

# Notes

## Attorney-Client Privilege for the Government Entity

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The attorney-client privilege protects communications between attorney and client from public disclosure.<sup>1</sup> The privilege for individual clients has a venerable history in the common law.<sup>2</sup> However, application of the priv-

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1. The classic formulation extends the attorney-client privilege in the following situation: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except when the protection is waived. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (J. McNaughton rev. ed. 1961). Wigmore's definition has been incorporated wholesale into much of the federal common law on attorney-client privilege. *See, e.g.*, *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985); *In re Walsh*, 623 F.2d 489, 492 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980); *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 319 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963).

This Note does not address the separate protection of attorney-client communications provided by the ethical codes of the legal profession. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1980). The professional ethical considerations forbid voluntary disclosure by the attorney, while the evidentiary privilege prevents a compulsion of disclosure by a court. Yet another doctrine protects the confidentiality of communications between attorney and client which constitute attorney work product. *See* discussion *infra* notes 97-101 and accompanying text.

2. The evidentiary privilege for attorney-client communications is the oldest of the privileges and is well established in American common law. 8 J. WIGMORE, *supra* note 1, § 2290, at 542; Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978). The common-law attorney-client privilege also has been codified by various state legislatures. *See, e.g.*, ALASKA R. EVID. 503 (1986); WASH. REV. CODE ANN. § 5.60.060(2) (1987).

Federal codification of all privilege rules, including attorney-client privilege, is limited to a very general rule providing that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501. The federal rule also establishes that privileges in diversity actions derive from state, rather than federal, law. *Id.* In enacting Rule 501, Congress explicitly rejected the privileges section of the proposed evidence rules

ilege to public agencies<sup>3</sup> lacks a sound basis in the theory underlying the privilege and may compromise the role of the government in litigation.

Application of the privilege to modern legal relationships has required courts to examine the scope of the privilege where the client is an organization or entity rather than a natural person.<sup>4</sup> Courts have extended the attorney-client privilege to shield communications between client corporations and their attorneys.<sup>5</sup> However, it is not clear that the privilege should be given the same scope with respect to all organizational clients, such as public agencies. While an attorney-client privilege for governmental bodies has been assumed in the cases raising the issue,<sup>6</sup> and treatises on evidence echo that assumption,<sup>7</sup> the merit of this assumption has not been thoroughly explored.

This Note considers the function of the attorney-client privilege in the context of civil litigation to which the federal government is a party. After examining the basis of the attorney-client privilege as applied to individual and entity clients, Section I establishes that the privilege applies only where it serves to protect a relationship or to provide incentives for socially valuable conduct. Section II addresses the applicability of the privilege to communications between an attorney for a federal government agency<sup>8</sup> and agency directors or employees and then explains why the

promulgated by the Supreme Court in 1972. See 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 501-2 to 501-5, ¶ 501[01] (1988) [hereinafter WEINSTEIN'S EVIDENCE] (summarizing congressional reaction to Proposed Rules of Evidence); see also sources cited *infra* note 19. Those proposed rules enumerated all privileges to be recognized by federal courts, including the attorney-client privilege. See Proposed Fed. R. Evid. 503, 56 F.R.D. 235, 235-37 (1972) (Supreme Court proposal for "lawyer-client privilege" rule). Although Proposed Federal Rule of Evidence 503 was among the privilege rules for which Congress substituted the general Rule 501, the proposed rule remains a source for defining the federal common law of the attorney-client privilege. See Citibank, N.A. v. Andros, 666 F.2d 1192, 1195 & n.6 (8th Cir. 1981) (using proposed federal rule as source of law regarding privilege for corporate client); *In re* Grand Jury Proceedings, Detroit, Michigan, Aug., 1977 (*In re* Jackier), 434 F. Supp. 648, 649-50 & n.1 (E.D. Mich. 1977), *aff'd per curiam*, 570 F.2d 562 (6th Cir. 1978).

3. The Freedom of Information Act defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f) (Supp. IV 1986).

4. See Proposed Fed. R. Evid. 503(a)(1), 56 F.R.D. 235 (1972) ("client" may be a "corporation, association, or other organization or entity, either public or private"). When an attorney represents an amorphous entity, the client can communicate only through individual agents, and questions arise regarding who may assert or waive the privilege and which communications with which agents are privileged. The corporate attorney-client privilege is discussed *infra* Section I-C.

5. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963); Upjohn Co. v. United States, 449 U.S. 383 (1981); see *infra* Section I-C.

6. Hearn v. Rhay, 68 F.R.D. 574, 579 (E.D. Wash. 1975) (analogizing to situation of corporate client and holding that state prison officials were clients of state Attorney General, so attorney-client privilege attaches); *People ex rel.* Department of Pub. Works v. Glen Arms Estate, Inc., 230 Cal. App. 2d 841, 854, 41 Cal. Rptr. 303, 310 (1964) (privilege is same where client is "body politic" as where client is corporation). Governmental privilege cases are discussed *infra* Section II.

7. See, e.g., S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 348 (4th ed. 1986) ("[o]rganizations like corporations and government entities" may claim privilege).

8. The functional analysis proposed in this Note has equal applicability to state agencies. State privilege rules for public entities are discussed *infra* notes 65-70.

privilege should not be extended to governmental entities. In addition, Section II examines current law regarding the claim of privilege by government agencies, addresses the conflict between the privilege and public policies on secrecy in government, and discusses the limits of the analogy between corporations and government agencies.

This Note concludes that extension of the attorney-client privilege to government agencies does not serve the privilege's underlying goals and conflicts with the principle of open government. The courts therefore should not apply the corporate attorney-client privilege to communications between attorneys and government agencies.

## I. ATTORNEY-CLIENT PRIVILEGE

Inquiry into attorney-client privilege in the government context must be framed by a general understanding of the evidentiary privilege. Privileges are to be construed narrowly and must be justified by the protection of a special relationship. The traditional purpose of the attorney-client privilege—to promote candor between a client and his legal advisor—has justified extension of the attorney-client privilege to the client corporation.

### A. *Privileges as Evidentiary Rules of Exclusion*

While most rules of evidence are designed to enhance the search for the truth by excluding evidence that is weak or prejudicial, rules of privilege serve substantive goals extrinsic to the litigation.<sup>9</sup> Privileges apply where certain confidential relationships valued by society would be threatened by the general rules requiring disclosure.<sup>10</sup> The traditional evidentiary privi-

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9. See E. CLEARY, MCCORMICK ON EVIDENCE § 72 (3d ed. 1984) [hereinafter MCCORMICK]. Wigmore discusses the general duty to disclose information needed by the justice system, see 8 J. WIGMORE, *supra* note 1, § 2192, at 70-73, and he notes that only particular extrinsic policies can justify exceptions to the duty to give testimony, *id.* at 73, § 2285, at 527.

10. Wigmore lists the fundamental conditions necessary to establish a privilege: (1) the communication must originate in confidence; (2) the element of confidentiality must be essential to the "full and satisfactory maintenance" of the relationship in question; (3) the relationship must be one which the community has determined should be "sedulously fostered"; and (4) the injury to the relationship caused by disclosure of the communications would be greater than the benefit of disclosure to the "correct disposal" of litigation. 8 J. WIGMORE, *supra* note 1, § 2285, at 527.

Thus, Wigmore formulated the classic justification for evidentiary privileges: privileges should be upheld only where confidential communications occur in a relationship which society desires to foster and where the harm to the relationship from not protecting the confidentiality would be greater than the harm done by suppressing relevant information. This instrumentalist approach to privileges has been challenged by some commentators, who urge that privileges serve the ultimate value of privacy and should not be weighed against litigation interests on a utilitarian scale. See, e.g., Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956). However, Wigmore's pragmatic approach has been most influential. See, e.g., *Garner v. Wolfinbarger*, 430 F.2d 1093, 1101 (5th Cir. 1970) (using the individual gain/societal harm balancing test), *cert. denied*, 401 U.S. 974 (1971). See generally R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 647-51 (2d ed. 1982) (discussing justifications for the privilege); *Developments in the Law—Privileged Communications: Attorney-Client Privilege*, 98 HARV. L. REV. 1501, 1501-09 (1985) [hereinafter *Developments: Attorney-Client Privilege*] (same).

leges protect professional<sup>11</sup> and private<sup>12</sup> relationships by preserving the confidences of the parties to that relationship.<sup>13</sup>

The scope of a privilege is shaped by the privilege's purposes.<sup>14</sup> For the privilege to apply, confidentiality must be of value to the relationship and must have been preserved in the communication.<sup>15</sup> Furthermore, privileges generally yield where the integrity of the relationship already has been defeated by the actions of the parties to the relationship, as where the relationship itself is being litigated.<sup>16</sup>

11. The professional relationships most frequently protected by privileges are attorney-client and physician-patient. The physician-patient privilege and the related psychiatrist-patient privilege are discussed in McCORMICK, *supra* note 9, §§ 98-105. See also UNIF. R. EVID. 503, 13 U.L.A. 277 (1974) (physician- and psychotherapist-patient privilege); Proposed Fed. R. Evid. 504, 56 F.R.D. 240, 240-41 (1972) (psychotherapist-patient privilege). Some jurisdictions extend privileges to communications with clergymen, accountants, and social workers. McCORMICK, *supra* note 9, § 76.2.

