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Upjohn Warnings, The Attorney-client Privilege, And Principles Of Lawyer Ethics: Achieving Harmony

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Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony

GRACE M. GIESEL*

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I. Introduction

An entity, such as a corporation, occasionally asks its lawyer to investigate a particular matter. Often the investigation requires the lawyer to interview employees, officers, directors, or other individuals related to the entity. The individuals interviewed may be high-ranking members of management if the matter the lawyer investigates relates to a high-level matter, such as stock-option granting activities. The lawyer may interview rank-and-file individuals who work on the loading dock if the lawyer is investigating the existence of a drug-dealing ring on the dock.

The lawyer, seeking to render the best possible representation to the entity client, wishes to obtain complete and unfettered disclosure by the individuals with whom the lawyer communicates. The more complete the disclosure, the better counsel the lawyer can give to his or her client, the entity.

The individual in this tripartite situation may be inclined to disclose all to the lawyer because the individual does not truly understand where the loyalties of the lawyer and the entity lie. The individual may view the entity, the lawyer, and the individual as on the same team, just as they are with regard to the typical day-to-day happenings involving the entity. The individual may not understand that the attorney does not view the individual as a client. The individual may not understand that the attorney places the entity's interest well above that of the individual. The individual may not realize that he or she has no right to block disclosure of his or her own communications with the attorney. The individual may not realize that statements made to the attorney ultimately might be used against the individual by the entity or other parties, such as the government in a criminal prosecution.

The lawyer could eliminate any confusion of roles by clearly explaining, in writing or otherwise, the situation to the individuals with whom the lawyer talks.[1] A lawyer's explanation to the individual in the tripartite situation has been referred to as a corporate *Miranda* warning or an *Upjohn* warning.[2] In fact, the rules of professional responsibility

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1. *See* Brian Martin, *Process Makes Perfect: Managing In-House Attorney-Client Privilege*, Inside Couns., Mar. 2010, at 10, *available at* http://www.insidecounsel.com/Issues/2010/March-2010/Pages/Process-Makes-Perfect.aspx.

> An essential component of the investigative process is the "*Upjohn* warning," which clarifies to an employee being interviewed that the attorney is representing the corporation and not the individual. Establishing this relationship at the outset precludes the employees from reasonably asserting ownership of the privilege relating to interactions with in-house counsel.

Id.

2. These warnings are sometimes called *Upjohn* warnings in honor of *Upjohn Co. v. United*

governing lawyer conduct require the lawyer in the tripartite situation to be honest and forthright.[3]

Yet, cases in which attorneys have been less than clear in their explanations or in which the attorneys cannot prove that they gave any clarification to the individuals with whom they dealt are anecdotal evidence that attorneys are not rigorous in their explanation of the implications of the tripartite situation to the individuals with whom they communicate.[4] The lawyer's desire to serve the entity client well by

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States, 449 U.S. 383 (1981), in which the United States Supreme Court affirmed that an entity, such as a corporation, can have an attorney-client privilege. In *Upjohn*, the Court clarified that the corporation's privilege rightly could attach to communications between a lawyer and a variety of constituents of the entity and was not simply limited to communications between a lawyer for the entity and the control-group individuals. *See also infra* Section III.D. This recognition that the corporation's lawyer could have communications with all sorts of individuals and the entity's attorney-client privilege could protect those communications created an environment in which individuals speak with entity counsel and may not understand the role of the attorney, the role of the individual, and privilege rights of the entity and the individual. The *Upjohn* case did not deal with warnings or explanations about the lawyer's role. It simply discussed the context in which explanation or warnings for the individual might be needed. Thus, the clarification of roles is sometimes called an *Upjohn* warning. *See* Lee G. Dunst & Daniel J. Chirlin, *A Renewed Emphasis on* Upjohn *Warnings*, WHITE-COLLAR CRIME ANDREWS LITIG. REP. (Thomson Reuters, Danvers, Mass.), Sept. 2009, *available at* http://www.gibsondunn.com/publications/Documents/Dunst-Chirlin-RenewedEmphasisOnUpjohnWarnings.pdf.

The clarification or explanation is sometimes called a corporate *Miranda* warning in honor of *Miranda v. Arizona*, 384 U.S. 436 (1966). That case established that a person must be informed of his or her constitutional rights before any custodial interrogation can occur. An interrogation without informing the interrogated of constitutional rights violates the Fifth Amendment protection against self-incrimination. An attorney's clarification in the entity context is, simply, analogous, but not truly related, to the criminal context of the *Miranda* case.

There are many suggestions in the literature about what lawyers should say to clarify the situation to the individual, especially in light of recent developments in the area. *See, e.g.*, Ashish S. Joshi, *Corporate* Miranda*: Clarifying Lawyers' Loyalty During an Internal Investigation*, BUS. L. TODAY, Sept.-Oct. 2009, at 51; Dunst & Chirlin, *supra*; Michael Li-Ming Wong & Asheesh Goel, *Beefing up "Corporate* Miranda *Warnings": Averting Misunderstandings & Detrimental Consequences in Internal Investigations*, WALL ST. LAW. (Thomson Reuters, Danvers, Mass.), Aug. 2009, *available at* http://www.ropesgray.com/files/upload/Article_WSJ_MirandaWarnings.pdf; Robert J. Jossen & Neil A. Steiner, *The "Upjohn" Pitfalls of Internal Investigations*, N.Y.L.J., July 13, 2009, at S4; Elkan Abramowitz & Barry A. Bohrer, *"Adnarim" Warnings in Corporate Internal Investigations*, N.Y.L.J., May 5, 2009, at 3.

Most recently, the White Collar Crime Committee of the ABA's Criminal Justice Section established a Task Force to examine the issue of just what lawyers need to say. In July of 2009, the Task Force issued a report with recommended best practices which provides a suggested *Upjohn* warning along with recommended procedures. *See* Upjohn *Warnings: Recommended Best Practices when Corporate Counsel Interacts with Corporate Individuals*, 2009 A.B.A. SEC. CRIM. JUST., *available at* http://meetings.abanet.org/webupload/commupload/CR301000/newsletterpubs/ABAUpjohnTaskForceReport.pdf.

3. *See infra* Section VI.

4. *See, e.g.*, United States v. Stein, 463 F. Supp. 2d 459, 460 (S.D.N.Y. 2006) (commenting on the lack of explanation given even though the need for the explanation has been well known for many years); *see also* United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009). In *United States v. Ruehle*, the Ninth Circuit noted that the district court had found that the lawyers had not provided any sort of *Upjohn* or *Miranda* warning to the individual. The Ninth Circuit refused to declare that

obtaining complete disclosure perhaps explains this behavior. Unfortunately, because attorneys want to provide the best possible representation to the entity clients, which pay their fees, and thus because these attorneys want to obtain the fullest possible disclosure from the individuals, these attorneys have the incentive to give weak explanations or no explanation at all of the situation to the individuals, regardless what the governing standards of professional conduct might suggest.[5]

Not infrequently in recent years, this tripartite relationship of entity, attorney, and individual has come under scrutiny by the courts. The judicial scrutiny does not arise from claims against attorneys for professional misconduct, however. Rather, the typical context bringing the issue to the courts is that the entity waives any attorney-client privilege right it has with regard to the communications between the lawyer and the individual and discloses the content of the communications to an arm of the government. Sometimes the entity does this to garner favor when the government has targeted the entity for prosecutorial scrutiny. The government then may seek to use the individual's communications with the lawyer in the prosecution of the individual.

The individual typically attempts to block the use of his or her communications with the lawyer by asserting that the communications are privileged apart from the entity's privilege. There are several different ways an individual can assert the attorney-client privilege in the tripartite situation. First, the individual might claim that he or she was a client of the lawyer for purposes of the communications such that the individual has the right on the basis of the attorney-client privilege to block disclosure of the communications. The individual might claim that the attorney represented him or her separately or jointly with the entity. With a separate representation the privilege and the waiver right is the individual's alone. The attorney simply has two clients with separate attorney-client privilege rights. With a joint-client representation, the entity and the individual share the privilege such that both must agree to a waiver of it. Generally, the clients must share a common interest for a court to recognize a joint-client privilege.[6] The only exception to the

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lower-court finding "clearly erroneous." *Id.* at 604 n.3. In fact, the district court stated than even if the lawyers gave a warning, the warning described by the attorney was "woefully inadequate." United States v. Nicholas, 606 F. Supp. 2d 1109, 1117 (C.D. Cal. 2009), *rev'd sub nom.* United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

5. *See* Dunst & Chirlin, *supra* note 2; Jossen & Steiner, *supra* note 2. One lawyer who handles white-collar matters has said, "that particular tension is one of the most difficult things that any in-house counsel can manage." *See* Steven Andersen, *Full Disclosure: 9th Circuit Restores Conventional Wisdom on Privilege*, INSIDE COUNS., Dec. 2009, at 36, *available at* http://www.insidecounsel.com/Issues/2009/December-2009/Pages/Full-Disclosure.aspx.

6. The Restatement (Third) of the Law Governing Lawyers states:

(1) If two or more persons are jointly represented by the same lawyer in a matter, a

dual-waiver requirement is that if the parties become adverse, one of the joint clients can disclose and use communications against the other without the other's consent.[7]

An individual in a tripartite situation might make a third type of privilege claim. The individual might claim that a joint-defense or community-of-interest privilege protects the communications from disclosure. With such a claim, the individual does not assert that the entity attorney represented the individual. Rather, the claim is that the entity and the individual shared a community of interest or joint defense such that any communications between the parties or their lawyers enjoy a privilege and are not disclosable unless all parties agree.[8]

> communication of either co-client that otherwise qualifies as privileged under §§ 68–72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.
>
> (2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (2000); *see also* Robert Bosch LLC v. Pylon Mfg. Corp., 263 F.R.D. 142, 145–46 (D. Del. 2009) (stating that in a joint-client situation, a co-client "may unilaterally waive the privilege regarding its communications with the joint attorney, but cannot unilaterally waive the privilege for the other joint clients or any communications that related to those clients"); Teleglobe USA, Inc. v. BCE Inc. (*In re* Teleglobe Commc'ns Corp.), 392 B.R. 561, 589 (Bankr. D. Del. 2008) 0 (noting that waiver by one joint client is not sufficient without waiver by other client). *See generally* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES §§ 4:30–32 (2d ed. 1999 & Supp. 2009).

7. Regarding joint-client privilege, the Restatement (Third) of the Law Governing Lawyers states: "Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them." § 75(2); *see also In re* Blier Cedar Co., Inc., 10 B.R. 993, 1002 (Bankr. D. Me. 1981). *See generally* RICE, *supra* note 6, § 4:33.

8. The Restatement (Third) of the Law Governing Lawyers states:

> (1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68–72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.
>
> (2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.

§76. *See generally* RICE, *supra* note 6, §§ 4:22, :35.

For an example of a claim of a joint-defense or community-of-interest privilege in a corporate-tripartite setting, see *United States v. Weissman*, No. S1 94 CR. 760 CSH., 1996 WL 737042 (S.D.N.Y. Dec. 26, 1996). In *Weissman*, the Chief Financial Officer (CFO) of Empire Blue Cross and Blue Shield claimed that Empire improperly disclosed protected communications he had with Empire's counsel. The CFO did not claim an individual privilege. The court said it would not have recognized one anyway because any privilege established as to conversations between Weissman and counsel for the corporate entity could be waived at any time, but only by the corporate entity. *Id.* at *13. The CFO claimed that the communications were privileged because the CFO and the entity were a part of a joint-defense or a community-of-interest

Courts often confuse the joint-defense or community-of-interest situation and the joint-client situation.[9] Any claim of attorney-client privilege based on a claim that the attorney represented the individual separately or jointly is centered on the relationship between the attorney and the individual. In contrast, a claim of attorney-client privilege based on a claim that the individual and the entity share a community of interest or a joint defense is centered on the relationship between the individual and the entity.

This article focuses on claims by individuals that the attorneys not only represented the entities but also the individuals as separate or joint clients. This article leaves for another day an analysis of claims of a community of interest or a joint defense.

Given the apparent client-interest-based incentive lawyers in the tripartite situation have to not explain the lawyer's role and the implications of that role to the individual, and given that the entity client benefits from the lack of clarity at the expense of the individual, one might expect courts dealing with an individual's privilege claim to look upon the individual, rather than the entity, sympathetically. Interestingly, the contrary has occurred.

Many courts have engaged in flawed analysis and narrow vision in

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arrangement. *Id.* at *6; *see also* United States v. Sawyer, 878 F. Supp. 295, 296–97 (D. Mass. 1995) (rejecting a vice president's claims that an entity's in-house counsel represented him personally, or in the alternative, that he had a joint-defense arrangement with the entity).

9. For example, in *In re Grand Jury (00-2H)*, 211 F. Supp. 2d 555 (M.D. Pa. 2001), the government sought testimony from a lawyer who had represented the Chief Executive Officer (CEO) and the entity. There was no dispute that the attorney represented both the individual and the entity. *Id.* at 558 ("Both the Government and Attorney acknowledge that Attorney represented all parties in the Employee Litigation."). The entity waived its privilege, and the government argued that the individual could not block disclosure. *Id.* at 557. The court disagreed, finding that the CEO and corporation were part of a joint defense.

> [The] CEO has not waived his privilege. Therefore, any confidential statements by CEO, pertaining to the Employee Litigation, are privileged. CEO's statements to Attorney are protected by CEO's individual attorney-client privilege. Just as CEO cannot unilaterally prohibit Corporation from consenting to disclosure of its confidential communications with counsel, Corporation cannot waive the privilege belonging to CEO. If CEO made statements to Vice President, who then relayed those statements to Attorney, those statements fall within the joint defense privilege. Although the Third Circuit has not addressed the issue, the court agrees with Attorney that Corporation cannot unilaterally waive the entire joint defense privilege.

