privilege under all state and federal privilege regimes. *Ex ante*, predictability as to the applicability of the privilege and the likelihood of waiver would help encourage the candor with counsel. Controlling for conflicts when determining the membership of the committee could prevent later risk of waiver due to factional board conflicts.<sup>182</sup> Delineating between activity that takes place in a Privileged Communications Committee which enjoys privilege protections and activities that occur outside such a committee would help committee members more clearly distinguish among things they can and cannot share with third parties, potentially cutting down on leakages across interlocking directorates.<sup>183</sup> *Ex post* differentiating between privileged and nonprivileged documents in discovery would be meaningfully easier, lightening burdens on courts and litigants alike and, in one small way, equalizing the power between more moneyed corporate defendants and less powerful individuals and entities.

Finally, the creation of a Privileged Communications Committee could have the effect of forcing a deliberative and director-led assessment of legal risk

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179. See 17 C.F.R. § 240.10A-3(b)(i) (requiring members of audit committees to be independent); 17 C.F.R. § 229.407(d) (requiring that a company explain the lack of a financial expert on the audit committee). A fitting requirement for a Privileged Communications Committee would be to require at least one member hold a juris doctorate.

180. See *supra* Part I.B–D.

181. *Id.*

182. See *In re WeWork Litig.*, 250 A.3d 976, 1008 (Del. Ch. 2020) (noting the "potential privilege waiver issues" that arise out of factional conflict on the Board of Directors).

183. See *supra* Part II.D.

to become an essential component of corporate governance, which, in turn, could lead to improved compliance outcomes. In the wake of Enron and the other financial scandals of the early twenty-first century, the Securities and Exchange Commission (SEC) laid the groundwork for such a board committee.<sup>184</sup> As part of the Sarbanes-Oxley Act of 2002, Congress charged the SEC with adopting minimum standards for attorney conduct.<sup>185</sup> In response, the SEC promulgated Rule 205, which created reporting duties for attorneys who represent issuers.<sup>186</sup> As an alternative to reporting material violations of law to the chief legal officer of the issuer, or, in some cases, to the audit committee and/or the board of directors, the SEC proposed a new structure to receive and act on reports of misconduct—the “qualified legal compliance committee.”<sup>187</sup> Per Rule 205, the SEC contemplated a committee consisting of a member of the issuer’s audit committee and two or more independent directors charged with hearing reports of misconduct, informing the chief executive officer and chief legal officer of the issuer, and choosing whether and how to act on such risks.<sup>188</sup> Most issuers have ignored the SEC’s suggestion, instead folding compliance into the list of responsibilities delegated to the audit committee.<sup>189</sup> However, in proposing a qualified legal compliance committee, the SEC sketched out a rough blueprint that could actually serve to fix the cognitive dissonance of the corporate attorney-client privilege.

### C. OTHER TOOLS FOR GUARDING CORPORATE SECRETS

This Article proposes a sea change in the corporate privilege. To the corporate bar, the elimination of a broad attorney-client privilege covering communications with all corporate agents may be shocking at first blush. However, there is an entire architecture for keeping corporate secrets that is totally independent of the attorney-client privilege. Additionally, in the absence of an attorney-client privilege, sensitive corporate information is still protected by ethical rules governing lawyers, the fiduciary duties of corporate officers and directors, the attorney work product doctrine in litigation, protective orders, and the gatekeeping function of the courts.

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184. 15 U.S.C. § 7245.

185. *Id.*

186. 17 C.F.R. § 205.3.

187. 17 C.F.R. § 205.2(b)(3).

188. 17 C.F.R. § 205.2(k); *see also* Jill E. Fisch & Caroline M. Gentile, *The Qualified Legal Compliance Committee: Using the Attorney Conduct Rules to Restructure the Board of Directors*, 53 DUKE L.J. 517, 539–45 (2003) (describing potential benefits and costs of the use of qualified legal compliance committees, including the potential to create friction between such a committee and management, which, in turn, could disincentivize open communication between the two).

189. A Westlaw search for “qualified legal compliance committee” returned just a single case—a shareholder action which made a passing reference in its complaint to the audit committee’s role as a qualified legal compliance committee. *Elkas v. Burris*, No. 07-61156-CIV, 2007 WL 4055630 at \*2 (S.D. Fla. Nov. 7, 2004); *see also* John Armour, Brandon Garrett, Jeffrey Gordon & Geeyoung Min, *Board Compliance*, 104 MINN. L. REV. 1191, 1219, 1227–28 (2020) (noting that “many firms simply append compliance to the [audit committee’s] terms of reference” and that only 20% of firms have a standalone compliance committee).