12. A privilege for communications between husband and wife is widely recognized. See McCORMICK, *supra* note 9, § 78, at 189 (nearly all states recognize privilege for marital communications); *Blau v. United States*, 340 U.S. 332 (1951) (confidential communication between husband and wife is privileged); *Wolfe v. United States*, 291 U.S. 7, 14 (1934) (same); see also *Trammel v. United States*, 445 U.S. 40, 45 n.5 (1980) (*Wolfe* and *Blau* not disturbed by ruling limiting privilege against adverse spousal testimony). A child-parent privilege has been proposed, see, e.g., Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1 (1982), but has been severely limited, see *In re Grand Jury Proceedings of John Doe v. United States*, 842 F.2d 244 (10th Cir.), *cert. denied*, 109 S. Ct. 233 (1988); *United States v. Davies*, 768 F.2d 893, 896-900 (7th Cir.), *cert. denied*, 474 U.S. 1008 (1985). See generally *Developments in the Law—Privileged Communications: Familial Privileges*, 98 HARV. L. REV. 1563, 1588-92 (1985) (proposing a limited privilege for familial relationships).

13. See *United States v. Byrd*, 750 F.2d 585, 589 (7th Cir. 1984) (privileges "protect those interpersonal relationships which are highly valued by society and peculiarly vulnerable to deterioration should their necessary component of privacy be continually disregarded by courts of law"). The few evidentiary privileges that do not protect relationships instead protect important societal interests. Principal among these is the constitutional privilege against compulsory self-incrimination. See U.S. CONST. amend. V. See generally McCORMICK, *supra* note 9, § 118 (discussing policy foundations of constitutional privilege). Other nonrelational privileges are the various privileges for governmental secrets, see McCORMICK, *supra* §§ 106-13; see also *infra* notes 105-07 and accompanying text, and the putative privilege for journalistic sources, see *United States v. Criden*, 633 F.2d 346, 355-56 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); cf. *Branzburg v. Hayes*, 408 U.S. 665 (1972). See generally *Developments in the Law—Privileged Communications: Institutional Privileges*, 98 HARV. L. REV. 1592 (1985) (discussing, inter alia, governmental privileges and media source privilege).

14. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *United States v. El Paso Co.*, 682 F.2d 530, 538 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984).

15. The first condition for the establishment of a privilege is that the communication originate in a confidence. 8 J. WIGMORE, *supra* note 1, § 2285, at 527; see also *supra* note 10 (summarizing Wigmore's formulation of elements essential for privilege). Communications to which a third party is a witness generally are unprivileged. See McCORMICK, *supra* note 9, § 74 (privileges generally), § 80, at 193-94 (marital communications), § 91 (attorney-client communications). Voluntary disclosure of a communication by the holder of the privilege likewise destroys confidentiality and constitutes waiver of the privilege. See Proposed Fed. R. Evid. 511, 56 F.R.D. 258 (1972); 8 J. WIGMORE, *supra* note 1, § 2327; *id.* § 2389 (bringing suit in which physical condition and communication to physician is at issue constitutes waiver of physician-patient privilege).

16. See *United States v. Ballard*, 779 F.2d 287, 292 (5th Cir. 1986) (lawyer may reveal privileged communications from client to recover fee or defend against misconduct charges); *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974) (privilege is waived when client calls into public question the competence of the attorney), *cert. denied*, 419 U.S. 1125 (1975); see also McCORMICK, *supra* note 9, § 84, at 199-200 (spousal privilege does not apply in controversies between the spouses); *id.* § 91, at 220 (attorney can defend against charges of malpractice and can fight nonpayment of fees by revealing relevant confidential communications); Proposed Fed. R. Evid. 503(d)(3), 56 F.R.D. 235, 236 (1972) (no privilege as to communication relevant to breach of duty by lawyer or client); cf. McCORMICK, *supra*, § 104, at 258 n.5 (physician-patient privilege curtailed in malpractice actions);

Privileges deny the finder of fact access to information that may be both relevant and probative.<sup>17</sup> The deleterious effects of evidentiary privileges on the search for the truth urge narrow construction of those privileges.<sup>18</sup> Consequently, federal common law<sup>19</sup> essentially incorporates a narrow approach to questions of attorney-client privilege.<sup>20</sup>

### B. Policies Underlying the Attorney-Client Privilege

The purpose of the attorney-client privilege is to encourage full and frank communication between clients and their attorneys.<sup>21</sup> The privilege is motivated by a concern that apprehension about compelled disclosure by the attorney must be removed to promote candor between client and legal advisor.<sup>22</sup> The client will speak freely with his attorney when assured that

ALASKA R. EVID. 504(d)(3) (1986) (communications relevant to "issue of breach of duty" arising out of relationship not protected by physician- and psychotherapist-patient privilege).

17. Professor Saltzburg argues that because the attorney-client privilege generates information that might not exist were the communication not privileged, no information is "lost" due to the attorney-client privilege. Saltzburg, *Communications Falling Within the Attorney-Client Privilege*, 66 IOWA L. REV. 811, 817-18 (1981); Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 609-11 (1980) [hereinafter Saltzburg, *Privileges and Professionals*]. The generation of such information is important to the functioning of the attorney, see *infra* text accompanying note 24, but the privilege nonetheless withholds the communication from the trier of fact.

18. See *United States v. Nixon*, 418 U.S. 683, 710 (1974) (reasoning that privileges should not be "lightly created nor expansively construed, for they are in derogation of the search for truth"). Wigmore argues:

[P]rivilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete . . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

8 J. WIGMORE, *supra* note 1, § 2291, at 554; cf. 5 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 302-04 (J.S. Mill ed. 1827) (criticizing privilege).

19. The common law governs privilege decisions in federal courts. FED. R. EVID. 501. In 1974, Congress rejected the codification of evidentiary privileges presented by the Supreme Court in the Proposed Federal Rules of Evidence. See 2 D. LOISELL & C. MUELLER, *FEDERAL EVIDENCE* § 200, at 634-45 (1985) (describing congressional action on proposed privilege rules); see also *Developments in the Law—Privileged Communications: Introduction*, 98 HARV. L. REV. 1454, 1465-69 (1985) (discussing controversy over proposed privilege rules); Note, *The Attorney-Client Privilege: Where Do We Go After Upjohn?*, 81 MICH. L. REV. 665, 672 n.19 (1983) (suggesting that Congress was looking to the courts to develop federal privilege rules); *supra* note 2.

20. See, e.g., *Fisher v. United States*, 425 U.S. 391, 403 (1976) (privilege "applies only where necessary to achieve its purpose"); *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir.) (because attorney-client privilege "serves to obscure the truth," it should be construed as narrowly as is consistent with its purpose), *cert. denied*, 108 S. Ct. 505 (1987); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir. 1983) ("Since the attorney-client privilege may serve as a mechanism to frustrate the investigative or fact-finding process, it creates an inherent tension with society's need for full and complete disclosure of all relevant evidence . . . . These competing societal interests demand that application of the privilege not exceed that which is necessary to effect the policy considerations underlying the privilege, i.e., 'the privilege must be upheld only in those circumstances for which it was created.'") (quoting *In re Walsh*, 623 F.2d 489, 492 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980)); *United States v. Goldfarb*, 328 F.2d 280, 282 (6th Cir.) (privilege should be confined within "narrowest possible limits consistent with the logic of its principle"), *cert. denied*, 377 U.S. 976 (1964).

21. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

22. 8 J. WIGMORE, *supra* note 1, § 2291, at 545; *Colton v. United States*, 306 F.2d 633, 636 (2d Cir. 1962) (adopting Wigmore's statement), *cert. denied*, 371 U.S. 951 (1963).

his revelations will not be disclosed without his consent;<sup>23</sup> in turn, this communication allows the attorney to provide informed advice and to function effectively in the adversary legal system.<sup>24</sup>

Since the purpose of the privilege is to assure the client that communications with his attorney are confidential, the ability of the individual client to assert or waive the privilege is critical. The attorney-client privilege belongs to the client and the client alone.<sup>25</sup> A client may assert the privilege even when not a party to the litigation at hand.<sup>26</sup>

The attorney-client privilege for individual criminal defendants has a constitutional foundation in the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to counsel, and the due process clause of the Fourteenth Amendment.<sup>27</sup> However, the attorney-client priv-

23. Whether the attorney-client privilege actually does encourage such communication has not been verified empirically. See Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 S. CAL. L. REV. 303, 306 (1977) (benefits of privilege are unverifiable); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1262 (1962) (limited survey of laymen inconclusive). Nonetheless, most courts and commentators agree that "incentive to confide is at least partially dependent upon the client's ability to predict that the communication will be held in confidence." *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224, 1235 (3d Cir. 1979). For discussion of the dilution of the incentive in the corporate context, see *infra* note 41 and accompanying text.

24. Professional legal expertise is necessary to guide litigants through procedural rules, to protect the legal rights of parties, and to facilitate the legal process by screening out spurious claims. See Saltzburg, *Privileges and Professionals*, *supra* note 17, at 605-06 (describing attorney's special role in legal system); see also *Clute v. Davenport Co.*, 118 F.R.D. 312, 314 (D. Conn. 1988) (Blumenfeld, J.) ("The purpose of the privilege, most basically stated, is to shelter the confidences a client shares with his or her attorney when seeking legal advice, in the interest of protecting a relationship that is a mainstay of our system of justice.").

25. MCCORMICK, *supra* note 9, § 92, at 221; see, e.g., *Kevlik v. Goldstein*, 724 F.2d 844, 850 (1st Cir. 1983) (privilege may be waived only by client); *Schnell v. Schnell*, 550 F. Supp. 650, 653 (S.D.N.Y. 1982) (attorney's testimony does not waive privilege where client did not consent); *Ex parte Lipscomb*, 111 Tex. 409, 415, 239 S.W. 1101, 1103 (1922) (attorney may not assert privilege on own behalf).

26. 8 J. WIGMORE, *supra* note 1, § 2321, at 629; MCCORMICK, *supra* note 9, § 92, at 222-23; see also *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn.) (privilege not limited to legal consultations in litigation situations; corporations should be encouraged to seek legal advice to avoid litigation as well as to pursue it), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976).

27. See *Fisher v. United States*, 425 U.S. 391, 405 (1976) (if defendant is privileged from producing information, attorney may not be compelled to produce same information); *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953) (trial invalidated because government secret agent was party to conferences between accused and defense counsel), *cert. denied*, 349 U.S. 930 (1955); *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951) (government intrusion into attorney-client relationship violated defendant client's sixth amendment rights), *cert. denied*, 342 U.S. 926 (1952); see also Hazard, *supra* note 2, at 1062 (privilege necessary to protect right to counsel and privilege against self-incrimination); Comment, *Extending the Attorney-Client Privilege: A Constitutional Mandate*, 13 PAC. L.J. 437, 441-42 (1982) (protection of fifth and sixth amendment rights fundamental to privilege); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485-86 (1977). But see *Beckler v. Superior Court*, 568 F.2d 661 (9th Cir. 1978) (evidentiary privilege does not assume constitutional dimensions); *Magida v. Continental Can Co.*, 12 F.R.D. 74, 76 (S.D.N.Y. 1951) (no implicit constitutional requirement that lawyer-client confidence regarding civil claims be protected), *aff'd*, 231 F.2d 843 (2d Cir.), *cert. denied*, 351 U.S. 972 (1956); Saltzburg, *Privileges and Professionals*, *supra* note 17, at 603 n.14 (discouraging constitutionalization of privileges).

ilege is not limited to the criminal defendant; indeed, the privilege applies to lawyer-client discussion in numerous contexts.<sup>28</sup>

### C. *Corporate Privilege*

It is now universally recognized that the attorney-client privilege applies to corporate clients.<sup>29</sup> A corporation may assert the attorney-client privilege to protect the flow of information between the organization and the attorney advising the corporation.<sup>30</sup> The privilege has been extended to corporations by analogizing organizations to individual clients.<sup>31</sup> Codifications of the attorney-client privilege generally refer to the holder of the privilege as the "client" rather than an "individual," and definitions of "client" in those codifications often explicitly include corporations.<sup>32</sup> When a lawyer represents a corporation, the lawyer's client is the entity itself, not any individual employee, director, or stockholder.<sup>33</sup> The client

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28. For example, the privilege is not limited to communications between attorney and client in preparation for litigation. 8 J. WIGMORE, *supra* note 1, § 2291, at 545; *id.* § 2294, at 563; *see also* *Alexander v. United States*, 138 U.S. 353, 358 (1891) ("If he consulted him in the capacity of an attorney, and the communication was in the course of his employment, . . . neither the payment of a fee nor the pendency of litigation was necessary to entitle him to the privilege."); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (privilege "extends to all situations in which an attorney's counsel is sought on a legal matter"); *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964). Furthermore, the privilege protects not only communications from the client to the lawyer, but also protects communications from lawyer to client, at least if they tend to disclose the client's confidential communications. *See Hodges, Grant & Kaufmann v. IRS*, 768 F.2d 719, 720-21 (5th Cir. 1985). The consultation must, however, involve use of the attorney as a legal professional rather than business adviser. *See Proposed Fed. R. Evid. 503(b)*, 56 F.R.D. 235, 236 (1972); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359-60 (D. Mass. 1950) (communication soliciting business advice not privileged). In addition, consultations for the purpose of furthering illegal activities are not privileged. *See McCORMICK, supra* note 9, § 95, at 229-31; *Proposed Fed. R. Evid. 503(d)(1)*, 56 F.R.D. 236 (1972); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *United States v. Laurins*, 659 F. Supp. 847 (N.D. Cal. 1987).

29. *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963); *see also Upjohn Co. v. United States*, 449 U.S. 383 (1981) (addressing scope of privilege as applied to corporate clients); *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915) (recognizing extension of privilege to corporate client); *McCORMICK, supra* note 9, § 87, at 206-07 (debating scope, but not application, of privilege to corporate client).

30. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) ("Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients."). The privilege applies to "in-house" corporate counsel as it does to "outside" counsel, *see In re LTV Securities Litig.*, 86 F.R.D. 595, 601 (N.D. Tex. 1981); *see also Upjohn Co. v. United States*, 449 U.S. at 394-95 (approving privilege for communications to company's general counsel), although where in-house counsel has extra-legal business responsibilities, only communications made in counsel's legal capacity are privileged, *see In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1167 (D.S.C. 1975).

31. One author has suggested that the privilege initially was extended to corporations in the nineteenth century because simple business structure and identification of a corporation with its owner-manager gave a corporation a personal identity. Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 40 U. DET. L.J. 299, 310 (1963).

32. *See, e.g., MODEL CODE OF EVIDENCE Rule 209(a)* (1942); *Proposed Fed. R. Evid. 503(a)(1)*, 56 F.R.D. 235 (1972); CAL. EVID. CODE § 954 (West Supp. 1988); DEL. UNIF. R. EVID. 502(a)(1) (1987); IDAHO CODE § 9-203(2) (Supp. 1987).

33. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (authority to waive attorney-client privilege passes with control of corporation; displaced managers do not preserve the privilege for their communications with counsel); *see also MODEL CODE OF PROFESSIONAL RESPON-*

corporation retains the attorney-client privilege and may choose to waive the privilege and disclose the information gathered by counsel.<sup>34</sup>

Adapting the scope of the privilege to the structure of a corporate "client," which communicates with its attorneys through agents<sup>35</sup> and employees, presents complicated questions.<sup>36</sup> The "control group" theory for the attorney-client privilege extended the privilege to communications by a corporate employee if the employee was in a position to control the action the corporation might take on the advice of the attorney.<sup>37</sup> However, the individual corporate agents who furnish essential information to the attorney for a corporation often are not empowered to direct the corporation's litigation and therefore inadequately personify the corporate client. In *Upjohn Co. v. United States*,<sup>38</sup> the Supreme Court extended the federal corporate attorney-client privilege to include a corporate attorney's communications with employees of the corporation outside the corporate managerial control group.<sup>39</sup>

SIBILITY EC 5-18 (1986) (lawyer retained by corporation owes allegiance to entity); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (1987) (same). Corporate counsel may represent individual employees of a corporation along with the corporation itself. See *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 388 (S.D. Tex. 1969) (multiple representation not uncommon in corporate context); see also MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.13(e), 1.7 (1987) (dual representation ethically permissible where conflicts of interest are avoided). Absent joint representation, however, the lawyer for the corporation has an attorney-client relationship with the corporation and not with its individual employees. See *United States v. Piccini*, 412 F.2d 591 (2d Cir. 1969) (corporate officer could not claim privilege for communications to corporate attorney), *cert. denied*, 397 U.S. 917 (1970); see also cases cited *infra* note 34.

34. *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986) (corporate official may not prevent corporation from waiving privilege arising from discussions with corporate counsel about corporate matters); *In re Grand Jury Proceedings*, Detroit, Mich., Aug., 1977 (*In re Jackier*), 434 F. Supp. 648 (E.D. Mich. 1977) (company officer cannot block testimony of company attorney about interview with officer), *aff'd per curiam*, 570 F.2d 562 (6th Cir. 1978); see also *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1032 (S.D.N.Y. 1975).

35. In general, communications by a client to his attorney through an agent are privileged. Wigmore indicates, "[t]he client's freedom of communication requires a liberty of employing other means than his own personal action. . . . A communication, then, by any form of agency employed or set in motion by the client is within the privilege." 8 J. WIGMORE, *supra* note 1, § 2317, at 618 (emphasis in original). Where the agent's principal is a corporation, however, the identity of the "client" becomes complicated. See *Weintraub*, 471 U.S. at 348 (discussing special problems applying attorney-client privilege in corporate context).

36. McCormick describes the problem as one of "extrapolating the essential operating conditions of the privilege from the paradigm case of the traditional individual client who both supplies information to, and receives counsel from, the attorney." MCCORMICK, *supra* note 9, § 87, at 207.

37. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.* *General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). This test was widely followed until the 1981 Supreme Court decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). See, e.g., *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224, 1235-37 (3d Cir. 1979). *But see Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970) (describing "subject matter test" under which employee's communication to corporate attorney regarding job duties is privileged if made at direction of superiors), *aff'd by equally divided Court*, 400 U.S. 348 (1971).

38. 449 U.S. 383 (1981).

39. *Upjohn* is binding only in federal cases in which the federal common law of privilege applies. See FED. R. EVID. 501; see also MCCORMICK, *supra* note 9, at 22 (Supp. 1987) (noting that because *Upjohn* did not rest on constitutional basis, states may apply old "control group" test or other rules). Compare *National Farmers Union Property & Casualty Co. v. District Court*, 718 P.2d 1044 (Colo. 1986) (adopting *Upjohn* as standard for corporate attorney-client privilege) with *Consolidation Coal*



Like the individual attorney-client privilege, the corporate privilege is justified as encouraging communication with corporate counsel.<sup>40</sup> However, the incentives are less clear in the corporate context. Since most individual employees of a corporation are not the "client" of the corporate attorney and do not personally hold the privilege with regard to their communications to the attorney, it seems unlikely that the attorney-client privilege provides any incentive for corporate employees to divulge information to the corporate attorney.<sup>41</sup>

A narrower justification for the corporate privilege responsive to that criticism is that the corporate attorney-client privilege promotes "institutional" communication with counsel. Assurances of confidentiality provide incentives for the organizational client to investigate within its own ranks. The theory is that without the assurance of an absolute privilege, the corporation might not pursue certain inquiries for fear of compelled disclosure.<sup>42</sup> The Supreme Court has endorsed these policy underpinnings for the corporate privilege, noting that the attorney-client privilege for corporations "encourages observance of the law and aids in the administration of justice" by promoting full and frank communications between attorneys and corporate clients.<sup>43</sup>

## II. ATTORNEY-CLIENT PRIVILEGE IN THE GOVERNMENT CONTEXT

Nearly all decisions concerning the attorney-client privilege for entity clients arise in the context of corporate clients being advised by lawyers. Like corporations, government agencies are entity "clients" that seek legal advice and are parties to litigation.<sup>44</sup> Although the scope of the attorney-

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Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 432 N.E.2d 250 (1982) (continuing to apply "control group" test).

40. See *Weintraub*, 471 U.S. at 348 (1985); Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 955 (1956).

41. See Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 306 (1984) (arguing that communication-maximizing rationale for privilege should limit privilege to corporate employees who have authority to decide whether their communications may be disclosed by corporation). A pre-*Upjohn* opinion from the Third Circuit defended the control group theory for the corporate privilege, observing that any offer of confidentiality to lower-echelon employees is "illusory" where the corporation can waive the privilege and turn employees' statements over to law enforcement officials. *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224, 1236 (3d Cir. 1979).

42. See Note, *supra* note 19, at 670 n.15 (*Upjohn* management would not have initiated major internal investigation had they believed government would be able to discover information collected). But see Nath, *Upjohn: A New Prescription for the Attorney-Client Privilege and Work Product Defenses in Administrative Investigations*, 30 BUFFALO L. REV. 11, 44-47 (1981) (potential legal liabilities provided motivation for *Upjohn's* internal investigation); Recent Developments, 7 J. CORP. L. 359, 372-73 & nn.88 & 91 (1982) (suggesting existence of privilege cannot be determinative motivation for intracorporate communication).

43. *Weintraub*, 471 U.S. at 348; see also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901, 913-14 (1969) (free interchange between corporate clients and attorneys promotes voluntary compliance with laws).

44. Rules of evidence generally include public entities within the definition of "client." See, e.g., Proposed Fed. R. Evid. 503(a)(1), 56 F.R.D. 235 (1972) ("A 'client' is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered

client privilege in the government context has not been delineated clearly, application of the attorney-client privilege to communications between attorneys and federal governmental agencies has paralleled application of the corporate privilege.<sup>45</sup>

The rationale for the extension of the privilege in the government context is rarely discussed. Prior to general acceptance of the corporate attorney-client privilege, a few commentators suggested that a government entity should have no traditional attorney-client privilege.<sup>46</sup> The only post-*Upjohn*<sup>47</sup> commentary on the privilege in the government context simply asserts a need of the governmental client for assurances of confidentiality equivalent to a corporation's need for confidential advice.<sup>48</sup> The cases accepting a governmental attorney-client privilege do not address the policy of this privilege; a functional similarity between public and private bureaucratic organizations usually is assumed with minimal discussion.<sup>49</sup>

professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him."); UNIF. R. EVID. 502(a)(1), 13 U.L.A. 256 (1986) (same).

As in corporate entity representation, the client of a government attorney is the government as an entity. *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 616 (D.D.C. 1979); G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 46 (1978). The government is treated like any other party to civil litigation for purposes of discovery. *See* 4 J. MOORE, J. LUCAS & G. GROTHEER, *MOORE'S FEDERAL PRACTICE* ¶ 26.61[2] (2d ed. 1987) [hereinafter *MOORE'S FEDERAL PRACTICE*].

45. *See United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 621 (D.D.C. 1979) (privilege for government analogous to corporate privilege); *see also* Note, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 62 B.U.L. REV. 1003 (1982) (urging extension of governmental attorney-client privilege to parallel corporate privilege).

46. Gardner argues that the personal nature of the attorney-client privilege makes extension of the privilege to entities, including corporations and the government, inappropriate. *See* Gardner, *supra* note 31; *see also* Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B.J. 61, 68 (1978) (noting scattered authority for declining to extend privilege).

47. 449 U.S. 383 (1981); *see* discussion *supra* Section I-C.