Id. at 559. In this situation, the corporation and the individual, the CEO, were really joint clients in that both were represented by the same attorney. *See also* Fuji Photo Film Co., Ltd. v. Benun (*In re* Benun), 339 B.R. 115, 127 & n.12 (Bankr. D.N.J. 2006) (discussing confusion of joint client and community of interests); 24 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5493 (1986) (noting the confusion between the joint-defense privilege and the privilege for joint clients).

denying privilege to the individual.[10] The courts have been eager to protect the entity's control over its attorney-client privilege at the expense of any competing privilege of the individual. These courts have not applied the traditional attorney-client privilege used in other settings. Rather, these courts have added requirements when the question is whether the privilege applies to communications of the individual and attorney in the tripartite situation. For example, some courts have refused to recognize the right of the individual to assert the protection of the attorney-client privilege and thus have refused to recognize an individual's right to control disclosure of his or her communication with the attorney unless the communication involved matters unrelated to the business or operations of the entity.[11] In other settings, there is no similar requirement for application of the attorney-client privilege.[12]

In applying these additional requirements to the tripartite situation, these courts have failed to give effect to the individual's honest and reasonable belief in the existence of an attorney-client relationship. Such a failure is a failure to apply a basic and accepted legal principle. Historically, whether the question has been malpractice liability, conflicts of interest, or the application of the attorney-client privilege, the courts' decisions have been guided by the honest and reasonable belief of the person dealing with the lawyer.[13] If the person honestly and reasonably believes that the attorney represents or may represent the individual in the future, then there is an attorney-client relationship for purposes of malpractice, conflicts of interest, and attorney-client privilege. Yet, in the tripartite setting, the additional and exacting requirements for the existence of an attorney-client relationship and recognition of a privilege render the individual's honest and reasonable belief irrelevant. Thus, an individual in the tripartite situation may honestly and reasonably believe that the attorney for the entity also represents him or her. The individual may honestly and reasonably believe that in talking with counsel, the individual is consulting in confidence with the attorney for the purpose of obtaining legal advice. The individual may honestly and reasonably not understand the implications of that lack of representation for purposes of the privilege and disclosure of the statements of the individual. Even so, the analysis of many courts yields a finding of no attorney-client relationship and no privilege.

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10. *See infra* Section V.

11. *See, e.g.*, United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 215–16 (2d Cir. 1997); *In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 124–25 (3d Cir. 1986).

12. *See infra* Section III.

13. *See, e.g.*, Bos. Scientific Corp. v. Johnson & Johnson Inc., 647 F. Supp. 2d 369, 373 (D. Del. 2009) (stating that the question for consideration is the reasonableness of the client's belief); *see also infra* Section IV.

These courts have ventured away from traditional doctrine by requiring an individual in the tripartite situation to satisfy more and different requirements in order to enjoy the protection of the privilege. These courts have ventured away from traditional doctrine in making irrelevant the individual's honest and reasonable belief that the attorney in the tripartite situation represented the individual. The courts apparently have followed this approach in a misguided effort to protect the entity's privilege rights, especially its waiver right, and to ensure narrow application of the attorney-client privilege in general. The courts have done so at the expense of the rights of the individual.

An added effect of the courts' treatment of claims of privilege by individuals in the tripartite situation is that the approach in no way encourages lawyers dealing with such individuals to clarify the situation to the individuals. To the contrary, the courts' treatment creates a situation in which the lawyer may have added incentive to not clarify the situation and perhaps even mislead the individual since the individual's claim of privilege can rarely succeed. If there is little chance a court will recognize that an individual has an attorney-client privilege with regard to communications with the lawyer, the incentive for the lawyer in the entity-tripartite situation is to allow the individual to misunderstand the situation so that the individual discloses more fully to the lawyer than he or she might do if the individual fully understands that the lawyer represents only the entity and that the individual has no control over disclosure of the communications. The individual discovers the true story only after the communications are a fait accompli. This approach is grossly unfair to the individual. Even such an injustice might properly exist in the law if an outweighing benefit can only be created with that cost. Yet, in the tripartite situation, the entity's privilege rights can be protected without such a cost.

An elegant and superior approach is to apply the traditional attorney-client privilege in the traditional manner to an individual's claim of a personal privilege in the tripartite situation. The individual should be required to meet the same application requirements as any other privilege claimant in any other context. In addition, the traditional approach of honoring the claimant's honest and reasonable belief regarding the existence of an attorney-client relationship should govern. No special rules are needed.

In such an environment a lawyer can easily protect the entity's privilege and waiver rights by being clear with the individual that the attorney does not represent the individual and that the individual has no control over disclosure of the communications. Then the individual cannot infringe the entity's rights. A belief that the attorney in the tripartite

situation represents the individual would be unreasonable. Importantly, however, this approach does not needlessly trample the individual's rights. Because the attorney clarifies the individual's position and rights and the lawyer's role in the tripartite situation, the individual is not affirmatively or negligently misled. This approach also encourages the very conduct espoused by the standards of professional conduct for lawyers.[14] The individual is not misled or confused. There is no infringement of the rights of the entity. The lawyer conducts himself or herself forthrightly and in a professionally responsible manner. There is fairness for all. All interests are protected.

If the lawyer is not clear in explaining the situation to the individual, then it is fair to have not only the lawyer, but also the entity who selected the lawyer, suffer the consequences of having a court determine that the lawyer represented both the entity and the individual. If the lawyer's representation of the individual means that the entity cannot alone control the disclosure of the communications between the lawyer and the individual, so be it. The lawyer's lack of clarification may have been motivated by a desire to obtain the greatest disclosure from the individual so as to benefit the entity. Since the entity would benefit from the obfuscation, intentional or otherwise, it is just that the entity suffer the negative effects of the obfuscation as well.[15]

Section II of this Article presents two recent examples of confusion of roles when entity individuals deal with entity lawyers. Section III discusses the traditional parameters of the attorney-client privilege. Section IV explores the traditional approach for determining the existence of a lawyer-client relationship. Section V examines the treatment the tripartite situation has received in the courts when the question is privilege. Section VI then examines the standards of professional responsibility governing lawyer conduct in the tripartite setting.

The Article concludes in Section VII that the application of the attorney-client privilege to the situation of an individual communicating with an entity lawyer requires no special legal standards, rules, or exceptions but rather the application of traditional principles applied traditionally. Such a treatment should lead to a legally correct, professionally responsible, and fair result for all.

II. RECENT SITUATIONS ILLUSTRATING THE PROBLEM

Several recent matters have brought the tripartite situation into the

14. *See infra* Section VI.

15. In *United States v. Stein*, 463 F. Supp. 2d 459, 462 n.13 (S.D.N.Y. 2006), the court stated that at least in cases of deception, it would be fair to have the entity client shoulder the burden of the obfuscation.

light of media coverage. An understanding of these widely publicized situations can provide a basis for realistic analysis of the interests involved and how various rules and holdings affect the interests of the entity, the interests of the individual, the interests of the lawyer, and the interests of the justice system. These situations illustrate what happens, or does not happen, "in the real world."

A. *The Broadcom Situation*

1. THE FACTS

In the spring of 2006, Broadcom Corporation became concerned that it had engaged in impermissible stock-option granting activities.[16] Broadcom asked the law firm of Irell & Manella LLP to investigate Broadcom's stock-option practices.[17] At about the same time, a group of shareholders filed a derivative suit against William Ruehle, Broadcom's Chief Financial Officer, and several other Broadcom individuals. The basis of the suit was that Ruehle and the others had engaged in improper stock-option granting activities. In another suit, an amended complaint was filed dealing with the same subject and named Ruehle as a defendant.[18] The lawyers' individual representation of Ruehle did not stand out as unusual since Irell & Manella attorneys had represented Ruehle in several other recently concluded lawsuits dealing with Ruehle's involvement in Broadcom securities activities.[19]

On June 1, 2006, the Irell & Manella lawyers met with Ruehle to discuss stock-option granting activities at Broadcom.[20] On June 13, the Securities and Exchange Commission (SEC) began an investigation of Broadcom.[21] In August of 2006, the Irell & Manella attorneys disclosed the substance of Ruehle's June communications to Ernst & Young LLP, Broadcom's auditors.[22] The attorneys later disclosed the substance of Ruehle's June 1 conversation with the lawyers to the SEC and to the United States Attorney.[23]

Ruehle knew of the disclosure to Ernst & Young in 2006.[24] He learned of the disclosure to the government in 2008 when the govern-

16. Several published articles indicated that certain corporations had engaged in impermissible stock-option granting activities. In May, an investor-rights group publicly identified Broadcom as a company that had backdated stock options in contravention of laws and regulations. United States v. Ruehle, 583 F.3d 600, 602 (9th Cir. 2009).
17. *Id.* at 603.
18. *Id.*
19. United States v. Nicholas, 606 F. Supp. 2d 1109, 1112 (C.D. Cal. 2009).
20. *Ruehle*, 583 F.3d at 604.
21. *Nicholas*, 606 F. Supp. 2d at 1114.
22. *Ruehle*, 583 F.3d at 604.
23. *Id.* at 605.
24. *Id.* at 610.

ment indicated that it intended to use the substance of Ruehle's June 1, 2006, conversation with the Irell & Manella lawyers in the criminal prosecution of Ruehle.[25] Ruehle had been indicted on charges of conspiracy, securities and wire fraud, and other violations of Title 15 of the United States Code.[26] Ruehle asserted that his personal attorney-client privilege protected his June 1 conversation with the Irell & Manella lawyers. He asserted that the privilege belonged to him individually and that he had not consented to the disclosure.[27]

2. THE DISTRICT COURT

The United States District Court for the Central District of California agreed that the June 1 conversation was privileged and refused to allow the government to use the communication.[28] The district court determined that Ruehle was reasonable in believing that the Irell & Manella attorneys represented him when the parties conversed on June 1.[29] Irell & Manella lawyers represented Ruehle regarding two other lawsuits at roughly the same time, and the court did not believe that the lawyers clarified their role to Ruehle before the June 1 conversation. In other words, the district court did not believe that the attorneys explained to Ruehle that they did not represent him in that conversation, though they represented him generally before and after. The Irell & Manella attorneys presented no written evidence of such a disclosure.[30] The district court noted that even if a warning was given as one of the lawyers described, the warning was "woefully inadequate."[31] The lawyer testified that he told Ruehle that the lawyers were speaking with him on behalf of the entity, Broadcom, in connection with the investigation of Broadcom's stock-option granting procedures. The lawyer testified that the lawyers did not tell Ruehle that they did not represent him, did not tell him that he should consult with another lawyer, and did not tell him that his statements to them could be disclosed to third parties, such as the government, and could be used against him in a criminal prosecution.[32]

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25. *Nicholas*, 606 F. Supp. 2d at 1114.

26. *Ruehle*, 583 F.3d at 605.

27. *Id.*

28. *Nicholas*, 606 F. Supp. 2d at 1121.

29. *Id.* at 1115 ("There is no serious question in this case that when Mr. Ruehle met with the Irell lawyers on June 1, 2006, Mr. Ruehle reasonably believed that an attorney-client relationship existed, he was communicating with his attorneys in the context of this relationship for the purpose of obtaining legal advice, and that any information he provided to Irell would remain confidential.").

30. *Id.* at 1116–17.

31. *Id.* at 1117.

32. *Id.*

In addition, the district court noted that even if the lawyers gave Ruehle an oral warning, it was ineffective given that Ruehle was not simply an individual who needed to be reminded that the lawyers did not represent him. In fact, these lawyers represented Ruehle on other matters, the civil cases, and so an oral warning could not dissolve the relationship between the lawyers and Ruehle, the client, already in existence; could not waive the conflict of the interview in light of the representation; and thus could not waive the attorney-client privilege.[33] The district court determined that the attorney-client privilege applied. The conversation was a communication between attorney and client for the purpose of obtaining legal advice and was intended to be confidential.[34]

Finally, the district court noted that the Irell & Manella attorneys violated their duty of loyalty to Ruehle in three ways. First, the lawyers did not disclose and obtain consent to the obvious conflict of interest in which the lawyers labored in representing both Broadcom in the investigation and Ruehle with regard to the two other related actions.[35] Second, the lawyers questioned Ruehle as part of the representation of Broadcom.[36] Lastly, the Irell & Manella attorneys disclosed Ruehle's June 1 communications with third parties without his consent.[37] The district court stated that the court would report the lawyers to the discipline authority of the California Bar.[38]

3. THE NINTH CIRCUIT

The Ninth Circuit took a very different view of the situation on interlocutory appeal. Recognizing that the district court found that the Irell & Manella lawyers did not provide any sort of *Upjohn* warning, the Ninth Circuit did not hold that finding to be "clearly erroneous."[39] Likewise, the court of appeals accepted the lower-court determination that Ruehle reasonably believed that the Irell & Manella lawyers represented him in the June 1 conversation.[40] The court noted that the Irell & Manella attorneys also represented Broadcom in the June 1

33. *Id.*

34. *Id.* at 1116–17. The court rejected the government's argument that there was no expectation of confidentiality since Mr. Ruehle knew that there would be a disclosure to the auditors, Ernst & Young. The court stated, "This argument is unpersuasive. Mr. Ruehle never understood that Irell might disclose statements adverse to Mr. Ruehle's interests to the Government for use in a criminal case against him." *Id.* at 1116 n.6.

35. *Id.* at 1117–18.

36. *Id.* at 1119.

37. *Id.* at 1120.

38. *Id.* at 1121.

39. United States v. Ruehle, 583 F.3d 600, 604 n.3 (9th Cir. 2009).

40. *Id.* at 607.

conversation.[41]

The Ninth Circuit disagreed with the district court's conclusion, however, that Ruehle had the right to prevent disclosure of his June 1 conversation with the lawyers. While not denying Ruehle the theoretical right to control disclosure of his communication with the lawyers, the Ninth Circuit determined that Ruehle did not prove that the situation met the traditional definition for application of the attorney-client privilege.[42] In particular, Ruehle failed to prove that the communications he had with the lawyers on June 1 were "made in confidence."[43] Ruehle, as the Chief Financial Officer, had been present at Broadcom meetings before June 1 in which it was clear that the findings of the investigation would be turned over to the outside auditors.[44] In the view of the Ninth Circuit, Ruehle could not "credibly claim ignorance of the general disclosure requirements imposed on a publicly traded company with respect to its outside auditors or the need to truthfully report corporate information to the SEC."[45] Because Ruehle knew that his statements would be shared with third parties such as Ernst & Young, the Ninth Circuit refused to find Ruehle's communications with the lawyers privileged.[46]

This Broadcom situation is helpful in illustrating the complexity of the tripartite situation, even for sophisticated high-level entity representatives and even for the lawyers involved. The situation is also helpful in providing an example of lawyers' conduct in the tripartite situation in terms of the kind of explanation lawyers provide to the individuals with whom the lawyers communicate.

B. *The Stanford Financial Group Situation*

While not involving a specific claim of attorney-client privilege, the recent Stanford Financial Group situation also illustrates the confusion inherent in the tripartite relation of the entity, the entity attorney, and the entity individual. The SEC charged that the Stanford Financial Group had conducted a "massive fraud."[47] Specifically, the SEC claimed

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41. *Id.*

42. *Id.* at 609. The court of appeals noted the narrower test of privilege applied by some courts to the tripartite situation but determined that it need not "decide the propriety of adopting the specialized test" because it could resolve the matter using the less restrictive traditional attorney-client privilege definition. *Id.* at 608 n.7.