Lawyers are required to abide by the ethical rules of their licensing jurisdictions or face sanctions such as suspension or disbarment.<sup>190</sup> These ethical rules prohibit attorneys from disclosing “information relating to the representation of a client” without the permission of the client unless certain narrow exceptions are met.<sup>191</sup> These exceptions include where disclosure is impliedly authorized in order to carry out the representation or “to comply with other law or a court order.”<sup>192</sup> Thus, lawyers have an independent ethical obligation to guard a corporate client’s secrets from disclosure. Failure to do so can result in sanction.<sup>193</sup> Similarly, corporate officers and directors have fiduciary duties that prevent them from disclosing confidential information in a way that could harm the entity they serve.<sup>194</sup> Privileged or not, corporate officers, directors, and the lawyers with whom they consult have independent duties and risk sanctions or liability for violating those duties.<sup>195</sup> Prior to the commencement of litigation, there is little that can compel corporate agents and their lawyers to disclose corporate secrets and affirmative duties to carefully guard them.<sup>196</sup>

Even in the absence of the corporate attorney-client privilege, the attorney work product doctrine, codified in Federal Rule of Civil Procedure in Rule 26(b)(3), protects from disclosure in civil discovery, “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another

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190. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS, intro. (2000).

191. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS’N 2020). States have adopted various constructions of this model rule, all requiring confidentiality on the part of the attorney absent certain exceptions. See, e.g., N.Y. RULES OF PRO. CONDUCT r. 1.6 (N.Y. STATE BAR ASS’N 2021); DEL. LAW. RULES OF PRO. CONDUCT r. 1.6 (2020); TEX. RULES OF PRO. CONDUCT r. 1.05 (TEX. STATE BAR ASS’N. 2022)

192. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS’N 2020).

193. See, e.g., *In re Lee*, 821 N.Y.S.2d 682, 683–84 (2006) (retired former attorney for National Fuel Gas Company who disclosed to press and law enforcement client confidences learned during representation incurred fines and sanctions in excess of \$500,000 and faced public censure).

194. *Cary v. Ne. Ill. Reg’l Commuter R.R.*, No. 1:19-CV-03014, 2021 WL 6091750, at \*4 (N.D. Ill. Dec. 23, 2021) (denying motion to dismiss breach of fiduciary duty claim against officer for wrongfully sharing confidential documents with her attorney); *Shocking Techs., Inc. v. Kosowsky*, No. 7164, 2012 WL 4482838 (Del. Ch. Oct. 1, 2012), *vacated on other grounds*, 2015 WL 3455210, at \*11 (Del. Ch. May 29, 2015) (finding director breached duty of loyalty by providing confidential information to investor); *Henshaw v. Am. Cement Corp.*, 252 A.2d 125, 129 (Del. Ch. 1969) (allowing inspection of books and records and limiting disclosure so long as it does not breach director’s duty of confidentiality).

195. Notably, corporate law practitioners who advise public company boards have cited director confidentiality—not privilege—as being important for “facilitat[ing] candid deliberations with fellow board members.” Steven B. Stokdyk & Joel H. Trotter, Latham & Watkins, L.L.P., *Maintaining Director Confidentiality*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 15, 2016), <https://corpgov.law.harvard.edu/2016/02/15/maintaining-director-confidentiality>.

196. There may also be room for a set of more tailored evidentiary privileges for the corporate context. Professor Veronica Root Martinez has suggested a work-product style evidentiary privilege for communications facilitating the work of corporate monitors based on the “full and frank” rationale, but with the “undue hardship” waiver. See Veronica Root, *The Monitor-“Client” Relationship*, 100 VA. L. REV. 523, 564–67 (2014).

party or its representative.”<sup>197</sup> From the threat of litigation onward, work done in preparation to litigate may not be compelled in discovery.<sup>198</sup>

Once parties are in litigation, the discovery process is constrained by state and federal rules confining the scope of discoverable materials to those that are relevant and proportional to the needs of the case.<sup>199</sup> Parties are able to challenge requests they deem overbroad.<sup>200</sup> After documents are disclosed in litigation, they may still be shielded from broader disclosure by the use of protective orders. Protective orders restrict the use of confidential information exchanged in discovery and can provide guardrails around the handling of such information.<sup>201</sup> Indeed, some documents may even be designated “attorneys’ eyes only,” preventing such documents from being shared with the litigants themselves.<sup>202</sup> Violators of these protective orders, like violators of any court order, face sanctions for contempt of the order.<sup>203</sup>

These tools for keeping corporate confidences—the duties of agents and attorneys, the work product doctrine, the limitations on discovery, and the use of protective orders—all prevent unwanted disclosures. None rely on the privilege. An elimination of large swaths of the corporate privilege does not open up corporate information to public consumption. Rather, under highly specific circumstances, namely litigation, certain corporate information may be

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197. FED. R. CIV. P. 26(b)(3).