48. Note, *supra* note 45, at 1021 n.111.

49. *See, e.g.*, *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (where government uses attorneys as would any private party seeking advice to protect personal interests, government needs same assurance of confidentiality); *SEC v. World-Wide Coin Invs., Ltd.*, 92 F.R.D. 65, 67 (N.D. Ga. 1981) (conclusively citing *Upjohn* to extend privilege to communications between SEC staff and SEC counsel); *People ex rel. Department of Pub. Works v. Glen Arms Estate, Inc.*, 230 Cal. App. 2d 841, 854, 41 Cal. Rptr. 303, 310 (1964) (extent of privilege "is the same where the client is a body politic as where the client is a corporation"); *see also* *Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (privilege "unquestionably is applicable to the relationship between Government attorneys and administrative personnel"), *aff'd mem.*, 734 F.2d 18 (7th Cir. 1984); *Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 598 & n.6 (E.D. Pa. 1980) (indicating that "[c]ourts generally have accepted that attorney-client privilege applies in the governmental context" but citing only work product and executive privilege cases).

Some cases fail to cite even facially supportive precedent for the extension of the privilege. For example, *Connecticut Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448, 450 (S.D.N.Y. 1955), extends the attorney-client privilege to a public body by citing only Wigmore, who does not address the issue of government as client, and an Ohio case involving individual representation of a government official, *Rowley v. Ferguson*, 48 N.E.2d 243 (Ohio Ct. App. 1942). A more recent case discussing the governmental attorney-client privilege confidently states, "[f]ederal courts have uniformly held that the attorney-client privilege can arise with respect to attorneys representing a state." *Hearn v. Rhay*, 68 F.R.D. 574, 579 (E.D. Wash. 1975) (state prison officials are clients of state attorney general, and privilege is applicable to confidential communications between attorney and agency control group). However, the cited case authority for the proposition, *United States v. Alu*, 246 F.2d 29 (2d Cir. 1957), does not in fact address the attorney-client privilege.

Corporations and government entities are dissimilar in ways that recommend against applying the corporate attorney-client privilege to governmental agencies.<sup>50</sup> Two important factors distinguish the government agency from a private entity client: the public policy against secrecy in governmental affairs, and the differing incentives for internal investigation resulting from the unique public function of the government as a party to civil litigation.<sup>51</sup>

#### A. *Open Government and Attorney-Client Privilege*

The government has a special responsibility to make available to the public information concerning government operations.<sup>52</sup> The preeminent codification of open government policy is the Freedom of Information Act (FOIA).<sup>53</sup> FOIA provides, inter alia, that agencies shall make government records available to the public upon request.<sup>54</sup> Agencies may withhold information only in nine specifically exempted categories.<sup>55</sup>

FOIA exemption 5 provides that a government agency need not release to the public documents that would not be available "by law" to a private party in litigation with the agency.<sup>56</sup> Exemption 5 insulates agency decisionmaking from premature scrutiny;<sup>57</sup> its protection extends to documents

50. Cf. Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party"*, 61 MINN. L. REV. 1007 (1977) (suggesting applicability of rule regarding contact with parties represented by counsel be modified where multi-person entity represented by counsel is government body rather than corporation).

51. The sheer size of the federal government and the corresponding volume of potentially privileged communications present an additional motivation to maintain a narrow approach to the attorney-client privilege in the government context. Cf. *Jupiter Painting*, 87 F.R.D. at 598 (acknowledging "pernicious potential" of attorney-client privilege in government context "top-heavy with lawyers"); *Kent Corp. v. NLRB*, 530 F.2d 612, 623-24 (4th Cir. 1976) (government claims of work product privilege should be carefully reviewed because executive branch employs "unaccountable and ever-growing number of attorneys").

52. See generally J. MASHAW & R. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 561-617 (2d ed. 1985) (discussing contours of public access to government information).

53. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982 & Supp. IV 1986)); see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.").

54. Enforcement is available through the federal district courts. 5 U.S.C. § 552(a)(4)(B)-(G) (1982 & Supp. IV 1986); see also *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 79 & n.16 (2d Cir. 1979) (suggesting FOIA enforcement action in Court of Appeals also proper).

55. See 5 U.S.C. § 552(b)(1)-(9) (1982 & Supp. IV 1986); see also *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 220-21; *EPA v. Mink*, 410 U.S. 73, 79-80 (1973) (FOIA exemptions explicitly exclusive). These exemptions are to be narrowly construed. See *United States Dept't of Justice v. Julian*, 108 S. Ct. 1606, 1611 (1988); *Department of the Air Force v. Rose*, 425 U.S. 352, 361-62 (1976).

56. 5 U.S.C. § 552(b)(5) (1982) ("This section does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.").

57. Chief Judge Wald has described the purposes of the government deliberative privilege: [I]t serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed poli-

revealing deliberative processes<sup>58</sup> and to the work product of government legal advisors.<sup>59</sup> Exemption 5 also has been found to encompass an attorney-client privilege for communications between agency employees and government attorneys.<sup>60</sup> However, it would be a mistake to use exemption 5 to justify a broad attorney-client privilege for government entities.<sup>61</sup>

Congressional enactment of FOIA exemption 5 cannot be viewed as a legislative mandate for application of the attorney-client privilege to gov-

cies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-51 (1975) (quality of decisions protected by privilege for deliberations). Exemption 5 does not apply to "final" statements of policy or agency opinion but protects only deliberative communications. *See Sears, Roebuck & Co.*, 421 U.S. at 151-54; *Coastal States*, 617 F.2d. at 868-69 (agency interpretations of regulations not exempt as predecisional); *see also* Schlefer v. United States, 702 F.2d 233 (D.C. Cir. 1983) (agency rulings accorded precedential weight not exempt as deliberative predecisional documents).

58. NLRB v. Sears, Roebuck & Co., 421 U.S. at 150; Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988) (documents must be "predecisional" and "deliberative"); Taxation With Representation Fund v. IRS, 646 F.2d 666, 677-81 (D.C. Cir. 1981) (describing features of documents exempt under deliberative process privilege); *see also* Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565 (D.C. Cir. 1987) (exemption 5 protects from disclosure draft manuscript of historical work on Vietnam War; editorial judgments included in protection of deliberative process). In defining the contours of the deliberative process exemption, the Court has distinguished deliberative or advisory communications from factual information, indicating that the latter generally is not to be exempted from disclosure. EPA v. Mink, 410 U.S. 73, 87-91 (1973); *see also* Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980). However, exemption 5 does apply where disclosure of factual material would expose an agency's deliberative processes. *See* Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982); Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 85 (2d Cir. 1979); Mead Data Cent., Inc. v. Department of the Air Force, 566 F.2d 242, 256-57 (D.C. Cir. 1977).

59. *See* FTC v. Grolier, 462 U.S. 19 (1983); NLRB v. Sears, Roebuck & Co., 421 U.S. at 154 (Congress "had the attorney's work-product privilege specifically in mind when it adopted Exemption 5"). Some courts have limited exemption 5 to protect only work product information which also would be shielded by the deliberative process privilege, permitting disclosure of purely "factual" work product. Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 734-37 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214 (1978); Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1137-38 (4th Cir. 1977). The better (and more recent) rule, however, makes exemption 5 work product protection coextensive with the work product privilege for civil discovery. *See* Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987) (*Mink's* factual/deliberative distinction limited to deliberative process privilege; exemption 5 protects work product whether "factual" or "deliberative"). Accordingly, the work product privilege is available only for documents prepared in contemplation of litigation. *See* Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 864-65 (privilege requires identifiable prospect of litigation); Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967, 974 (7th Cir. 1977) (no privilege where litigation foreclosed); *see also infra* notes 97-101 and accompanying text (discussing attorney work product doctrine).

60. *See* Brinton v. Department of State, 636 F.2d 600, 603 (D.C. Cir. 1980) ("Both congressional intent and judicial precedent establish the attorney-client privilege as a ground for applying Exemption 5."), *cert. denied*, 452 U.S. 905 (1981); Mead Data Cent., Inc. v. Department of the Air Force, 566 F.2d at 252-53 (attorney-client privilege included in exemption 5). However, the attorney-client privilege rarely provides the sole basis for the privilege of a document sought under FOIA. *See, e.g., Brinton*, 636 F.2d at 604 (legal advice also falls within deliberative process exception).