43. *Id.* at 609 (internal quotations omitted).

44. *Id.*

45. *Id.* at 610.

46. *Id.* at 612 ("His admitted awareness that anything relating to the former would not be held in confidence but rather shared with at least one third party destroys the confidentiality essential to establishing the privilege as to both.").

47. Katheryn Hayes Tucker, *Stanford GC's Resignation Offers Lessons*, FULTON COUNTY

that the Group made unrealistic promises of returns in selling $8 billion in high-yield certificates of deposit.[48]

In February of 2009, in the midst of an investigation by the SEC, Laura Pendergest-Holt, the Chief Investment Officer for the Stanford Financial Group, was deposed. Thomas Sjoblom, outside counsel to the Stanford Financial Group, attended the deposition with Pendergest-Holt. A result of her deposition testimony, Pendergest-Holt later was arrested and indicted for obstruction of the investigation.[49] Pendergest-Holt sued Sjoblom and his firm for malpractice and breach of fiduciary duty, claiming that Sjoblom and the firm led her to believe that they represented her at the deposition but then failed to fulfill the duties inherent in the representation. In particular, Pendergest-Holt claimed that Sjoblom never told her that he did not represent her, he never told her she could refuse to appear before the SEC, he never told her about criminal penalties related to sworn testimony before the SEC, he never told her about her Fifth Amendment right not to testify, he never told her that her statements to him were not privileged, he never told her that he could not represent her because of the conflict of representing both her and the entity, and he never told her that she should engage separate counsel.[50] At the deposition Sjoblom stated in response to a question about whom Sjoblom represented, "I represent the company Stanford Financial Group and affiliated companies" and then stated regarding Pendergest-Holt, "I represent her insofar as she is an Officer or director of one of the Stanford affiliated companies."[51]

Pendergest-Holt's attorney on the malpractice claim stated that even when Sjoblom stated during the testimony that he represented Pendergest-Holt to the extent she was an officer of the company, "[s]he didn't know what that meant."[52] Pendergest-Holt later moved to have

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DAILY REP., Apr. 9, 2009, at 1, *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202429758491.

48. *Id.* (quoting the regional director of the SEC's Fort Worth Regional Office as stating that "[w]e are alleging a fraud of shocking magnitude that has spread its tentacles throughout the world"); *see also* Tom Fowler, *Firm's Leader Was Warned*, HOUS. CHRON., Mar. 12, 2009, at T1, *available at* 2009 WLNR 4766046; Julie Creswell & Clifford Krauss, *Scandal's Small Sanctum*, N.Y. TIMES, Feb. 28, 2009, at B1, *available at* 2009 WLNR 3900687.

49. *See* Lisa A. Cahill, *Cases Highlight Minefield in Internal Investigations*, N.Y.L.J., May 21, 2009, at 4, 9. Allegedly, she failed to reveal the extent of what she knew about the group's investments. *See* Creswell & Krauss, *supra* note 48 (quoting Pendergest-Holt as stating in response to SEC questions about a category of investments referred to as Tier III holdings that "[i]f I knew anything about Tier III, I'd tell you . . . God's honest truth").

50. *See* Abramowitz & Bohrer, *supra* note 2, at 7; Mary Flood, *Ex-Lawyer for Stanford Sued*, HOUS. CHRON. Mar. 28, 2009, at 2, *available at* 2009 WLNR 5975472.

51. *See* Dunst & Chirlin, *supra* note 2, at 3; Cahill, *supra* note 49, at 9; Abramowitz & Bohrer, *supra* note 2, at 7.

52. Ashby Jones, *The Stanford Situation Heats Up: Pendergast-Holt Sues Sjoblom*, WALL ST.

the matter dismissed without prejudice.[53] Eventually the SEC filed a civil suit against Pendergest-Holt and criminal indictments were issued adding charges against Pendergest-Holt and others.[54]

As is true with the Broadcom case, this real-world situation and the involvement of the lawyers and the individual bring to life the complexity of the tripartite relationship and the confusion that easily can result.

III. THE TRADITIONAL ATTORNEY-CLIENT PRIVILEGE

A. *The Definition*

The attorney-client privilege protects from compelled disclosure communications between a client or prospective client or the client's agents and an attorney or the attorney's agents. To be protected, the communications must be for the purpose of obtaining legal advice or assistance. The client or prospective client must intend such communications to be confidential when making them. If a communication meets this definition but is in furtherance of a crime or fraud, the privilege does not protect the communication. If the client or prospective client waives the privilege for a communication, the privilege no longer protects the communication from compelled disclosure.[55] Judge Wyzanski of the United States District Court for the District of Massachusetts in *United States v. United Shoe Machinery Corp.*[56] described the privilege in a passage that has been much quoted over the years:

> The privilege apples only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communica-

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J.L. BLOG (Mar. 31, 2009, 9:24 AM), http://blogs.wsj.com/law/2009/03/31/the-stanford-situation-heats-up-pendergast-holt-sues-sjoblom.

53. *See* Cahill, *supra* note 49, at 4.

54. *See* Mary Flood, Tom Fowler & Jennifer A. Dlouhy, *Seven Indicted in Stanford Ponzi Case*, HOUS. CHRON., June 20, 2009, at A1, *available at* 2009 WLNR 11939528; Mary Flood, *Indictment Delay OK with Stanford Figure*, HOUS. CHRON., Mar. 24, 2009, at B6, *available at* 2009 WLNR 5550146.

55. *See* RICE, *supra* note 6, § 2:1, at 6–10. Wigmore's treatise on evidence states that the attorney-client privilege applies:

> (1) [w]here legal advice of any kind is sought (2) from a professional legal adviser 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 adviser, (8) except the protection be waived.

8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (John T. McNaughton rev. ed. 1961); *see also* United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997); Marc Rich & Co. A.G. v. United States (*In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983), 731 F.2d 1032, 1036 (2d Cir. 1984); New Jersey v. Sprint Corp., 258 F.R.D. 421, 425 (D. Kan. 2009); Jones v. Murphy, 256 F.R.D. 510, 512 (D. Md. 2008), *aff'd*, No. CCB-05-1287, 2009 WL 604937 (D. Md. Feb. 23, 2009); *In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 795 (E.D. La. 2007). *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68–86 (2000).

56. 89 F. Supp. 357 (D. Mass. 1950).

> tion was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[57]

The one claiming the privilege has the burden of proving that the privilege applies.[58]

The actual existence of an attorney-client relationship is not necessary. The privilege applies in the situation of a prospective client consulting with an attorney whom the prospective client honestly and reasonably believes may eventually become the client's lawyer.[59] The privilege attaches even though no attorney-client relationship actually develops as a result of or after the communication.[60] The Ninth Circuit Court of Appeals has explained this point as follows:

> There is nothing anomalous about applying the privilege to such preliminary consultations. Without it, people could not safely bring their problems to lawyers unless the lawyers had already been retained. "The rationale for this rule is compelling," because "no person could ever safely consult an attorney for the first time with a view to his employment if the privilege depended on the chance of whether the attorney after hearing his statement of the facts decided to accept the employment or decline it."[61]

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57. *Id.* at 358–59.

58. *See* Solidus Networks, Inc. v. Excel Innovations, Inc. (*In re* Excel Innovations, Inc.), 502 F.3d 1086, 1099 (9th Cir. 2007); Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 412 F.3d 215, 225 (1st Cir. 2005).

59. *See* Barton v. U.S. Dist. Court for the Cent. Dist. of Cal., 410 F.3d 1104, 1111 (9th Cir. 2005) (holding that website that said that no attorney-client relationship was created and might never exist did not defeat claim of attorney-client privilege because the privilege attaches before the attorney-client relationship exists). The court in *Barton* stated, "Prospective clients' communications with a view to obtaining legal services are plainly covered by the attorney-client privilege under California law, regardless of whether they have retained the lawyer, and regardless of whether they ever retain the lawyer." *Id.* at 1111.

60. *See* Pucket v. Hot Springs Sch. Dist. No. 23-2, 239 F.R.D. 572, 579–80 (D.S.D. 2006) (holding that if a person seeks legal advice and reasonably believes the attorney represents the person, the attorney-client privilege can apply even though no attorney-client relationship actually exists or develops).

61. *Barton*, 410 F.3d at 1111 (quoting People v. Gionis, 892 P.2d 1199, 1205 (1995)); *see also* Factory Mut. Ins. Co v. APComPower, Inc., 662 F. Supp. 2d 896, 899 (W.D. Mich. 2009) ("The Sixth Circuit recognizes that '[w]hen a potential client consults with an attorney, the consultation establishes a relationship akin to that of an attorney and existing client.' Attorneys are bound by the attorney-client privilege and the duty of confidentiality in those circumstances." (quoting Banner v. City of Flint, 99 F. App'x 29, 36 (6th Cir. 2004))).

In addition, the privilege applies even if the person consulted as an attorney is in fact not one.

B. *The Rationale of the Privilege*

The primary rationale for the privilege is utilitarian.[62] By protecting communications between attorneys and clients, the privilege encourages clients to fully and completely disclose information. Only with this complete information can attorneys render competent and proper legal assistance and advice. The assumption is that clients will not be so open and disclose so much and thus cannot obtain such assistance and advice unless those clients are confident that the communications with attorneys will remain confidential.[63] Long ago in *Annesley v. Anglesea*,[64] an English court stated:

> No man can conduct any of his affairs which relate to matters of law, without employment and consulting with an attorney; even if he is capable of doing it in point of skill, the law will not let him; and if he does not fully and candidly disclose every thing that is in his mind, which he apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him.[65]

Two hundred and thirty-eight years later, the United States Supreme Court in *Upjohn Company v. United States*[66] reiterated this rationale and expanded upon it by noting that the attorney-client privi-

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The privilege applies if the person consulting the lawyer honestly and reasonably believes the person is a lawyer. *See infra* Section IV.D.2.

62. *See* 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:13, at 520 (3d ed. 2007); 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 87, at 387 (6th ed. 2006); Note, *Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison*, 108 HARV. L. REV. 1697, 1697 (1995); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (2000).

63. *See* RICE, *supra* note 6, § 2:3, at 14–15; *see also* Bailey v. Chi., Burlington & Quincy R.R., 179 N.W.2d 560, 563 (Iowa 1970) (recognizing that this privilege is "of ancient origin. It is premised on a recognition of the inherent right of every person to consult with legal counsel and secure the benefit of his advice free from any fear of disclosure").

64. *See* RICE, *supra* note 6, § 1:3, at 12 n.20. For a discussion of the case, see Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1073–80 (1978).

65. RICE, *supra* note 6, § 1:3, at 12 n.20; *see also* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that the attorney-client privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"); Phoenix Solutions Inc. v. Wells Fargo Bank, 254 F.R.D. 568, 575 (N.D. Cal. 2008) ("The purpose of the attorney-client privilege is to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981))); Castellani v. Scranton Times, L.P., 956 A.2d 937, 951 (Pa. 2008) ("The attorney-client privilege, on the other hand, renders an attorney incompetent to testify as to communications made to him by his client in order to promote a free flow of information only between attorney and his or her client so that the attorney can better represent the client.").

66. 449 U.S. 383.

lege encourages client candor, full disclosure, and frequent consultation by the client with the attorney. This complete candor and consultation means that attorneys can counsel clients as to how to conduct themselves within the bounds of the law. Ultimately, the administration of justice improves.[67]

The utilitarian rationale of the privilege depends on the certainty of the application of the attorney-client privilege. The privilege encourages a client to communicate fully with his or her lawyer only to the extent that the client can determine before the opportunity for disclosure that the privilege will protect the communication from future disclosure. As the Supreme Court has stated,

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. 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.[68]

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67. The *Upjohn* Court stated:

> [The] purpose [of the privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Id. at 389; *see also* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985) ("[T]he attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice."); *Hunt*, 128 U.S. at 470 ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."); *In re* Grand Jury Subpoenas 04-124-23 & 04-124-05, 454 F.3d 511, 519 (6th Cir. 2006) ("The purpose of attorney-client privilege is to ensure free and open communications between a client and his attorney.").

Deontological justifications, such as the notion that the client's privacy interest in the communication justified the privilege or the notion that respect for the client's autonomy justifies the privilege, are sometimes suggested. *See* Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. Colo. L. Rev. 349, 350 (1981); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 Tul. L. Rev. 101, 112–13 (1956).

68. *Upjohn*, 449 U.S. at 393; *see also* Teleglobe USA Inc. v. BCE Inc. (*In re* Teleglobe Commc'ns Corp.), 493 F.3d 345, 360 (3d Cir. 2007) ("It is essential that parties be able to determine in advance with a high degree of certainty whether communications will be protected by the privilege."); Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994) ("If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to apply the privilege in ways that are predictable and certain. '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.'" (quoting Von Bulow v. Von Bulow (*In re* Von Bulow), 828 F.2d 94, 100 (2d Cir. 1987))); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 144 (D. Del. 1977) ("Only if the client is assured that the

C. *Cost of the Privilege and Related Skepticism*

The generally recognized cost of the privilege is that applying the privilege in a particular situation may keep relevant evidence away from the truth-finder.[69] This cost probably is less than one might imagine because the privilege protects communications between client and lawyer, but does not protect the facts underlying the communications.[70]

Even with this downside, the attorney-client privilege has been an accepted creature of the law for centuries.[71] This acceptance indicates a shared belief that the benefits of the privilege ultimately outweigh the costs.[72] Yet, courts recognize and fear the obstruction of the truth that the attorney-client privilege may cause. As a result, courts have "strictly confined [the privilege] within the narrowest possible limits consistent with the logic of its principle."[73] As a United States District Court for

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information he relays in confidence, when seeking legal advice, will be immune from discovery will he be encouraged to disclose fully all relevant information to his attorney.").

69. *See* Better Gov't Bureau v. McGraw (*In re* Allen), 106 F.3d 582, 600 (4th Cir. 1997) ("Like all privileges, the attorney-client privilege 'interferes with the truth seeking mission of the legal process,' and therefore is not 'favored.'" (quoting United States v. Aramony, 88 F.3d 1369, 1389 (4th Cir.1996))); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423 (3d Cir.1991) (noting that the attorney-client privilege is narrowly construed because it "obstructs the truth-finding process"); Siegler v. Zak, 874 N.Y.S.2d 535, 537 (App. Div. 2009) (observing that the attorney-client privilege is an obstacle to truth-finding). The great thinker Jeremy Bentham believed the cost of the privilege was too high. *See* MUELLER & KIRKPATRICK *supra* note 62, §5:13, at 521 n.16.