198. There is currently a circuit split as to the precise standard for interpreting Rule 26(b)(3)’s “in anticipation of litigation” requirement. The majority of courts have held that a document may be withheld as attorney work product where the document was prepared or obtained “because of” the prospect of litigation. *See, e.g., In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *United States v. Adlman*, 134 F.3d 1194, 1202–03 (2d Cir. 1998); *Martin v. Bally’s Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993); *Nat’l Union Fire Ins. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006); *Binks Mfg. v. Nat’l Presto Indus.*, 709 F.2d 1109, 1118–19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004). The Fifth Circuit allows documents to be withheld in litigation where their primary purpose is to aid in future litigation. *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982). The First Circuit has described the standard as protecting work done for litigation. *United States v. Textron Inc. & Subsidiaries*, 577 F.3d 21, 31 (1st Cir. 2009).

199. The federal rules limit discovery to certain materials:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.)

FED. R. CIV. P. 26(b)(1). State law procedural rules largely mirror this relevance and proportionality requirement. *See, e.g., Del. Ch. Ct. R. 26*; N.Y. CPLR § 3101(a); *see also Forman v. Henkin*, 93 N.E.3d 882, 889 (N.Y. 2018) (clarifying that New York’s discovery rules are constrained by relevance and proportionality as limiting principles).

200. *See, e.g., Del. Elevator, Inc. v. Williams*, No. CIV.A. 5596, 2011 WL 1005181, at \*2 (Del. Ch. Mar. 16, 2011) (noting the Court had ruled several of plaintiff’s discovery requests were overbroad).

201. *See, e.g., Interim Protective Order, Strebeck v. Am. Mod. Ins.*, No. 5:23-CV-00147 (W.D. La. Feb. 2, 2023), ECF No. 2-1.

202. *See, e.g., Standing Protective Order, U.S. Sec. & Exch. Comm’n v. Lee*, No. 3:23-CV-00125 (D. Conn. Feb. 1, 2023), ECF No. 7.

203. *See, e.g., York Grp., Inc. v. Pontone*, No. CIV.A. 10-1078, 2014 WL 3811014, at \*13 (W.D. Pa. Aug. 1, 2014) (finding party in contempt of protective order and ordering sanctions).

disclosed in a controlled context, subject to the gatekeeping function of the courts.

#### D. BALANCING THE COST OF THE PRIVILEGE: AN ILLUSTRATION

A look at a particularly ugly privilege battle provides a window into the absurdity of battles over the scope of the corporate privilege and illustrates how little is lost when the privilege is downsized. In 1994, artists Jeffrey Atkins (professionally known as “Ja Rule”) and Christopher Black and Otha Miller, collectively known as the Cash Money Click (“CMC”), signed a record deal with TVT Records (“TVT”), which was, at the time, the nation’s largest independent record label.<sup>204</sup> While with TVT, CMC recorded, but never released, a number of songs with famed hip-hop producer Irv Gotti.<sup>205</sup> By the early 2000s, Ja Rule and Irv Gotti had left TVT for Island Def Jam, a division of Universal Music Group Recordings, Inc., the world’s largest record company.<sup>206</sup> Though they had left TVT, the label approached Ja Rule and Irv Gotti and proposed they reunite CMC to release a remixed and remastered version of the original CMC recordings that had been originally shelved.<sup>207</sup> TVT and Island Def Jam initially pursued a collaboration, negotiating an agreement.<sup>208</sup> However, the collaboration collapsed and the parties sued one another for contract, tort, and copyright claims.<sup>209</sup>

In discovery, the parties were cutthroat, resulting in tremendous consumption of judicial resources. The parties—both with the budget to employ large global law firms as counsel—challenged each other’s privilege calls, leading to litigation requiring document review *in camera* by both the district judge and the magistrate assigned to preside over discovery in the matter, a lengthy telephonic hearing, two written decisions by the magistrate judge, and a written decision by the district judge.<sup>210</sup>

The murkiness of the corporate attorney-client privilege gives parties the tendency—and arguably the obligation—to over-withhold. As a result, enormous litigation and judicial resources were expended to protect documents that the parties improperly withheld, such as a fax cover sheet used for transmitting unprivileged contracts from inside to outside counsel, documents relaying unprivileged communications with third parties, and communications that serve an obvious, purely business function.<sup>211</sup> For many of the other

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204. *TVT Recs. v. Island Def Jam Music Grp.*, 412 F.3d 82, 85 (2d Cir. 2005).