61. Some courts have been wary of extending the FOIA privilege to the full breadth of a common law attorney-client privilege for government agencies. *See Niemeier*, 565 F.2d at 974 & n.23 (purpose of FOIA limits attorney-client privilege to narrower work product privilege); Falcone v. IRS, 479 F. Supp. 985, 989-90 (E.D. Mich. 1979) (attorney-client privilege as applied in FOIA cases narrower than in civil discovery and limited to purposes of privilege in agency context).

ernmental agencies.<sup>62</sup> The suggestion in the legislative history of this exemption that the attorney-client privilege applies to the government as to private parties is, at most, a congressional estimation of the common law of privilege in the government context.<sup>63</sup> If federal courts were to limit the attorney-client privilege in the government context, FOIA exemptions would be likewise limited.<sup>64</sup> FOIA's text and legislative history therefore do not compel a governmental attorney-client privilege.

Some states have distinguished public agencies from other clients for purposes of the attorney-client privilege,<sup>65</sup> and in at least some cases the distinction has been motivated by the type of open government concerns motivating FOIA.<sup>66</sup> For example, the Florida Supreme Court has limited the attorney-client privilege for governmental agencies, holding that the privilege does not provide an exception to the state statute requiring open meetings and disclosure of public records.<sup>67</sup> In addition, the Revised Uniform Rules of Evidence, adopted in 1974 by the National Conference of Commissioners on Uniform State Rules,<sup>68</sup> provide in Rule 502 that communications between a public agency and its attorney are not privileged unless a court determines that disclosure will "seriously impair the ability of the public officer or agency to process the claim or conduct a pending

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62. The statute as enacted indicates that the FOIA exemptions will follow federal common law regarding what documents are not available "by law" in litigation. 5 U.S.C. § 552(b)(5) (1982); see *Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 511 F.2d 192, 197-98 (9th Cir. 1975) (FOIA exemptions "were not intended to create evidentiary privileges for civil discovery"), *aff'd*, 426 U.S. 394 (1976); *Denny v. Carey*, 78 F.R.D. 370, 373 (E.D. Pa. 1978) (FOIA exemption does not create independent evidentiary privilege).

63. S. REP. NO. 813, 89th Cong., 1st Sess. 2 (1965) [hereinafter SENATE REPORT] (exemption 5 protects documents including "the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties").

64. Cf. *McCORMICK*, *supra* note 9, § 108, at 266 (discussing relationship between FOIA exceptions and evidentiary privileges).

65. See, e.g., ARK. STAT. ANN. § 28-1001, Rule 502(d)(2) (1979) (Arkansas attorney-client privilege rule does not protect communication between public officer or agency and government lawyers); ME. REV. STAT. ANN. tit. 16, Rule 502(d)(6) (same); N.D.R. EVID. 502(d)(6) (same), *reprinted in* 5B N.D. CENT. CODE § 268 (Supp. 1987).

66. See, e.g., *Eastern Or. Mining Ass'n v. Grant County*, 51 U.S.L.W. 2669 (D. Or. Apr. 22, 1983) (Oregon public meetings law operates as waiver of privilege for communications between city officials and city attorneys at meetings required by law to be open).

67. *City of North Miami v. Miami Herald Publishing Co.*, 468 So. 2d 218 (Fla. 1985) (written communications between lawyer and governmental clients generally not exempt from disclosure as public records); *Neu v. State*, 462 So. 2d 821 (Fla. 1985) (discussion between city council and city attorney must be open to public); see also *Turner, Florida's Open Government Laws: No Exceptions for Attorney-Client Communications*, 13 FLA. ST. U.L. REV. 389 (1985); *Smith, The Public Records Law and the Sunshine Law: No Attorney-Client Privilege Per Se, and Limited Attorney Work Product Exemption*, 14 STETSON L. REV. 493, 506-11 (1985) (enactment of privilege statute did not abrogate "preeminent public policy" assuring public access to government records). *But see* *City of Melbourne v. A.T.S. Melbourne, Inc.*, 475 So. 2d 270 (Fla. Dist. Ct. App. 1985) (*Miami Herald* superseded by amendment of public record law providing exemption for attorney work product during pendency of litigation); FLA. STAT. ANN. § 119.07(3)(a) (West 1985) (public record containing "mental impression, conclusion, litigation strategy, or legal theory" prepared by government attorney for litigation or adversarial proceeding is temporarily exempt from disclosure under public records law).

68. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK AND PROCEEDINGS OF THE ANNUAL CONFERENCE 145 (1974).

investigation, litigation, or proceeding in the public interest."<sup>69</sup> Rule 502's public agency exception to the attorney-client privilege is not universally accepted but has been adopted in some states.<sup>70</sup>

### B. *Limits to the Corporate Analogy*

As a party to litigation, the government entity has a unique public function. The government has an obligation to advance the public interest in litigation, a feature distinguishing government attorneys from attorneys for private parties.<sup>71</sup> The government attorney must seek a fair result beyond, or rather as the ultimate manifestation of, the interests of the government client.<sup>72</sup> The government also has a responsibility to act lawfully and to police itself that arguably surpasses any analogous duty on the part

69. UNIF. R. EVID. 502(d)(6), 13A U.L.A. 257, 257-58 (1985).

70. Maine, Arkansas, and North Dakota are among the states that have adopted Rule 502(d)(6) of the Uniform Rules. See *supra* note 65. However, Weinstein's survey of state evidence rules indicates that the Revised Uniform Rules of Evidence exception for public agencies frequently is omitted. E.g., 2 WEINSTEIN'S EVIDENCE, *supra* note 2, at 503-31 (South Dakota privilege rule deletes public entity exception).

71. This public responsibility may even outweigh the government's interest in winning a particular lawsuit:

The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980) provides that the duty of a public prosecutor is to "seek justice, not merely to convict." Prosecutors must disclose to the defendant exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (prosecutor has constitutional obligation to disclose facts favorable to criminal defendant). Similarly, the government lawyer in a civil action must "seek justice" and avoid unfair settlements or results. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1980); see also *City of Los Angeles v. Decker*, 18 Cal. 3d 860, 871, 558 P.2d 545, 551, 135 Cal. Rptr. 647, 653 (1977) (duty of government attorney in eminent domain action includes developing full and fair record to arrive at just compensation); Schnapper, *Legal Ethics and the Government Lawyer*, 32 REC. A.B. CITY N.Y. 649, 655 (1977) (government attorney has ethical obligation in civil litigation paralleling constitutional obligation in criminal case). See generally Lawry, *Confidences and the Government Lawyer*, 57 N.C.L. REV. 625, 627-31 (1979) (discussing ethical provisions reflecting special obligations of government attorneys).

72. The Professional Ethics Committee of the Federal Bar Association described the public trust of the federally employed lawyer:

[T]he government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. In contrast, the private practitioner represents the client's personal or private interest. . . . [W]e do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.

Federal Bar Association Ethics Committee, *The Government Client and Confidentiality: Opinion 73-1*, 32 FED. B.J. 71, 72 (1973) [hereinafter *Opinion 73-1*]; see also FEDERAL ETHICAL CONSIDERATIONS 5-1, 6-1, 7-2 (Fed. B. Ass'n 1973) (noting the public interest functions of the federal government attorney), reprinted in Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A. J. 1541, 1543-44 (1974); Josephson & Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 555-57 (1986) (discussing public trust of government lawyers).

of private business enterprises. While corporate employees bear no legal responsibility to report wrongdoing,<sup>73</sup> individual employees of the government have obligations to report illegal activity by other government employees.<sup>74</sup> Further, unlike an attorney for a private corporation, the attorney for a government agency has an obligation to act on discovered wrongdoing.<sup>75</sup>

As in the corporate setting,<sup>76</sup> but to an even greater degree, it is unclear how the attorney-client privilege for governmental entities can promote candor from individuals who are unable to prevent the ultimate waiver of the privilege.<sup>77</sup> Given the obligation of government attorneys to report wrongdoing, the legal representative of a government entity cannot assure government employees the degree of confidentiality sufficient to the goals of the attorney-client privilege. Furthermore, in litigation to which the government is a party, some litigation strategy is directed by the legal advisor rather than the client;<sup>78</sup> thus, even government officials in posi-

73. Mere failure to report a crime does not constitute misprision of a felony under the federal misprision of felony statute, 18 U.S.C. § 4 (1982), or under most state common law or statutory provisions. See *United States v. Ciambrone*, 750 F.2d 1416 (9th Cir. 1985) (violation of 18 U.S.C. § 4 requires positive act of concealment); *United States v. Davila*, 698 F.2d 715, 717 (5th Cir.), *reh'g denied*, 703 F.2d 557 (5th Cir. 1983) (same); see also *Holland v. State*, 302 So. 2d 806 (Fla. App. 1974) (common law crime of misprision not adopted in Florida law); MODEL PENAL CODE § 242.5 commentary at 251 (1980) (model code "accords with vast majority of jurisdictions in assigning no penalty to simple failure to inform authorities of criminal conduct"); *id.* at 256-57 (requirements of affirmative concealment and intent to prevent justice generally nullify misprision provisions); Note, *Forcing Bystanders to Get Involved: The Case for a Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787, 1793 (1985) (majority view has been that misprision of felony requires element beyond failure to report). See generally Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 517-21 (discussing absence of obligation to report crimes).