70. *See Upjohn*, 449 U.S. at 395–96 ("[P]rotection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." (quoting City of Philadelphia, Pa. v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962))); *see also* Robert Allen Sedler & Joseph J. Simeone, *The Realities of Attorney-Client Confidences*, 24 OHIO ST. L. J. 1, 9 (1963). *But see* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 228–31 (1989).

71. *See Better Gov't Bureau*, 106 F.3d at 600 ("The Supreme Court, however, has expressly recognized that the attorney-client privilege enjoys a special position as 'the oldest of the privileges for confidential communications known to the common law' and that the privilege serves a salutary and important purpose: to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" (quoting *Upjohn*, 449 U.S. at 389)); *see also* Hazard, *supra* note 64, at 1061; Max Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 CAL. L. REV. 487 (1928).

72. *See Teleglobe USA Inc.*, 493 F.3d at 361 n.13 (stating that the privilege is not "disfavored"); *Rhone-Poulenc Rorer Inc.*, 32 F.3d at 862 ("The privilege encourages the client to reveal to the lawyer confidences necessary for the lawyer to provide advice and representation. As the privilege serves the interests of justice, it is worthy of maximum legal protection.").

73. *In re* Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 802–03 (3d Cir. 1979) (internal quotations omitted); *see also* U.S. EEOC v. ABM Indus., Inc., 261 F.R.D. 503, 507 (E.D. Cal. 2009) ("Still '[b]ecause the attorney-client privilege has the effect of withholding relevant information from the factfinder, it is only applied when necessary to achieve its limited purpose of encouraging full and frank disclosure by the client to his or her attorney.'" (quoting Clarke v. Am.

the District of New Jersey recently stated:

> While it is true that the attorney-client privilege is narrowly construed because it "obstructs the truth-finding process," the privilege is not "disfavored." Courts should be cautious in their application of the privilege mindful that "it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." In all instances, the facts underlying any given communication remain discoverable.[74]

Placing the burden on the claimer to prove the applicability of the privilege also reflects a healthy skepticism of it.[75]

D. *The Attorney-Client Privilege and Entities*

The attorney-client privilege applies to entities, such as corporations, just as it applies to individuals.[76] This principle has long been accepted by the courts.[77] Of course, an entity must speak and act through its agents and so a frequently asked question is which communications by which agents of the entity enjoy the privilege.

In *Upjohn Co. v. United States*,[78] the Supreme Court reviewed a situation involving an internal investigation by Upjohn. The corporation sought to determine whether illegal bribes had been offered or paid by agents of Upjohn. Lawyers acting at the behest of Upjohn interviewed a variety of individuals.[79] The government later sought access to those communications. Upjohn claimed that its attorney-client privilege protected the communications from compelled disclosure.

Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992))); *Siegler*, 874 N.Y.S.2d at 537 (narrowly construing the attorney-client privilege).

74. La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 305 (D.N.J. 2008) (quoting, in order, *Westinghouse Elec. Corp.*, 951 F.2d at1423; *Teleglobe USA Inc.*, 493 F.3d at 361 n.3; Fisher v. United States, 425 U.S. 391, 403 (1976)); *see also* Trammel v. United States, 445 U.S. 40, 50 (1980); Intervenor v. United States (*In re:* Grand Jury Subpoenas), 144 F.3d 653, 658 (10th Cir.) (stating that the privilege "is to be strictly construed"); Jones v. Murphy, 256 F.R.D. 510, 512 (D. Md. 2008) ("The privilege is 'not favored by the federal courts' because it interferes with the truth seeking process and contravenes the right of citizens to evidence, and should be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" (quoting *In re* Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984))).

75. *See, e.g.*, Solidus Networks, Inc. v. Excel Innovations, Inc. (*In re* Excel Innovations, Inc.), 502 F.3d 1086, 1099 (9th Cir. 2007); Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 412 F.3d 215, 225–26 (1st Cir. 2005).

76. *See Upjohn*, 449 U.S. at 391; *see also La. Mun. Police Emps. Ret. Sys.*, 253 F.R.D. at 305 ("It is axiomatic that the privilege extends to corporations."). *See generally* Grace M. Giesel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations*, 48 MERCER L. REV. 1169 (1997).

77. *See, e.g.*, United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915); LaLance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 F. 563, 564 (S.D.N.Y. 1898).

78. 449 U.S. 383.

79. *Id.* at 387.

The Sixth Circuit Court of Appeals had concluded that communications between Upjohn's counsel and any employee within the control group of Upjohn were protected by Upjohn's privilege, assuming other requirements of the privilege were satisfied. Communications between Upjohn's counsel and other employees were not protected by Upjohn's privilege.[80] An employee was considered to be within the control group of Upjohn if the individual could control or would be involved in planning Upjohn's response to legal advice.[81]

The Supreme Court rejected the control-group analysis. The Court concluded that the applicability of the entity's attorney-client privilege did not depend on whether the communications involved individuals in the control group of an entity for purposes of federal common law.[82] The Court stated:

> In the corporate context, . . . it will frequently be individuals beyond the control group as defined by the court below . . . who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—individuals can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these individuals would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.[83]

The Court stated that applying the narrow control-group analysis hindered the free flow of information to lawyers and thus thwarted the rationale of the privilege.[84] The Court explained that limiting the application of the privilege to control-group agents of the entity "makes it more difficult to convey full and frank legal advice to the individuals who will put into effect the client corporation's policy."[85] The Court ultimately held that Upjohn's privilege applied to the communications in question, but the Court provided little guidance as to a specific analysis to apply. The Court discussed a list of factors it considered in support of its holding.[86]

In response to the *Upjohn* opinion's rejection of the control-group analysis for purposes of federal-privilege law, courts have adopted less limiting tests for application of the attorney-client privilege for entities. For example, some courts have adopted an analysis that protects as priv-

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80. *Id.* at 388–89.

81. *See generally* Glen Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899, 908–11 (1980); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

82. *Upjohn*, 449 U.S. at 389–91.

83. *Id.* at 391.

84. *Id.* at 392.

85. *Id.*

86. *See id.* at 394–96; *see also* RICE, *supra* note 6, § 4:14, at 4-67 (listing five factors).

ileged any confidential communication between an employee and the attorney for the corporation for the purpose of obtaining legal assistance for the corporation. The entity's privilege applies if the communication concerns matters that are within the scope of the responsibilities the individual has as an employee.[87] The Restatement (Third) of the Law Governing Lawyers, in section 73, proposes a test that focuses on whether the communication "concerns a legal matter of interest to the organization."[88]

If the nature of the individual's communication with the entity's lawyer is such that a court would recognize the communication as a privileged communication of the entity with its counsel, then the entity has the right to assert or waive that privilege. The difficulty is that the entity's attorney-client privilege may apply to a communication between an employee and entity counsel, but that same individual may not have the right to assert or waive the privilege on behalf of the entity.[89] Only those agents of the entity responsible for the policy and operation of the entity may assert or waive the entity's privilege.[90] In other words, that employee's communications create a privileged communication for the

87. *See, e.g.*, Barton v. Zimmer Inc., No. 1:06-CV-208, 2008 WL 80647, at *4 (N.D. Ind. Jan. 7, 2008) ("This so-called 'subject-matter' test asks whether the communication was made at the instance [sic] of the employee's superior and whether the subject matter of the communication, upon which the attorney's advice is sought by the corporation and contained within the communication, was within the scope of the individual's duties."); Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 198 (Tex. 1993) (noting that the subject-matter test is met if "the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment"); *see also* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491–92 (7th Cir. 1970) ("We conclude that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment."), *aff'd*, 400 U.S. 348 (1971). *See generally* RICE, *supra* note 6, §§ 4:13–:14; Bufkin Alyse King, Commentary, *Preserving the Attorney-Client Privilege in the Corporate Environment*, 53 ALA. L. REV. 621 (2002); Note, *The Corporate Attorney-Client Privilege: Alternatives to the Control Group Test*, 12 TEX. TECH. L. REV. 459 (1981).

88. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(3) (2000).

89. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349 (1985) ("[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well."); *see also* RICE, *supra* note 6, § 4:20, at 4-113 ("Courts universally accept the notion that the corporate board of directors and the officers to whom it delegates its management authority have both the right and the responsibility to either assert or waive the corporation's attorney-client privilege claims for the benefit of the corporation.").

90. *See In re* In-Store Adver. Sec. Litig., 163 F.R.D. 452, 458 (S.D.N.Y. 1995) ("Where the client is a corporation, the power to 'invok[e] or waiv[e] a corporation's privileges is an incident of control of the corporation.'" (quoting *In re* Grand Jury Subpoenas 89-3 & 89-4, 734 F. Supp. 1207, 1211 (E.D. Va.), *aff'd in relevant part sub nom.* United States v. Under Seal (*In re* Grand

corporation, but that employee does not necessarily have control over the assertion or waiver of the corporation's privilege.

The bottom line is that the entity's attorney-client privilege may apply to communications with all sorts of individuals. Because such communications are privileged, corporate counsel has incentive to talk with individuals who might know about a particular issue; the communications actually take place. And, absent clarification by the attorney, the individual, sophisticated or unsophisticated, may be confused as to his or her control over the disclosure of those conversations. Such an individual may believe that he or she has the ability to control the entity's privilege with regard to the individual's own statements. Or, such an individual may believe that the lawyer for the entity is also the individual's lawyer such that the individual has attorney-client privilege rights apart from any rights of the entity.

IV. The Traditional Approach to Determining the Existence of a Lawyer-Client Relationship

A. *The Standard Generally*

Though no attorney-client relationship is absolutely required for the attorney-client privilege to apply,[91] the recognition of an attorney-client relationship is very helpful in attorney-client privilege analysis. The privilege applies only to communications between an attorney and client for the purpose of obtaining or rendering legal advice. The existence of an attorney-client relationship makes the finding that the communication was for the purpose of obtaining or rendering legal advice more certain. The honest and reasonable belief of the person in the position of the client generally determines the existence of an attorney-client relationship in contexts other than the entity-tripartite setting.[92] The courts look

Jury Subpoenas, 89-3 & 89-4), 902 F.2d 244 (4th Cir. 1990))); *see also* RICE, *supra* note 6, § 4:25, at 4-144.

91. The privilege can apply when the person or entity in the client's position seeks representation by the lawyer, but the relationship has not yet formed. *See supra* Section III.A; *see also* Barton v. U.S. Dist. Court for the Cent. Dist. of Cal., 410 F.3d 1104 (9th Cir. 2005). In addition, the privilege can apply even if the relationship never actually ripens into an attorney-client relationship. *See* Pucket v. Hot Springs Sch. Dist. No. 23-2, 239 F.R.D. 572, 579–80 (D.S.D. 2006).

92. *See* Bos. Scientific Corp. v. Johnson & Johnson Inc., 647 F. Supp. 2d 369, 373 (D. Del. 2009) ("Under Delaware law, where there is no express contract or formal retainer agreement evidencing an attorney-client relationship, 'courts look at the contacts between the potential client and its potential lawyer to determine whether it would have been reasonable for the "client" to believe that the attorney was acting on its behalf as counsel.'" (quoting Benchmark Capital Partners IV, L.P. v. Vague, No. C.A. 19719-NC, 2002 WL 31057462, at *3 (Del. Ch. Sept. 3, 2002))); *see also* NLRB v. Jackson Hosp. Corp., 257 F.R.D. 302, 312 (D.D.C. 2009) ("[I]t is well settled that 'the relationship between attorney and client hinges on the client's intention to seek legal advice and his belief that he is consulting an attorney.' Thus, to determine whether there is

to all of the circumstances of the situation such as the existence of a representation agreement, written or otherwise. The presence of an agreement to represent and be represented is not necessary for a court to find an attorney-client relationship.[93] If there is an agreement, however, courts are very likely to find an attorney-client relationship.[94] Paying the lawyer is an indication of an attorney-client relationship as well, although a person may pay a lawyer for the representation of another and thus have no attorney-client relationship with the lawyer.[95] Statements or other indications by the lawyer to the effect that the lawyer represents a person or entity are also excellent evidence of an attorney-client relationship. For example, if a lawyer gives the person or entity in the position of the client legal advice or other legal assistance, a court likely will find an attorney-client relationship. If a person makes statements or otherwise signals that he or she believes the lawyer represents him or her and the lawyer knows of these statements or other signals and does not correct this belief, a court may very well recognize that the person honestly and reasonably believes that the lawyer represents the person. A lawyer's "failure to dispel [the putative client's] expectations" is telling.[96]

The existence of a conflict of interest may be a factor arguing

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an attorney-client relationship here, I must determine whether the Union 'believed [it] was seeking advice and whether [the Union's] belief about the confidentiality of the conversation was reasonable.'" (quoting Jones v. United States, 828 A.2d 169, 175 (D.C. 2003))); Attorney Grievance Comm'n of Md. v. Kreamer, 946 A.2d 500, 521 (Md. 2008) ("Rather, '[t]he relationship may arise by implication from a client's reasonable expectation of legal representation and the attorney's failure to dispel those expectations.'" (quoting Attorney Grievance Comm'n of Md. v. Brooke, 821 A.2d 414, 425 (Md. 2003))); John V. Heutsche Co. L.P.A. v. McNea, 15 Ohio Misc. 2d 23, 26 (Mun. Ct. 2008) ("Whether or not an attorney-client relationship was created 'turns largely on the reasonable belief of the prospective client.'") (quoting Cuyahoga Cnty. Bar Ass'n v. Hardiman, 798 N.E.2d 369, 373 (Ohio 2003))). *See generally* Ingrid A. Minott, Note, *The Attorney-Client Relationship: Exploring the Unintended Consequences of Inadvertent Formation*, 86 U. DET. MERCY L. REV. 269 (2009).

93. *See* Tinn v. EMM Labs, Inc., 556 F. Supp. 2d 1191, 1192 (D. Or. 2008) (recognizing that no express written or oral contract is necessary); Smith v. State, 905 A.2d 315, 325-26 (Md. 2006) (noting that no express agreement is necessary).

94. *See, e.g.*, Avocent Redmond Corp. v. Rose Elecs., 491 F. Supp. 2d 1000, 1004 (W.D. Wash. 2007) (noting that engagement agreement said law firm represented a corporation "and its affiliates" and so the affiliate's claim of representation was reasonable); *see also* Johnson v. Schultz, 671 S.E.2d 559, 569 (N.C. Ct. App. 2009) ("'[T]he relation of attorney and client may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon execution of a formal contract.'" (quoting N.C. State Bar v. Sheffield, 326 S.E.2d 320, 325 (N.C. Ct. App. 1985), *aff'd*, 691 S.E.2d 701 (N.C. 2010))).