205. *Id.*

206. *Id.*

207. *Id.* “Shelved” is a music industry term for when an album is made but never released. B.J. Steiner, *Rap Albums That Got Shelved Into Oblivion*, COMPLEX (Nov. 16, 2014), <https://www.complex.com/music/2014/11/rap-albums-that-never-came-out>.

208. *TVT Recs.*, 412 F.3d at 85.

209. Answer to Plaintiffs’ Amended Complaint with Counterclaims, *TVT Recs. v. Island Def Jam Music Grp.* (S.D.N.Y. Mar. 6, 2003) (No. 02 CV 6644), 2003 WL 23474875.

210. See *TVT Recs. v. Island Def Jam Music Grp.*, 214 F.R.D. 143, 144 (S.D.N.Y. 2003); *TVT Recs., Inc. v. Island Def Jam Music Grp.*, No. 02 CIV. 6644, 2003 WL 749801, at \*3 (S.D.N.Y. Mar. 5, 2003).

211. See *TVT Recs.*, 2003 WL 749801 at \*3; *TVT Recs.*, 214 F.R.D. at 145–46, 148–49.

documents, both the district judge and magistrate judge acknowledged the difficulty of disentangling the business advice from the legal advice within the communications at issue, which largely originated from two executives whose roles were Senior Vice President of Business and Legal Affairs and Vice President of Business and Legal Affairs.<sup>212</sup> In a number of cases, the Court was forced to go line by line and approve specific redactions.<sup>213</sup>

The majority of the privileged advice that did pass judicial muster concerned the need to obtain copyright clearances.<sup>214</sup> Though this advice is undoubtedly legal in nature, there is an independent business need to have these communications. The clearances would need to be obtained in order for the deal to be done, and these communications would likely have happened in some form regardless of whether they were protected by the attorney-client privilege. In this case, the protection of these communications does nothing to promote “full and frank” communications with counsel.

In a world where only a corporation’s communications through a Privileged Communications Committee were protected by the attorney-client privilege, it is hard to imagine that anything would have changed in *TVT Records v. Island Def Jam* prior to litigation. Business needs drove the communications and those communications would have happened regardless of the privilege’s protection or lack thereof. For issues important or sensitive enough that communications might be chilled if subject to disclosure in discovery, those communications could be referred to a Privileged Communications Committee, which would have the opportunity to speak freely and have their privilege in those communications less likely to be challenged. In discovery, there would be greater certainty as to what may be withheld, those committee communications would be clearly delineated, and there would be far less opportunity to wage a lengthy and expensive privilege battle.

The parties in *TVT Records v. Island Def Jam* had time and money on their side. One can imagine the strategic advantage of the current state of affairs when resources are less evenly matched. Recently, litigants who brought actions against Abbott Laboratories when they claimed their children were killed or permanently disabled after consuming tainted Similac baby formula recounted how the giant corporation was strategically advantaged by dragging out litigation.<sup>215</sup> When only deep-pocketed litigants are able to challenge a corporation’s over-withholding of allegedly privileged materials, simplifying what may be withheld is a matter of equity.

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212. *TVT Recs.*, 214 F.R.D. at 144–45, 147.

213. *See, e.g., id.* at 146 (“[T]he highlighted portion of IDJ–PRIV 094 as it appears in Exhibit G to the Kempler Decl. is privileged in part such that the first full sentence beginning on line 2 of the highlighted paragraph and the first full sentence beginning on line 3 of the highlighted paragraph must be redacted.”).

214. *Id.*

215. David Enrich, *How Abbott Kept Sick Babies From Becoming a Scandal*, N.Y. TIMES, <https://www.nytimes.com/2022/09/06/business/abbott-baby-formula-lawsuits-jones-day.html> (Sept. 8, 2022).

## CONCLUSION

Privilege is a choice. Certain relationships are deemed societally important enough to protect their communications from being revealed in the truth-seeking process of litigation. Today's corporate privilege, however, now shields communications across entire constellations of relationships among corporate agents. And, as the lines between business and legal advice blur, an even greater universe of documents and communications may fall outside the bounds of litigation. Privilege logs often obscure the true nature of withheld communications and only moneyed litigants may be able to call an over-withholder's bluff.

If courts are going to justify the corporate attorney-client privilege by claiming that such a privilege promotes "full and frank" communications between attorney and client, the design and scope of that privilege should reflect its justification. A Privileged Communications Committee has the potential to preserve an opportunity for a corporate client to have an intimate space in which to engage in candid conversations with counsel that is predictable, clearly delineated, and provides a workable definition for privileged communications in discovery. Most importantly, use of a Privileged Communications Committee would serve to correct the mismatch between the privilege's alleged justification and its reality.

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