74. See H.R. Con. Res. 175, 72 Stat. B12 (1958) "Code of Ethics for Government Service" ("Any person in the Government service should: . . . (9) Expose corruption wherever discovered . . ."). 28 U.S.C. § 535 (1966) additionally requires department heads to "expeditiously report[]" information regarding criminal conduct by government employees to the Attorney General. Numerous federal agencies reinforce these requirements by engaging in governmental oversight. See, e.g., 28 C.F.R. § 0.39a (1988) (Department of Justice Office of Professional Responsibility investigates allegations of misconduct by department employees). While some of these ethical and legal provisions for government employees and attorneys and for public agencies may be largely hortatory, they nonetheless are distinctive to the public sphere.

75. FEDERAL ETHICAL CONSIDERATION 4-3 (Fed. B. Ass'n 1973) (federal lawyer has ethical responsibility to disclose information revealing official misconduct), *reprinted in* Poirier, *supra* note 72, at 1543; *cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983) (while general ethical obligation of attorney is to maintain confidences of client, attorney may reveal information necessary to "prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm").

76. See Gardner, *supra* note 31, at 376-84 (arguments against corporate privilege apply in government context); *id.* at 379 (assumption that privilege applies to governmental bodies is "even more fallacious" than assumption of corporate privilege).

77. Under the "entity" theory of representation for corporations adopted in *Upjohn*, a government attorney could avoid individual representation of an individual government employee while preserving for the government the attorney-client privilege for communications with the employee. See discussion *supra* notes 31-39 and accompanying text. The applicability of *Upjohn* in the government context has not been discussed explicitly in federal case law, although McCormick suggests that an analogous rule protecting communications from employees is appropriate for agency situations not involving corporations. MCCORMICK, *supra* note 9, § 96, at 233; see also Note, *supra* note 45.

78. See Weinstein & Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, 1 TOURO L. REV. 1 (1985) (government attorney's obligation to public requires deci-

tions analogous to a corporate "control group" would not have enough control over the litigation to be moved to communicate with the agency's lawyer. Finally, government employees always run the risk that successor officials in a current or later administration will waive the attorney-client privilege covering prior communications with counsel.<sup>79</sup> In sum, entity representation in the government context removes the assurances of confidentiality necessary to promote communications between government attorneys and agency employees. The attorney-client privilege for government agencies therefore cannot be justified as promoting individual disclosures.

Application of the policy justifications for the organizational attorney-client privilege further distinguishes governmental agencies from private businesses. For corporations, the attorney-client privilege is justified as promoting "entity" communications.<sup>80</sup> Corporations use legal advice<sup>81</sup> to pursue voluntary compliance with the law and need the attorney-client privilege to encourage internal examinations necessary for such compliance.<sup>82</sup> Such internal investigations generate information that might not otherwise exist and certainly would not otherwise be neatly packaged for adversarial discovery.<sup>83</sup> Keeping such investigations confidential and privileged helps minimize the risk of liability that might result from the release of such information and thus allows corporations to patrol their own wrongdoing.<sup>84</sup>

The profit motives of corporations distinguish those business entities from government agencies. Corporations have disincentives to investigate not shared by the government, since the ability of a business entity to

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sionmaking independent of agency client's direction).

79. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 357 (1985) (rejecting argument that giving bankruptcy trustee control of privilege will have chilling effect on communications with attorney; chilling effect is no greater than in solvent corporation, where successor management may waive corporation's attorney-client privilege for prior management's communications with counsel).

80. See *supra* notes 42-43 and accompanying text.

81. Internal investigations conducted for a business purpose other than giving legal advice to a corporation are not protected by the attorney-client privilege. See *Upjohn*, 449 U.S. at 390-91; see also *supra* note 28.

82. See *supra* note 43. This need to shield corporate internal investigations from discovery also is reflected in a nascent privilege for what has been termed "self-critical analysis." See *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 251 (D.D.C. 1970) (hospital self-evaluation given qualified privilege on basis of "overwhelming public interest" in unimpeded information flow for improvement of health care), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973); Leonard, *Codifying A Privilege for Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113 (1988); Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083 (1983).

83. See Block & Remz, *The Confidentiality of Corporate Internal Investigations*, 18 SEC. & COMMODITIES REG. 61, 61-62 (1985) (internal investigative files may offer private litigant or law enforcement agency "detailed roadmap" for litigation).

84. See Crisman & Mathews, *Limited Waiver of Attorney-Client Privilege and Work-Product Doctrine in Internal Corporate Investigations: An Emerging Corporate "Self-Evaluative" Privilege*, 21 AM. CRIM. L. REV. 123, 124-25 & *passim* (1983) (discussing need for confidentiality of corporate internal investigations).



compete is at risk if wrongdoing is discovered or discoverable.<sup>85</sup> Economic incentives may work in two directions. Where the costs of voluntary compliance are lower than the costs of "involuntary" compliance after discovery by a law enforcement agency or injured plaintiff, corporations may choose to employ internal investigations.<sup>86</sup> However, economic vulnerability may make a profit-motivated corporation shy away from exposure to liability or adverse publicity. Since the survival of government entities generally does not hinge on competitive success, this incentive to hide (or never to uncover) misconduct is less powerful in the government context.<sup>87</sup> An absolute privilege for communications with counsel therefore is less important in the government's incentive structure than it is in the private sphere.<sup>88</sup>

In addition, the Supreme Court has suggested that responsibility to the public may defeat evidentiary privileges protecting professional relationships. In *United States v. Arthur Young & Co.*,<sup>89</sup> the Supreme Court declined to extend a work product privilege to public accountants, indicating that an auditor's obligation to serve the public interest distinguishes the accountant from an attorney "whose duty it is to present the client's case in the most favorable possible light."<sup>90</sup> The Court found it significant that accountants perform "a public responsibility transcending any employment relationship with the client."<sup>91</sup> The government's public respon-

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85. Business competition may motivate both secrecy about wrongdoing and wrongdoing itself. For a general discussion of the structural and economic origins of corporate misconduct, see Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 MICH. L. REV. 1377 (1982).

86. See Nath, *supra* note 42, at 44-47; *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224, 1237 (3d Cir. 1979) ("[P]otential costs of undetected noncompliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential."). The SEC "voluntary disclosure program" provides incentives for corporations to self-police and to conduct internal investigations. See *In re Scaled Case*, 676 F.2d 793, 800-01 (D.C. Cir. 1982) (describing voluntary disclosure program); Report of the Securities and Exchange Comm'n on Questionable and Illegal Corporate Payments and Practices, Sec. Reg. & L. Rep. (BNA) No. 353 Supp. (May 19, 1976) (same); see also Recent Developments, *supra* note 42, at 373 n.88 (suggesting Upjohn Co. would not have undertaken internal investigation absent public opinion pressure and voluntary disclosure program).

87. Noneconomic incentives for hiding government misconduct are diffuse and individualized and are not countered by extension of the attorney-client privilege. See, e.g., P. SCHUCK, *SUING GOVERNMENT passim* (1983) (arguing that public officials are risk averse; self-protective official behavior is motivated in part by individual officials' fear of litigation and is best remedied by reform of liability system shifting liability to government entity).