95. *See* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1317 (7th Cir.) (stating that a professional relationship is not dependent on the payment of fees); *Tinn*, 556 F. Supp. 2d at 1192 (stating that payment of fees is not necessary); Attorney Grievance Comm'n of Md. v. Shoup, 979 A.2d 120, 136 (Md. 2009) ("Our cases make clear that an explicit agreement or payment arrangement is not a prerequisite to the formation of an attorney-client relationship.").

96. *Brooke*, 821 A.2d at 425.

against a putative client's reasonable belief of representation, but only if it is a conflict that would be obviously problematic to the particular client.[97] The lawyer's belief as to the relationship is largely irrelevant.[98] The lawyer's actions are important only in that the person or entity in the position of client bases the belief of a relationship on the lawyer's actions.

The Restatement (Third) of the Law Governing Lawyers, in section 14, is generally in agreement. Section 14 states:

> A relationship of client and lawyer arises when:
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
> (a) the lawyer manifests to the person consent to do so; or
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
> (2) a tribunal with power to do so appoints the lawyer to provide the services.[99]

B. *Determining the Existence of an Attorney-Client Relationship in the Conflicts Context*

Often, the question of the existence of an attorney-client relationship arises in a conflict-of-interest scenario. A party moves to disqualify counsel on the basis of a conflict of interest. The court then must determine whether the suspect counsel has or had an attorney-client relationship with a party. If the court determines there is or was a relationship, then the court may remove the attorney as counsel.

Sometimes the question is an easy one. In *Avocent Redmond Corporation v. Rose Electronics*,[100] a party claimed that the court must disqualify opposing counsel because opposing counsel recently represented it in a substantially related matter. In the earlier matter, an engagement

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97. *See* Harry A. v. Duncan, 330 F. Supp. 2d 1133, 1141 (D. Mont. 2004) ("'Where appropriate, due consideration should be given to the unreasonableness of a claimed expectation of entering into a co-client status when a significant and readily apparent conflict of interest exists between the organization or other client and the associated person or entity claimed to be a co-client.'" (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. f (2000))).

98. *See* Carnegie Cos., Inc. v. Summit Props., Inc., 918 N.E.2d 1052, 1062 (Ohio Ct. App. 2009) ("The law does not look to the reasonable expectations of the lawyer in order to determine whether an attorney-client relationship has been established by implication."); *see also In re* Conduct of Wittemyer, 980 P.2d 148, 153 (Or. 1999) (restating lawyer's argument that he and the alleged client were really partners in the business transaction).

99. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000); *see* MODEL RULES OF PROF'L CONDUCT pmbl. & scope at ¶ 17 (2009) ("[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."); *see also* Minott, *supra* note 92.

100. 491 F. Supp. 2d 1000 (W.D. Wash. 2007).

agreement provided that lawyers of a law firm represented a corporation "and its affiliates."[101] The party demanding the disqualification was an affiliate of the corporation.[102] The court held that the lawyers of the law firm were in an attorney-client relationship with the affiliate. The court stated: "The existence of the relationship '"turns largely on the client's subjective belief that it exists." The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions.'"[103]

Frequently, the existence of the relationship is cloudier. In *Westinghouse Electric Corporation v. Kerr-McGee Corporation*,[104] the Seventh Circuit Court of Appeals faced an intricate situation. Lawyers in a firm represented Westinghouse in an antitrust action against several uranium suppliers.[105] In addition, the very same law firm represented a trade group of which the uranium suppliers were members. The law firm contacted the supplier members in an effort to prepare a report about the effect on them if certain legislation were enacted.[106] The resulting report was released on the day the antitrust matter was filed.[107] The uranium suppliers then asked the court to disqualify the law firm from representing Westinghouse in the antitrust matter.[108] The court noted that the attorney-client relationship is fiduciary in nature and that therefore it is not completely a creature of contract[109] or agency.[110] The attorney-client relationship "does not arise only in the agency manner such as when the parties expressly or impliedly consent to its formation."[111] The court noted that the uranium suppliers did not request that the law firm act as its lawyer, the law firm did not accept such employment orally or in writing, and the suppliers did not pay the firm.[112] Yet, the court stated, "[a] fiduciary relationship may result because of the nature of the work performed and the circumstances under which confidential information is divulged."[113]

The court determined that each of the companies "entertained a reasonable belief that it was submitting confidential information regarding

101. *Id.* at 1006.
102. *Id.* at 1002–03.
103. *Id.* at 1003–04 (quoting Bohn v. Cody, 832 P.2d 71, 75 (Wash. 1992)).
104. 580 F.2d 1311 (7th Cir. 1978).
105. *Id.* at 1313.
106. *Id.*
107. *Id.* at 1314.
108. *Id.* at 1313.
109. *Id.* at 1317.
110. *Id.* at 1316–17.
111. *Id.* at 1317.
112. *Id.*
113. *Id.* at 1320.

its involvement in the uranium industry to a law firm which had solicited the information upon a representation that the firm was acting in the undivided interest of each company."[114] The court refused to allow the law firm to oppose the members of the trade group who were also defendants in the antitrust matter.[115]

In *Montgomery Academy v. Kohn*,[116] the District Court for the District of New Jersey faced a claim of disqualification in the context of an entity-tripartite situation. An attorney discussed with an employee the possibility of representing the entity, but the individual understood that the Board of Directors would have to approve the official hiring of the attorney. The employee confided in the attorney. The employee discussed personal matters, such as the employee's personal investments, insurance coverage, and such.[117] The lawyer had represented the individual individually in the past in other matters. The court approved a finding that the individual "reasonably considered [the lawyer] to be her personal lawyer and thought that [the lawyer] would protect her interests."[118] The court then approved the magistrate judge's disqualification of the lawyer.[119]

C. *Determining the Existence of an Attorney-Client Relationship in the Malpractice Context*

Another setting in which the question of the existence of an attorney-client relationship often arises is an action for malpractice. Absent an attorney-client relationship, a lawyer owes no duty of care to the person or entity. The existence of the relationship is a necessary first step to the success of any malpractice claim. For example, in *Mansur v. Podhurst Orseck, P.A.*,[120] a Florida appellate court held that the lower

114. *Id.* at 1321.

115. *Id.* at 1322.

116. 82 F. Supp. 2d 312 (D.N.J. 1999).

117. *Id.* at 315.

118. *Id.* at 314.

119. *Id.* at 315 (noting that the lawyer testified that the lawyer told the individual that the lawyer could not represent both the individual and the employer but the magistrate judge did not believe the testimony.).

In *Cody v. Cody*, 889 A.2d 733 (Vt. 2005), a son moved to disqualify a law firm from representing his parents and a corporation in an action against him. The lower court granted the motion to disqualify. On appeal, however, the Supreme Court of Vermont disagreed. The supreme court noted that the lower court "employed an appropriate test" by evaluating "the objective reasonableness" of the son's belief regarding the representation. *Id.* at 739. Yet, the court disagreed that the evidence necessarily supported a finding that the son's belief that the firm represented him was reasonable. *Id.* at 740. The court then ordered the lower court to hold an evidentiary hearing so that all relevant evidence could be considered in determining the existence of an attorney-client relationship. *Id.*

120. 994 So. 2d 435 (Fla. Dist. Ct. App. 2008).

court should not have granted summary judgment in favor of the law firm because there was some evidence that the firm's statements and actions led the alleged clients, who were brothers, to believe that the lawyers of the firm represented all of the brothers as opposed to only one of them.[121] The firm had sent a letter to a third party stating the desires of all of the brothers. The firm had filed a motion on behalf of one brother but stated that the brother acted on behalf of the other brothers.[122] The firm had sent the brothers communications that were at best ambiguous but appeared to render legal advice.[123] Also, the firm had sent a letter to a third party referring "to the four Mansur brothers we represent."[124]

D. *Determining the Existence of an Attorney-Client Relationship in the Attorney-Client Privilege Context*

In the context of applying the attorney-client privilege, courts have used the concept of honoring the honest and reasonable belief of the person or entity in the position of a client in several different ways.[125] For example, courts have used an honest-and-reasonable-belief analysis to answer the question of whether the person and the lawyer were in an attorney-client relationship. The courts have used this analysis as a stepping stone to determining whether the person consulted the lawyer for the purpose of obtaining legal advice or assistance such that the attorney-client privilege applied to the communication. Courts have also used the honest-and-reasonable-belief analysis to determine whether the privilege should apply when the person in the position of lawyer is not, in fact, a lawyer. Also, courts have used the honest-and-reasonable-belief analysis to determine whether the privilege should apply when the communication is not, in fact, confidential.

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121. *Id.* at 439; *see also* St. Paul Fire & Marine Ins. Co. v. GAB Robins N. Am., Inc., 999 So. 2d 72, 78 (La. Ct. App. 2008) (holding that correspondence specifically limited the representation to one suit and not others so belief of representation on other matters was not reasonable and so no malpractice action was possible).

122. *Mansur*, 994 So. 2d. at 436.

123. *Id.* at 437.

124. *Id.* at 438.

125. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 923 (8th Cir. 1997). The Eighth Circuit Court of Appeals stated:

> In some aspects of the law of attorney-client privilege, the client's reasonable beliefs may be relevant. For example, courts have found the privilege applicable where the client reasonably believed that a poseur was in fact a lawyer, reasonably believed that a lawyer represented the client rather than another party, or reasonably believed that a conversation with a lawyer was confidential, in the sense that its substance would not be overheard by or reported to anyone else. All these situations involve, in essence, reasonable mistakes of fact . . . .

Id. (footnotes omitted).

To use the honest-and-reasonable-belief analysis in these ways is consistent with the utilitarian rationale of the privilege. Yet, such use results in a more expansive application of the privilege. Honoring the client's or prospective client's honest and reasonable belief about a situation supports the privilege's rationale because the belief of the person or entity in the position of client determines that person's or entity's willingness to disclose to the lawyer. In other words, if the putative client believes the privilege protects a communication, then the client will more willingly provide a full disclosure to the attorney. The occurrence of this complete disclosure is the primary rationale of the privilege itself.[126]

1. REASONABLE BELIEF THAT THE LAWYER REPRESENTS THE PERSON OR ENTITY

Perhaps the most complex and detailed treatment of the honest-and-reasonable-belief analysis of whether a lawyer represents the person or entity in an attorney-client privilege setting is *Sky Valley Limited Partnership v. ATX Sky Valley, Ltd.*[127] In *Sky Valley*, a group of entities and individuals comprising the plaintiffs had been represented by a certain law firm.[128] The defendants in the litigation, also a group of entities and individuals, claimed that the same law firm had represented them as well as the plaintiffs. The defendants claimed that the plaintiffs and the defendants had been joint clients of the law firm.[129] Rather than the more commonly used joint-client privilege to block disclosure of communications, the defendants sought to use the claim of joint-client privilege to require disclosure.[130]

When parties sharing a joint-client privilege become adverse, there is no privilege between the former joint clients.[131] The *Sky Valley* court referred to this disclosure right as the "'joint client' *exception*."[132] The joint-client privilege shares the same basic rationale as the privilege in general. It encourages full communication between joint clients and the lawyer so the clients can obtain the best possible advice.[133] In contrast, the rationale of the joint-client exception, which leads to disclosure, is

> (1) to prevent unjustifiable inequality in access to information neces-

126. *See supra* Section III.B.
127. 150 F.R.D. 648 (N.D. Cal. 1993).
128. *Id.* at 650.
129. *Id.*
130. *Id.* at 651.
131. *See supra* text at note 6; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75(2) (2000); RICE, *supra* note 6, § 4:33.
132. *Sky Valley*, 150 F.R.D. at 651
133. *Id.* at 653.

> sary to resolve fairly disputes that arise between parties who were in the past joint clients–when the disputes relate to matters that were involved in the joint representation and (2) to discourage abuses of fiduciary obligations and to encourage parties to honor any legal duties they had to share information related to common interests.[134]

In order to determine whether the joint-client exception applied, the court first had to determine whether the lawyers in the firm and the defendants were in an attorney-client relationship. The court then had to determine whether the defendants and the plaintiffs were joint clients of the lawyers in the firm.

In performing this analysis, the court stated that "the courts have focused on whether it would have been *reasonable*, taking into account *all the relevant circumstances*, for the person who attempted to invoke the joint client exception to have inferred that she was in fact a 'client' of the lawyer."[135] The court continued that

> resolution of the dispute will turn on whether a contractual relationship was formed implicitly. To answer that question, courts necessarily look to circumstantial evidence, taking into account all kinds of indirect evidence and contextual considerations that appear relevant to determining whether it would have been reasonable for the person to have inferred that she was the client of the lawyer. Thus, in this setting, whether the attorney-client relationship existed is a question of law that is resolved through an objective test.[136]

The *Sky Valley* court then listed a plethora of factors to consider in determining whether a party's belief in a representational relationship, and a joint representation in particular, was reasonable. The court noted that the analysis might be different in other contexts but that this was the proper analysis when evaluating whether to apply the joint-client exception and thus force a disclosure.[137]

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134. *Id.*; *see also* Glacier Gen. Assurance Co. v. Superior Court, 157 Cal. Rptr. 435, 436 (Cal. Ct. App. 1979).

135. *Sky Valley*, 150 F.R.D. at 651; *see also* Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756, 766 (Cal. Ct. App. 1993).

136. *Sky Valley*, 150 F.R.D. at 652.

137. The court noted:

> There are a great many factors that the courts should take into account when deciding whether an implied contractual relationship exists for purposes of the joint client exception. These pertinent circumstances generally will include: the conduct of the party and counsel, what the party and counsel communicated to one another (both about their relationship and about other things, taking special note of any communications from the party to counsel that courts would not expect the party to have made if it had not considered itself to be a joint client of the lawyer), what drove the party to communicate with the lawyer and the lawyer to communicate with the party (considering especially whether the party was obligated to communicate what it did to the lawyer or was free to decide whether or not to make the communications to the lawyer), the capacity in which the party communicated

The court accepted that the defendants believed that the lawyers of the firm represented them. The court, however, found such beliefs "clearly unreasonable."[138] Thus, the defendants were not clients of the lawyers of the firm, were not joint clients of the firm, and therefore, could not compel disclosure via the joint-client exception.[139]

> with the lawyer and the capacity in which the lawyer communicated with the party, whether (with respect to matters on which the party and the lawyer communicated) the party played a decision-making role comparable to the role that the law empowers clients to play, whether the party was free to ignore the lawyer's advice or was bound to act in conformity with directives from the lawyer, whether the party paid or was obligated to pay the lawyer for her services, the relative sophistication of the party and the magnitude or significance of the interests of the party that were implicated in the matters covered by the alleged attorney-client relationship (the more sophisticated the party, and the more significant the interests affected, the more skeptically courts should view arguments that it was reasonable to rely on an *implied* attorney-client contract), and whether and to what extent the party also consulted or had access to any other lawyers during the relevant time period and with respect to the subject matter as to which that party is seeking to invoke the joint client exception.
>
> Moreover, since the ultimate question is whether the law will deem *two* (or more) parties to have been "joint clients" of a particular lawyer, it also is necessary (in conducting this inquiry into all the relevant circumstances) to analyze all pertinent aspects of the relationship and dynamics between (a) the party that claims to have been a joint client and (b) the party that clearly was a client of the lawyer in question. This analysis should include (but not necessarily be limited to) (1) the conduct of the two parties toward one another, (2) the terms of any contractual relationship (express or implied) that the two parties may have had, (3) any fiduciary or other special obligations that existed between them, (4) the communications between the two parties (directly or indirectly), (5) whether, to what extent, and with respect to which matters there was separate, private communication between either of them and the lawyer as to whom a "joint" relationship allegedly existed, (6) if there was any such separate, private communication between either party and the alleged joint counsel, whether the other party knew about it, and, if so, whether that party objected or sought to learn the content of the private communication, (7) the nature and legitimacy of each party's expectations about its ability to access communications between the other party and the allegedly joint counsel, (8) whether, to what extent, and with respect to which matters either or both of the alleged joint clients communicated privately with *other* lawyers, (9) the extent and character of any interests the two alleged joint parties may have had in common, and the relationship between common interests and communications with the alleged joint counsel, (10) actual and potential conflicts of interest between the two parties, especially as they might relate to matters with respect to which there appeared to be some commonality of interest between the parties, and (11) if disputes arose with third parties that related to matters the two parties had in common, whether the alleged joint counsel represented both parties with respect to those disputes or whether the two parties were separately represented.

Id. at 652–53.

138. *Id.* at 654.

139. *Id.* In support of its finding that the defendants' belief of representation was unreasonable, the court noted that the lawyers subjectively did not consider the defendants to be clients and never told anyone the firm represented the defendants. The lawyers told several people, including representatives of the defendants, that the firm did not represent the defendants. The defendants

2. REASONABLE BELIEF THAT THE PERSON CONSULTED IS A LAWYER

a. *case law*

In addition to applying the honest-and-reasonable-belief analysis in the attorney-client privilege setting to the question of representational relationship, courts have also applied the analysis when the person consulted is not, in fact, a lawyer. The courts addressing this issue have stated that the privilege applies to a communication even if the person consulted is not admitted to any bar and has enjoyed no legal training. If the putative client honestly and reasonably believes that the person consulted is a lawyer, and if the other requirements of the privilege are satisfied, the privilege applies even though the person consulted is, in fact, not a lawyer.[140]

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never paid the firm for services, and the firm never billed the defendants for services. The defendants received letters from the firm identifying the plaintiffs as clients but not identifying the defendants as clients. *Id.* at 654–55. The court found that the defendants sought legal advice from the law firm and received legal advice from the law firm but only in the defendants' contractual role as project manager, not individually. The project contract required that the project manager consult with that law firm. *Id.* at 656. During the project the defendants also consulted a separate lawyer about project matters. *Id.* at 657. The court concluded that "it would not advance the purposes of the privilege to hold that there was an attorney-client relationship between [the defendants] and [the law firm]" but might discourage communication by a party such as the plaintiffs. *Id.* at 659.

In concluding that the defendant's belief that the defendants and the plaintiffs were joint clients was unreasonable, the court noted that the parties were not equals with regard to the project and the flow of information about it and were aware that they were not equals. The plaintiffs and defendants also were not fiduciaries to each other and were not insurers or former clients. So even though the parties had "economically significant commonalities of interest," the court stated that such could not be "legally sufficient to invoke the joint client exception to the attorney-client privilege." *Id.* at 659–61. In applying the joint-client exception, the court stated that

> courts also should take into account the history of the relationship between the parties, the extent and character of any tensions in their relationship or of any asymmetry in their interests, and the likelihood and foreseeability of conflicts arising between the parties in the future. We hasten to acknowledge that the existence of some asymmetry of interests and/or the possibility of future disputes by no means foreclose the possibility that the joint client exception applies.

Id. at 661–62.

140. *See* United States v. Rivera, 837 F. Supp. 565, 567 n.1 (S.D.N.Y. 1993) ("It is common ground among the parties that the attorney-client privilege attaches to confidential communications made to an individual in the genuine, but mistaken, belief that he is an attorney. Accordingly, it is irrelevant for the purposes of this motion that Rivera was not an attorney, since the parties agree that his clients were operating under the mistaken belief that he was.") (citations omitted); *see also* United States v. Tyler, 745 F. Supp. 423, 425 (W.D. Mich. 1990) (holding that the privilege applied if a person reasonably believed that his cellmate was a lawyer); United States v. Boffa, 513 F. Supp. 517, 523 (D. Del. 1981) (stating that the privilege applied if the person reasonably believed the one consulted was a lawyer).

In *Dabney v. Investment Corp. of America*, 82 F.R.D. 464, 465 (E.D. Pa. 1979), the court acknowledged that the attorney-client privilege could apply if "the client is genuinely mistaken as to the attorney's credentials." The corporate client in *Dabney* was not "genuinely mistaken" because at the time of the communication the client knew that the person was at first a law student and then a law graduate who had not been admitted to any bar. *Id.*

In *United States v. Boffa*,[141] the defendants in a criminal matter claimed that they had communicated with a person believing him to be a lawyer, and thus the defendants claimed that the attorney-client privilege protected those communications. The court stated:

> [T]he rationale behind the privilege equally supports the theory that the privilege should be extended to those who make confidential communications to an individual in the genuine, but mistaken, belief that he is an attorney. Prudence dictates that such a belief should be reasonable in order to lay claim to the protections of the privilege and that a "respectable degree of precaution" in engaging the services of the "attorney" must be demonstrated. Where such a belief is proved, however, the client should not be compelled to bear the risk of his "attorney's" deception and he should be entitled to the benefits of the privilege as long as his bona fide belief in his counsel's status is

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In *United States v. Mullen & Co.*, 776 F. Supp. 620 (D. Mass 1991), the court faced a claim of privilege with regard to communications with accountants. The court stated: "[T]he attorney-client privilege may apply to confidential communications made to an accountant when the client is under the mistaken, but reasonable, belief that the professional from whom legal advice is sought is in fact an attorney." *Id.* at 621 (citing *Boffa*, 513 F. Supp. at 523).The *Mullen* court then noted that the record was devoid of any proof supporting such a reasonable belief. The court ordered that such proof be produced if available so a correct decision on the matter could be rendered. *Id.* at 622.

In *Financial Technologies International, Inc. v. Smith*, No. 99 CIV 9351 GEL RLE, 2000 WL 1855131 (S.D.N.Y. Dec. 19, 2000), the court faced a claim that the privilege should apply to communications between a corporate client and a person who was not a lawyer but whom the client honestly thought was a lawyer and had employed as in-house counsel. The court stated:

> On balance, the Court finds these sources compelling and is of the opinion that an individual who reasonably believed that the person consulted was a duly admitted attorney should be afforded a measure of protection. The alternative would require individuals to check the background of a prospective attorney to insure that they were confiding with a "real" attorney. The inherent delay in such a process might well deprive the person of effective counsel at a time when advice is most valuable.

Id. at *6. Having said that, the court refused to extend such an approach to the corporate claimant before it. The court took the position that a corporation or other entity, in employing in-house counsel, must at the least investigate the background of the individual to confirm the individual's status as a lawyer. *Id.* at *6–7. *See also* NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 129 n.23 (N.D.N.Y. 2007) ("[S]ince NXIVM is a corporation it should have made sure O'Hara was properly licensed."). *See generally* RICE, *supra* note 6, § 3:13, at 51. Wigmore also was of this view:

> The theory of the privilege clearly requires that the client's bona fide belief in the status of his adviser as an admitted attorney should entitle him to the privilege. No doubt an intention to employ only such a person is necessary, as well as a respectable degree of precaution in seeking one. But from that point onward he is entitled to peace of mind, and need not take the risk of deception or of the defective professional title.

WIGMORE, *supra* note 55, § 2302, at 584.

The same is true regarding the psychotherapist-patient privilege. *See* Speaker *ex rel.* Speaker v. Cnty. of San Bernardino, 82 F. Supp. 2d 1105, 1112 (C.D. Cal. 2000) (holding that such privilege can apply if the patient reasonably believes the person is a psychotherapist).

141. 513 F. Supp. at 517.

maintained.[142]

Unfortunately, the court did not find that the defendants honestly and reasonably believed the person to be an attorney.[143]

The court in *United States v. Tyler*[144] applied the honest-and-reasonable-belief analysis, but unlike the court in *Boffa*, the court determined that the privilege protected the communications. In *Tyler*, a criminal defendant claimed that his conversations with his cellmate, who was not a lawyer, should not be admissible. The defendant testified that he honestly and reasonably believed that his cellmate was a lawyer. To support his claim the defendant noted that a law-school diploma, among others, hung on the cellmate's wall. The inmate population referred to the cellmate as "counselor."[145] Also, the cellmate assisted other prisoners on all types of legal matters.[146] Finally, the defendant paid the cellmate for assistance on a parole-board matter.[147]

In an effort to defeat the defendant's privilege claim by defeating the defendant's claim that he honestly and reasonably believed the cellmate was a lawyer, the government pointed out that the law school the cellmate claimed to have attended did not exist at the time he claimed to have attended it and that the defendant knew the cellmate had committed a felony.[148]

The court found that the defendant had an honest and reasonable belief at the time of the communications that the cellmate was a lawyer. The attorney-client privilege applied and protected the communications from compelled disclosure.[149]

b. *other law*

Some jurisdictions define the attorney-client privilege by rule and more precisely address the issue of the status of the person.[150] For example, several states have rules that specifically define "lawyer" as "a person authorized, or reasonably believed by the client to be authorized, to

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142. *Id.* at 523 (citations omitted).

143. *Id.* at 524–26. The court so concluded because of the unusual compensation arrangement, the facts surrounding the person's employment, and activities in which the person was involved, all of which were known to the defendants.

144. 745 F. Supp. at 423.

145. *Id.* at 424.

146. *Id.* at 425.

147. *Id.* at 424.

148. *Id.* at 424–25. The government argued that if the defendant knew the cellmate committed a felony, he must have known that the cellmate was not a lawyer in good standing because no jurisdiction allows felons to practice law. The court disagreed, stating: "To expect a layperson to be familiar with the internal discipline procedures of the Bar is unreasonable." *Id.* at 425–26.

149. *Id.* at 426.

150. *See, e.g.*, ALASKA R. EVID. 503(b); CAL. EVID. CODE § 950 law revision commission cmts.; KY. R. EVID. 503 (b); ME. R. EVID. 502(b); TEX. R. EVID. 503(b).

engage in the practice of law in any state or nation."[151] Many of these states have been influenced by the language a proposed Federal Rule of Evidence, Rule 503,[152] which was proposed but rejected by Congress in the 1970s.[153]

The Restatement (Third) of the Law Governing Lawyers, in section 72, also has adopted this stance. Section 72 states that the privilege applies when the communication involves a person "who is a lawyer or who the client or prospective client reasonably believes to be a lawyer."[154]

3. REASONABLE BELIEF THAT THE COMMUNICATION IS CONFIDENTIAL

Another situation in which courts have used an honest-and-reasonable-belief analysis in the context of the attorney-client privilege is on the issue of confidentiality. Courts find communications confidential for purposes of the privilege if the client honestly and reasonably believes that the communications are confidential.[155]

For example, in *Griffith ex rel. Smith v. Davis*,[156] the court evaluated a claim of privilege by a former government employee. The employee had been involved in a shooting within the scope of his employment. As a result of the shooting, the employee met with representatives of the government and his attorneys. The agent was told that any information he conveyed to the representatives of the government would be revealed only to authorized government individuals.[157] The employee later claimed that the privilege applied to the conversation with the government representatives because these representatives later became agents of government counsel and thus were within the circle of privilege for those sharing a "common interest" privilege.[158] The *Griffith*

151. *See, e.g.*, KY. R. EVID. 503(a)(3); TEX. R. EVID. 503(a)(3).

152. For the text of the proposed rule, see *Rules of Evidence for U.S. Courts and Magistrates*, 56 F.R.D. 183, 235–40 (1973).

153. *See generally* Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678 (2000) (discussing the approval and disapproval of the proposed rules).

154. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 72(1) (2000).

155. *See, e.g.*, United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009); Griffith v. Davis, 161 F.R.D. 687, 694 (C.D. Cal. 1995). *See generally* RICE, *supra* note 6, § 6.1, at 7–9 ("The client's subjective intention of confidentiality must be *reasonable* under the circumstances.").

156. 161 F.R.D. 687 (C.D. Cal. 1995).

157. *Id.* at 690–91.

158. *Id.* at 691–92. Some courts refer to a joint-defense or community-of-interest privilege as a "common interest privilege." If the person to whom the IRS agent was speaking was a representative of a party or person with whom the IRS agent had a common interest, then the attorney-client privilege could apply to the communications, assuming the situation satisfied the confidentiality requirement of the privilege. *See supra* text at note 8 (discussing the joint-defense or community-of-interest privilege).

court agreed "that whether or not a given communication is 'confidential' within the meaning of the privilege is determined from the perspective of the client"[159] but noted that "[t]he client's expectation of confidentiality, however, must be reasonable."[160] Because the former employee knew at the time of the communication that the communication would be shared with third parties, the court determined that the employee could not have had a reasonable belief that the statements would remain confidential.[161]

Similarly, in *United States v. Ruehle*,[162] the Broadcom matter,[163] the court held that the privilege did not apply to Ruehle's communications with attorneys he thought represented him. The court did not deny the privilege on the basis of a lack of representation, however. Rather, the court determined that Ruehle did not establish that he had an honest and reasonable belief that the communications were confidential.[164] The court noted, in particular, that Ruehle, the Chief Financial Officer, understood before the conversation with the attorneys that the information uncovered by the attorneys would be disclosed to the independent auditors of Broadcom.[165] Ruehle also knew that "Broadcom intended to fully cooperate with the SEC and the auditors."[166]

The Restatement (Third) of the Law Governing Lawyers agrees that an honest-and-reasonable-belief analysis is appropriate on the issue of confidentiality. In section 71 the Restatement provides:

> A communication is in confidence with the meaning of [the privilege] if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person . . . or another person with whom communications are protected under a similar privilege.[167]

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159. *Griffith*, 161 F.R.D. at 694.