88. It might be argued that the privilege nonetheless gives the government some ability and "incentive" to perform internal investigations and should therefore be retained. However, the attorney-client privilege is an unwieldy mechanism for encouraging governmental self-policing. The scope of the privilege is broad (potentially extending to legal communications with thousands of federal employees) and its protection is absolute, while the benefits are even less clear than in the corporate context. In addition, agencies will not be inhibited from seeking legal advice absent the privilege because other privileges protect intragovernmental communications and attorney work product. See *infra* notes 97-107 and accompanying text.

89. 465 U.S. 805 (1984).

90. *Id.* at 817.

91. *Id.*

sibility is even more manifest than an accountant's, and a governmental attorney-client privilege can be similarly distinguished.

An exception to the corporate attorney-client privilege also has been applied where the client asserting the privilege is "an entity which in the performance of its functions acts wholly or partly in the interests of others, and those others, or some of them, seek access to the subject matter of the communications."<sup>92</sup> In *Garner v. Wolfenbarger*, the Fifth Circuit reasoned that since the management of a corporation has a duty to protect stockholders, stockholders should be permitted to show cause why the attorney-client privilege should not be invoked.<sup>93</sup> Under *Garner*, an entity acting in the interests of others has a semi-permeable, rather than an absolute, privilege for its communications with counsel.<sup>94</sup> Since the government is properly constrained to act wholly or partly in the interests of the citizenry,<sup>95</sup> the dicta in *Garner* regarding entity responsibility toward the opposing party suggest that the government's public responsibility makes it appropriate to limit the government's attorney-client privilege.<sup>96</sup>

### C. *Extra-Privilege Protections for Sensitive Information*

Denial of the attorney-client privilege to government agencies will not hamper governmental functions or litigation by exposing sensitive communications to public scrutiny. The government enjoys broad protection of its "mental processes" and deliberations which extends to most communications between agencies and their legal advisors. Existing protections, including exemptions to the FOIA, special governmental privileges, and the attorney work product doctrine, offer sufficient protection for the government's legitimate interests in confidentiality.

Communications between the attorney for the government party and his client often will fall within the protection of the attorney work product

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92. *Garner v. Wolfenbarger*, 430 F.2d 1093, 1101 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

93. *Id.* at 1103-04. The *Garner* exception has been extended to other fiduciary relationships. See *Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 543 F. Supp. 906 (D.D.C. 1982) (trustee of employee benefit plan may not assert privilege to keep information from plan beneficiaries). See generally *Developments: Attorney-Client Privilege*, *supra* note 10, at 1526-27 (discussing extensions of *Garner* exception).

94. See *Developments: Attorney-Client Privilege*, *supra* note 10, at 1527-28 (fiduciary duty undermines adverseness in litigation between fiduciary and beneficiary).

95. The government's duty to serve the public interest diminishes the adversary nature of litigation to which the government is a party. See *supra* note 69; *cf. supra* note 92.

96. At least one court has limited *Garner's* policy rationale to cases in which a shareholder brings a derivative suit to vindicate the interests of the corporation. *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 23 (9th Cir. 1981); see also Note, *The Shareholders' Derivative-Claim Exception to the Attorney-Client Privilege*, 48 LAW & CONTEMP. PROBS., Summer 1985, at 199 (criticizing *Garner*). While suits against the government to enforce public rights arguably are analogous to such shareholder actions, standing obstacles bar most such cases against the government. See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *Frothingham v. Mellon*, 262 U.S. 447 (1923).

doctrine.<sup>97</sup> Under the work product doctrine, an opposing party may not discover the work product of an attorney, including the attorney's ideas and litigation strategy as "reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways."<sup>98</sup> The doctrine has been extended to the government and protects the government party's strategic interests in litigation.<sup>99</sup> Unlike the attorney-client privilege,<sup>100</sup> the work product doctrine is not an absolute bar to disclosure of the protected communication; an attorney's work product is discoverable upon an adequate showing of necessity.<sup>101</sup> The work product doctrine thus accords substantial protection to the opinion work product of attorneys for the government distinct from an absolute privilege for attorney-client communications.

A special governmental privilege protects governmental deliberative processes, including the opinions, conclusions, and reasoning of government officials.<sup>102</sup> This privilege has been extended to consultations between agencies and legal counsel.<sup>103</sup> Like the work product privilege, this privilege is not absolute; the protection is weighed in each case and may be countered by a demonstrated need for the information.<sup>104</sup>

97. The seminal work product case is *Hickman v. Taylor*, 329 U.S. 495 (1947). The doctrine also is codified in FED. R. Civ. P. 26(b)(3), which provides:

[A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

98. *Hickman*, 329 U.S. at 511.

99. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *Detroit Screwmatic Co. v. United States*, 49 F.R.D. 77, 78 & n.3 (S.D.N.Y. 1970); *United States v. Anderson*, 34 F.R.D. 518 (D. Colo. 1963) (memoranda discussing legal arguments and conclusions were work product of government attorney and exempt from disclosure absent very good cause).

100. See *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 150-51 (D. Del. 1977) (distinguishing purposes of attorney-client privilege and work product immunity); *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58 (N.D. Ohio 1953) (same); 4 MOORE'S FEDERAL PRACTICE, *supra* note 44, at ¶ 26.64[4] (comparing attorney-client privilege and work product doctrine).

101. See FED. R. Civ. P. 26(b)(3) (work product discoverable upon showing of "substantial need" and where materials not otherwise available without "undue hardship"); *FTC v. Grolier Inc.*, 462 U.S. 19, 27 (1983) ("Under the current state of the law relating to the privilege, work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation."). While Rule 26(b)(3) provides special protection for a lawyer's opinion work product, see *Upjohn Co. v. United States*, 449 U.S. 383, 400-01 (1981), even opinion work product may be disclosed upon an adequate showing of necessity by the party seeking disclosure, see *Byers v. Burleson*, 100 F.R.D. 436, 439-40 (D.D.C. 1983); see also 4 MOORE'S FEDERAL PRACTICE, *supra* note 44, at ¶26.64[3.-2] (2d ed. & Supp. 1987-88).

102. See, e.g., *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958). See generally *McCORMICK*, *supra* note 9, § 108, at 266-67.

103. See, e.g., *Green v. IRS*, 556 F. Supp. 79 (N.D. Ind. 1982), *aff'd mem.*, 734 F.2d 18 (7th Cir. 1984).

104. See *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 404-05 (D.C. Cir. 1984);

Finally, absolute protection separate from the attorney-client privilege is available for those state secrets which should not be disclosed because of danger to the public interest. Common law and statutory privileges protect military and state secrets,<sup>105</sup> executive information,<sup>106</sup> and the identity of informants.<sup>107</sup>

### III. CONCLUSION

As a general rule, privileges should extend no further than the underlying policies require and should be strictly construed in accordance with their purpose. This Note urges the exercise of judicial restraint in the extension of the attorney-client privilege to contexts in which a government agency is the client.<sup>108</sup> Although the case law has moved toward extending to government agencies a privilege parallel to the corporate privilege, this trend should be arrested.

An absolute privilege for attorney-client communications in the government context compromises both the logic of the evidentiary privilege and the important public policy of openness in government affairs. Limitation of the attorney-client privilege in the government context would preserve the absolute privilege for circumstances in which it would promote attorney-client communications and aid in the administration of justice.

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*Carl Zeiss*, 40 F.R.D. at 327.

105. *United States v. Reynolds*, 345 U.S. 1, 7 (1953).

106. *United States v. Nixon*, 418 U.S. 683 (1974).

107. *McCray v. Illinois*, 386 U.S. 300, 311-12 (1967).

108. This limitation should not exclude from the privilege communications between a government attorney and a government employee represented in his individual capacity. An attorney for the government may act as the legal representative for a government employee sued or subpoenaed in his individual capacity only where such representation would be in the interest of the United States. 28 C.F.R. § 50.15(a) (1987). Where an attorney employed by the federal government is designated to represent a government employee as an individual, the usual attorney-client relationship arises. *Opinion 73-1*, *supra* note 72, at 72-73; FEDERAL ETHICAL CONSIDERATIONS CANONS 4-4, 6-1, 7-1 (Fed. B. Ass'n 1973), *reprinted in* Poirier, *supra* note 72. Since the individual client may retain or waive the attorney-client privilege in accordance with his own interests, the incentives to communicate with counsel are intact and the purposes of the attorney-client privilege are served.