160. *Id.*

161. *Id.* at 696. See *United States v. Moscony*, 927 F.2d 742, 752 (3d Cir. 1991), in which the court evaluated an argument that the privilege did not apply because the conversation between the attorney and clients took place with a third party present. The court stated that the privilege applied because the clients intended the conversations to be confidential. *Id.* at 752. One of the clients had "expressed concern" about the effect of the presence of the third party and had been told that he was a part of the representation team. *Id.* at 752 n.14. *See also* United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 29 (1st Cir. 1989) (stating that a client's reasonable belief is the "key question").

162. 583 F.3d 600 (9th Cir. 2009).

163. *See supra* discussion Section II.

164. *Ruehle*, 583 F.3d at 609 ("The notion that Ruehle spoke with [the attorneys] with the reasonable belief that his statements were confidential is unsupported by the record.").

165. *Id.*

166. *Id.* at 610.

167. Section 71 of Restatement (Third) of the Law Governing Lawyers provides the following illustration:

V. An Analysis of Courts' Treatment of the Attorney-Client Privilege in the Tripartite Situation

When confronted with a claim of privilege by an individual in the typical tripartite-entity situation, many courts have not applied the attorney-client privilege as it has been traditionally defined and have not followed the precedent of using an honest-and-reasonable-belief analysis to determine the nature of the relationship between the individual and the lawyer. As the court in *United States v. Stein* stated in 2006 about the treatment of an individual's claim of privilege in an entity-tripartite situation, "Courts have wrestled with this problem for some time now."[168] Unfortunately, much of the precedent that is the result of the wrestling match is flawed. Many courts facing such a scenario have taken a harsh approach to an individual's claim that the corporation's lawyer also represents the individual. These courts reach the result of denying the individual's claim of privilege by applying tests for application of the privilege that are more demanding than those used in other sorts of cases. In addition, the analyses used by these courts are not in accordance with the general law regarding the recognition of an attorney-client relationship.

A. *The* Bevill *Case*

A particularly influential case in this regard is *In re Bevill, Bresler & Schulman Asset Management Corp.*[169] In *Bevill*, trustees of two related corporate entities in bankruptcy and receivership sought disclosure of communications between officers of both entities and a team of lawyers.[170] The trustees waived any attorney-client privilege on behalf of the entities[171] and sought the disclosure in a bankruptcy and a receivership proceeding and also as part of an SEC criminal investigation into possible fraud.[172]

> Client and Lawyer confer in Client's office about a legal matter. Client realizes that occupants of nearby offices can normally hear the sound of voices coming from Client's office but reasonably supposes they cannot intelligibly detect individual words. An occupant of an adjoining office secretly records the conference between Client and Lawyer and is able to make out the contents of their communications. Even if it violates no law in the jurisdiction, the secret recording ordinarily would not be anticipated by persons wishing to confer in confidence. Accordingly, the fact that the eavesdropper overheard the Client-Lawyer communications does not impair their confidential status.

§ 71, cmt. c, illus. 1 (2000).

168. 463 F. Supp. 2d 459, 462 (S.D.N.Y. 2006).

169. 805 F.2d 120 (3d Cir. 1986).

170. *Id.* at 122.

171. *Id.* at 123.

172. *Id.* at 122.

The officers claimed that regardless of the entities' waiver of privilege, the individuals had privilege protection based on their own individual relationships with the lawyers such that their consent was necessary for disclosure.[173] In addition, the officers claimed that that even if the lawyers did not represent the individuals, the individuals consulted with the lawyers as part of a joint-defense effort with the entities, and thus the conversations could not be disclosed without their consent.[174]

In the communications at issue, the individuals met with the lawyers and told them that they sought to have the lawyers represent "possibly" one or all of them and also "possibly" one of the entities.[175] The lawyers considered the situation for several days and then stated that they would represent one of the entities. The lawyers continued to consider representing the individuals. Finally, several days later, the lawyers told the individuals that they should obtain separate counsel.[176]

The lower court determined that communications between the individuals and the lawyers that occurred before the lawyers announced that they represented the entity were privileged. These communications could not be disclosed without the consent of the individuals.[177] The lower court concluded differently with regard to conversations between the lawyers and the individuals that occurred after the lawyers stated that they would represent the entity but before they announced that they would not represent the individuals. The lower court determined that these communications were not privileged as part of a joint defense or

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173. *Id.* at 123.

174. *Id.* The officers claimed that they were represented by the lawyers along with one of the entities. To the extent that this is a claim of joint representation by the lawyers, generally the rule is that disclosure cannot occur without consent of both parties. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (2000); *see also supra* text at note 8. The privilege does not apply when the communication is to be disclosed in a proceeding in which the co-clients are adverse. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75(2) (2000); *see also supra* text at note 7. There is an argument that even if the officers had privilege rights, the officers could not block disclosure of the communications because the co-clients, the entity and the individuals, were adverse.

If the officers' claim was not of a joint-client representation but of a separate representation, then the officers' claim of the right to block disclosure would be correct even in a setting in which the entities and the officers were adverse. *See* RICE, *supra* note 6, § 4:30.

In the alternative the officers claimed that they enjoyed a joint-defense privilege even if the lawyers did not represent them. In a joint-defense setting, all parties must agree to a waiver. As in the joint-client setting the privilege does not apply when the communication is sought to be disclosed in a proceeding in which the co-clients are adverse. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(2) (2000); *see also supra* text at note 7. So, once again there is an argument that even if the joint-defense privilege applied generally here, the officers could not block disclosure of the communications because the entity and the individuals were adverse.

175. *Bevill*, 805 F.2d at at 121–22.

176. *Id.* at 122.

177. *Id.* at 123.

otherwise.[178]

On appeal the Third Circuit approved the test applied by the lower court.[179] That test required, for the recognition of individual attorney-client privilege protection, that an individual in the entity-tripartite situation prove (1) that the individual approached counsel for the purpose of seeking legal advice; (2) that the individual was clear with counsel that he or she sought legal advice in his or her individual capacity; (3) that the lawyer communicated with the individual in his or her individual capacity even with the possibility of a conflict of interest on the horizon; (4) that the communications were confidential; and (5) that the communications "did not concern matters within the company or the general affairs of the company."[180] The Third Circuit acknowledged that the individual officers may have a personal attorney-client privilege "as to matters not related to their role as officers of the corporation"[181] but that "they do not have an attorney-client privilege with regard to communications made in their role as corporate officials."[182] Though both the individuals and the attorneys stated that the individuals consulted with the attorneys for the purpose of personal representation, and even though the attorneys had not stated that they were not representing the individuals,[183] neither the lower court nor the Third Circuit accepted this evidence as sufficient evidence that the individuals' communications with the attorneys were protected by personal attorney-client privilege. The Third Circuit approvingly noted that the lower court had acknowledged that the individuals might have a personal privilege with regard to communications "relating to [their] personal liabilities, except insofar as they were related to their role as corporate officers."[184] Finally, the Third Circuit determined that the individuals had not proved that the communications were part of a joint-defense effort, that the communications were made in furtherance of that effort, and that the privilege had not been waived.[185]

The *Bevill* court's test and its application in that case render irrelevant the reasonable belief of the individuals in a tripartite-entity situation as to the nature of the lawyer-client relationship. Regardless of the reasonable belief of the individual, if the communications between the indi-

178. *Id.*

179. *Id.* at 125.

180. *Id.* at 123. The lower court in *Bevill* relied upon the test stated in *In re Grand Jury Investigation, No. 83-30557*, 575 F. Supp. 777, 780 (N.D. Ga. 1983).

181. *Bevill*, 805 F.2d at 125.

182. *Id.*

183. *Id.* at 122–23.

184. *Id.* at 125.

185. *Id.* at 126.

vidual and the lawyer concerned "matters within the company or the general affairs of the company,"[186] even if the communication concerned the individual's involvement and personal liability, no individual privilege can be recognized. Likewise, if the individual was not clear with counsel that individual representation was desired, no individual privilege is possible. If the *lawyer* did not communicate with the individual in the individual's personal capacity, no individual privilege is possible. An individual in an entity-tripartite situation could easily not satisfy one of these requirements and yet honestly and reasonably believe that the he or she is in a lawyer-client relationship with the lawyer.

The rejection of the honest-and-reasonable-belief approach is apparent in the lower court's determination that communications that occurred between the attorneys and the individuals before the attorneys announced that they would represent one of the entities were privileged, while communications after the attorneys announced that they would represent the entity were not privileged. One must consider whether individuals in a tripartite situation, even sophisticated ones, would understand that the lawyers' decision to represent one of the entities necessarily defeated the possibility that the lawyers also represented them or might represent them in the future.

Did the *Bevill* court intend to hold that no individual can have a reasonable belief that a lawyer who represents the entity could also represent the individual in the matter? Yet, lawyers often represent both the entity and an individual officer or director.[187] Often, lawyers represent even low-level individuals and the entity employer in matters such as suits relating to traffic accidents. Lawyers also represent higher-level individuals when the interests of the entity employer and the individual appear to be similar. Courts should take care not to establish a standard of reasonableness that does not comport with the realities of the world in which the people being measured by that standard operate.

In addition to the rejection of the honest-and-reasonable-belief approach, the *Bevill* test requires the claimant to prove elements not included within the traditional definition of the attorney-client privilege. The long-accepted definition of the privilege is that it applies to a communication between an attorney and a client, in confidence, for the purpose of obtaining legal advice or assistance, and where that privilege has

186. *Id.* at 123.

187. In *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 388 (S.D. Tex. 1969), the court stated, "The Court takes judicial notice that it is not uncommon for corporate counsel to represent an individual corporate officer when he is sued as a result of actions he has taken within the ambit of his official duties."

not been waived.[188] The *Bevill* test changes this basic definition.

An individual claiming the privilege in the tripartite scenario might prove that a communication was between an attorney and the individual. The individual might be able to prove an honest and reasonable belief that the lawyer represented the individual or might in the future and that in this context the individual communicated with the lawyer for the purpose of seeking legal advice or assistance. The individual might be able to prove an honest and reasonable belief that the communication was in confidence and that the individual had not waived the privilege.

In the typical claim of privilege, courts would find the claimant's burden had been successfully shouldered. Yet, in the entity-tripartite situation, the *Bevill* test would require, at the very least, that the individual prove the communication "did not concern matters within the company or the general affairs of the company."[189] Further, the individual must prove that he or she made clear to the attorney that personal legal advice was sought and that the attorney communicated with the individual in that capacity. These are elements required by *Bevill* in the tripartite situation that are not required in other settings. In other settings, for example, what the attorney knew or should have known is irrelevant. These requirements may involve facts that are relevant to an evaluation of whether the individual's belief that the attorney represented the individual was reasonable. To state them as additional independent required elements of proof is different, however.

Since the *Bevill* approach varies from the usual, one must look to the justification for the different rule. Without doubt, the *Bevill* approach protects the rights of the entity with regard to its privilege. The *Bevill* court sought to block infringement on current management's control of the entity's privilege, particularly since in this matter the entity's decision was a waiver, a decision to disclose. In the court's view, if an individual representative of the entity discusses entity matters with entity counsel, only the entity has a privilege with regard to those conversations, and thus only the entity may waive or not waive that privilege. The court supported its decision by noting that allowing individuals to assert a personal privilege would allow information to remain undisclosed.[190]

The court's interest in promoting disclosure is understandable. This

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188. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950); *see supra* Section III.A.

189. *Bevill*, 805 F.2d at 123 (quoting *In re* Grand Jury Investigation, No. 83-30557, 575 F. Supp. 777, 780 (N.D. Ga. 1983)).

190. *Id.* at 125 ("To provide a blanket privilege regarding all discussions of corporate matters on the basis of an assertion of personal privileges by the officers would prevent the trustee from investigating possible misconduct by the officers and permit the officers to 'use the privilege as a

interest is in accord with the general policy of the courts to apply the attorney-client privilege narrowly.[191] Yet, the privilege itself causes nondisclosure and yet it is an accepted creature of the law because its benefits are thought to outweigh the cost of nondisclosure. The joint-client privilege expands nondisclosure in certain cases as does the joint-defense or community-of-interest privilege. Yet, these, too, are accepted facets of the law because a perceived benefit outweighs the injury to the interest in full disclosure. The point is that the prevention of nondisclosure rationale is of limited value.

The effect of the *Bevill* approach of recognizing a privilege for the entity and refusing to consider a privilege for the individual reflects a valuation of the entity's rights as superior to any privilege rights of the individual. No matter how reasonable the individual's belief that the lawyer represents or may represent the individual in the future, there is no privilege if, for example, the individual consults with the lawyer about activity "within the company or the general affairs of the company."[192] If an individual goes to a lawyer's office and discusses his involvement in a matter that involves his actions as an individual, that conversation is protected by the privilege, assuming it satisfies the general requirements of the privilege, including the requirement that the individual honestly and reasonably believe that he is seeking legal advice or assistance from a person who may become or is the individual's lawyer. Under *Bevill,* if that individual has that same conversation with an attorney whom the individual knows represents the individual's entity employer, the individual has no privilege, regardless of the reasonableness of the individual's belief about the relationship the individual has with the lawyer.

The *Bevill* approach values the privilege rights of the entity over the individual's rights. The logical reverse of this approach would value the individual's rights over those of the entity. Both the *Bevill* approach and its logical reverse are inappropriate. The entity has no greater right to the protections of the attorney-client privilege than does the individual, and the reverse is true as well. Rather, courts should entertain the possibility that both the individual and the entity may have privilege protection.

A court applying the *Bevill* approach must hold that no matter what the lawyer might say or not say to the individual about the representation, the individual enjoys no personal privilege if the conversation

shield against the trustee's efforts.'" (quoting Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 353 (1985))).

191. *See supra* Section III.C.

192. *Bevill,* 805 F.2d at 123.

relates to his or her involvement in the entity. This would be true even if the lawyers told the individual during the conversation that they represented the individual. This is not a just result. This is not a just result in light of the ease with which the individual's confusion could be eliminated by forthright explanation by the lawyer. It is not a just result in light of professional responsibility standards that govern the lawyer's conduct and encourage, if not demand, forthright explanation of the situation to the individual.

B. Bevill *Progeny*

1. FEDERAL APPELLATE COURTS

In *In re Grand Jury Subpoena*,[193] the First Circuit applied the *Bevill* approach[194] to a situation in which a lawyer represented an entity that had waived the privilege.[195] The lawyer freely admitted that he represented the individuals in various matters in their personal capacities.[196] The lawyer also claimed that in the grand-jury investigation he represented the entity and the individuals in a "joint defense agreement" situation.[197] As a result of this evidence of representation, the court assumed that the first four *Bevill* factors were satisfied.[198]

The court then turned to the fifth *Bevill* factor, requiring that for an individual privilege to be recognized the communications must not concern matters "within the company or the general affairs of the company."[199] The First Circuit clarified that an individual privilege could be claimed even when a consultation involved the "general affairs" of the corporation if the focus of the consultation was with regard to the "'*indi-*

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193. 274 F.3d 563 (1st Cir. 2001).

194. *Id.* at 571–72.

195. *Id.* at 567–68.

196. *Id.* at 571–72.

197. *Id.* at 568. This court discusses this matter as involving a "joint defense agreement" and also as a "joint representation." Technically, a joint-defense privilege involves two parties who are represented by separate counsel who decide to share information and strategy and otherwise work together. A broader version of this privilege is the common-interest or community-of-interest privilege. *See* RICE, *supra* note 6, § 4:35 (discussing the joint-defense concept and the community-of-interests concept); *see also* United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989).

A joint representation is simply a situation in which two parties are represented by the same attorney and share strategy and information. The facts before the court suggest a joint representation, not a joint defense, since the individuals are not claiming to have separate representation by other attorneys. *See* RICE, *supra* note 6, § 4:30 (discussing the joint-client concept); *see also* Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995); *supra* text at notes 7–9.

198. *In re Grand Jury Subpoena*, 274 F.3d at 572.

199. *In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986). The lower court in *Bevill* relied upon the test stated in *In re Grand Jury Investigation No. 83-30557*, 575 F. Supp. 777, 780 (N.D. Ga. 1983).

vidual officer's personal rights and liabilities.' "[200] The court limited this position somewhat by stating, "We hold that an individual privilege may exist in these circumstances only to the extent that communications made in a corporate officer's personal capacity are separable from those made in his corporate capacity."[201] The court continued that "a corporation may unilaterally waive the attorney-client privilege with respect to any communications made by a corporate officer in his corporate capacity, notwithstanding the existence of an individual attorney-client relationship between him and the corporation's counsel."[202] In reviewing the communications at issue, the court noted that the communications did "not appear to be distinguishable from discussions between the same parties in their capacities as corporate officers and corporate counsel, respectively, anent matters of corporate concern."[203]

In response to the argument that the communications were jointly privileged such that disclosure could not occur without consent of both the individual involved and the entity, the court refused to recognize any joint-privilege rights in this entity situation, stating that to hold "otherwise would open the door to a claim of jointly held privilege in virtually every corporate communication with counsel."[204] Noting that the individuals involved in the matter before it were corporate officers who owed a fiduciary duty to the corporation, the court simply chose to view the corporation's rights as superior to the rights of the individuals.[205]

The First Circuit improved upon the *Bevill* approach in that it acknowledged that an individual should have privilege protection even when the individual talks with the attorney about the entity. The First Circuit approach limits the individual's rights, however, in that the individual has the protection of the privilege only when a communication is separable from entity communications with the lawyer and concerns only the rights and liabilities of the individual. As in *Bevill*, the honest and reasonable belief of the individual is given short shrift. In addition, an individual in the entity-tripartite situation has more to prove to obtain the protection of the attorney-client privilege than does an individual in other settings. Even if an attorney tells an individual that the attorney

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200. *In re Grand Jury Subpoena*, 274 F.3d at 572 (quoting Intervenor v. United States (*In re* Grand Jury Proceedings), 156 F.3d 1038, 1041 (10th Cir. 1998)).

201. *Id.* at 568.

202. *Id.* at 573.

203. *Id.* at 572.

204. *Id.* at 573.

205. *Id.* In addition, the court noted that even if the court were willing to recognize a jointly held privilege, such communications can be disclosed when the formerly joint clients become adverse. The court noted that the situation before the court in which one former co-client wished to disclose and the other does not in a criminal investigation sometimes has been viewed as an adverse setting. *Id.*

represented the individual, and even if the attorney tells the individual that the communications are privileged, and even if the attorney tells the individual that the communications cannot be disclosed without the consent of the individual, the individual may have no privilege protection.

A similar case is *United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.*[206] The attorneys involved represented a union election campaign in an investigation into election irregularities. The attorneys had several conversations with an employee of the campaign. The attorneys had not represented the individual in the past and never told the individual that they represented him individually. The attorneys told the employee that they represented the campaign and that the conversations were privileged. The lawyers never indicated whose privilege to which they referred and never indicated who had the power or authority to waive the privilege. After the conversations a lawyer for the entity called to explain to the employee that an election investigator wanted to interview him. The lawyer explained that the individual should obtain his own counsel.[207] Very tellingly, the individual was "surprised by the suggestion" and stated that he thought the campaign lawyers represented him as well.[208] The lawyer then explained that the lawyers represented the entity and "had never represented [the individual] individually."[209] The entity, the campaign, later waived the privilege, and the individual asserted that he had an individual privilege covering the conversations.[210]

In *International Brotherhood*, the Second Circuit confronted the individual's claim that his reasonable belief of the situation should determine whether a personal attorney-client privilege covered the key conversations.[211] The court rejected this path[212] and quoted the *Bevill* text approvingly.[213] The court stated that the *Bevill* approach, and not the reasonable-belief standard, was the proper method for dealing with the "competing claims" of the individual and of the entity.[214]

Turning to the facts, the *International Brotherhood* court noted that the individual "neither sought nor received legal advice from [the lawyers] on personal matters" and so did not enjoy a privilege to prevent

206. 119 F.3d 210 (2d Cir. 1997).
207. *Id.* at 212–13.
208. *Id.* at 212.
209. *Id.* at 213.
210. *Id.*
211. *Id.* at 214.
212. *Id.* at 216–17.
213. *Id.* at 215.
214. *Id.* at 216–17.

disclosure.[215] Finally, though noting that the court need not "reach the question of the reasonableness of [the individual's] belief that he was being individually represented," the court stated that the evidence supported "the district court's finding that [the individual] could not reasonably have believed that [the lawyers] represented him individually."[216]

The court so concluded even though the court acknowledged the inappropriateness of the lawyers' conduct, stating that they violated the "spirit, if not the letter," of the ethical principles applicable to them.[217] Specifically, the court noted that the lawyers "did not do all that they could have done to clarify the conflicts of interest that can and do develop between organizations and their employees, or to clarify that [the lawyers] represented the Campaign alone" or "to clarify that they did not represent [the employee]" until after problematic conversations had occurred.[218] The court then stated that "the arguably less-than-exemplary actions" of the lawyers did not "lead us to change our interpretation of the law of attorney-client privilege."[219]

The focus on whether the individual made clear to the lawyer that he sought personal legal advice places the burden for any misconceptions on the individual and not the lawyer. Yet, the lawyer surely has a more sophisticated and nuanced view of how an employee or other individual might misperceive the representation and the applicability and rights relating to the attorney-client privilege. Even sophisticated players in the business world commonly misunderstand the lawyer's role and the implications for the attorney-client privilege. It is odd that the *International Brotherhood* court places the burden on the individual to clarify the situation. A lawyer in the tripartite situation should be aware of the potential for the individual to misunderstand the relationship and the application of the attorney-client privilege. It is a slight burden to require the lawyer to clarify so that a reasonable individual would understand that the lawyer does not represent the individual and that the individual has no control over whether the conversations will be disclosed later.[220]

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215. *Id.* at 216.

216. *Id.* at 217. The Second Circuit also concluded that it need not deal with the conclusion of the lower court that even if the individual had a reasonable belief, the individual waived any privilege by failing to object to disclosure of the conversations to another person. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. The Sixth Circuit Court of Appeals has also placed a significant burden on the individual in the entity-tripartite situation. The court emphasized that when dealing with the entity lawyer, an employee or other individual must clearly state a desire to obtain individual advice. In *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005), the former police director of the City of Memphis sought to defend himself in a section 1983 action by claiming that he enjoyed qualified immunity. The individual supported his defense with a claim that he acted with the advice of counsel. *Id.* at 598–99. The question before the court was whether the individual's claim of advice of counsel

The Tenth Circuit has also followed the teachings of *Bevill*. In *Intervenor v. United States (In re: Grand Jury Subpoenas)*,[221] the President and Chief Executive Officer of a hospital claimed that his individual attorney-client privilege protected certain conversations he held with lawyers who also represented the hospital. Thus, he claimed that the lawyers should not be compelled to testify before the grand jury. The hospital waived any privilege it had protecting communications.[222] The court noted that a reasonable belief of representation "may be enough to create an attorney-client *relationship*, but is not sufficient here to create a *personal* attorney-client *privilege*."[223] Rather, the *Bevill* factors must be satisfied, and the privilege does not apply if "both corporate and individual liability were discussed."[224] Fortunately for the President, the lawyers testified that he sought the advice of the lawyers in an individual capacity and that they discussed his personal situation confidentially. The court determined that the President's privilege protected the communications from disclosure.[225]

In a related case, *Intervenor v. United States (In re Grand Jury Proceedings)*,[226] the same individual sought to block disclosure of certain documents.[227] The lower court had found that the individual could not satisfy the *Bevill* analysis because the documents in question concerned "matters within the company or the general affairs of the com-

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waived any privilege, including the City's privilege, that might attach to the key communications. *Id.* The court recognized that conversations between individuals and a lawyer for related entity attorneys are generally viewed as conversations between the entity and the attorney. The court recognized, however, that an individual can have a privilege in regard to conversations with corporate counsel. The court stated that an individual privilege would not be recognized unless the individual "indicate[s] to the lawyer that he seeks advice in his individual capacity." *Id.* at 605. The court stated that such a requirement "allows the attorney to gauge whether it would be appropriate to advise the individual given the attorney's obligations concerning representation of the corporation." *Id.* In remanding, the court noted that there was some evidence that the individual did just that. *Id.* at 605–06; *see also* United States v. Dakota, 197 F.3d 821, 825 (6th Cir. 1999) ("Absent an indication that the lawyer should act in a capacity other than that of the company's lawyer, a corporate officer will not have a privilege."); *In re* Grand Jury Proceedings, Detroit, Mich., Aug. 1977, 434 F. Supp. 648, 650 (E.D. Mich. 1977) ("If [the officer] makes it clear when he is consulting the company lawyer that he personally is consulting the lawyer and the lawyer sees fit to accept and give communication knowing the possible conflicts that could arise, he may have a privilege."), *aff'd*, 570 F.2d 562, 563 (6th Cir. 1978) (finding that the individual did not have a personal privilege).

221. 144 F.3d 653 (10th Cir. 1998).

222. *Id* at 657 n.2.

223. *Id.* at 659.

224. *Id.*

225. *Id.* The court then held that the crime-fraud exception applied such that the privilege, ultimately, did not protect the communications. *Id.* at 659, 660–61.

226. 156 F.3d 1038 (10th Cir. 1998).

227. *Id.* at 1039–40.

pany."[228] The Tenth Circuit clarified, however, that the last *Bevill* factor is satisfied "if the communication between a corporate officer and corporate counsel specifically focuses upon the *individual officer's* personal rights and liabilities . . . even though the general subject matter of the conversation pertains to matters within the general affairs of the company."[229] The individual must discuss with counsel "his or her *personal* liability, legal rights, or actions, as distinguished from the corporation's rights and responsibilities."[230] The individual could not make this proof, so the court denied the claim of privilege.[231]

2. THE LOWER COURTS

The *Bevill* approach also has influenced the lower courts.[232] For

228. *Id.* at 1041.

229. *Id.*

230. *Id.* at 1041–42.

231. *Id.* at 1042.

232. The cases are numerous. In *United States ex rel. Magid v. Wilderman*, No. 96-CV-4346, 2006 WL 2346426 (E.D. Pa. Aug. 10, 2006), the District Court for the Eastern District of Pennsylvania faced a claim by an individual that her communications with an investigator reporting to the employer's lawyer were privileged. Though recognizing the daunting task placed on the individual claiming privilege protection by so doing, the court applied the five-factored *Bevill* analysis. *Id.* at *4. The court concluded that "it is by no means clear" that the individual sought personal legal advice and "even less clear that [the lawyer] spoke to [the individual] in her individual capacity . . . ." *Id.* at *5. The court pointed out that the investigator stated that he worked for the lawyer and that the lawyer represented the employer's entity. Finally, the court noted that the communications all concerned the general affairs of the entity. The court concluded that at the time of the interviews, "[i]t can not reasonably be argued that [the lawyer] represented [the individual] . . . ." *Id.* Thus, the court held that the individual had no privilege protection relating to the communications. *Id.* Yet, in a letter sent to the court, the individual stated that "at the time this complaint was filed I was told I was represented by the practice attorney Arthur Shuman. I am now being told he does not represent me and I need to obtain my own attorney." *Id.* at *2 n.5.

In *Applied Technology International, Ltd. v. Goldstein*, No. Civ.A.03-848, 2005 WL 318755 (E.D. Pa. Feb. 7, 2005), the court applied *Bevill* and found that the individual, the former President of the company, did not prove that he had an individual privilege to protect communications with the attorney who also represented the entity. The attorney stated that he never distinguished between the entity and the President. *Id.* at *3. The court concluded that a lack of distinction by the lawyer resulted in no privilege for the President under the *Bevill* analysis. *Id.* The reason for this finding is that the individual has the burden of proving that the privilege applies. *Id.* at *4. If the President can prove only that the situation is ambiguous, then the individual has not shouldered the *Bevill* burden.

In *Tuttle v. Combined Insurance Co.*, 222 F.R.D. 424 (E.D. Cal. 2004), *aff'd*, 225 Fed. App'x 620 (9th Cir. 2007), a lawyer for a corporation claimed that an employee was a client. The lawyer was defending his conduct in contacting the employee and keeping the employee away from opposing counsel. The lawyer had been present at the employee's deposition. *Id.* at 429. The court used the *Bevill* factors to decide that the lawyer did not represent the individual. *Id.*

In *Grassmueck v. Ogden Murphy Wallace, P.L.L.C.*, 213 F.R.D. 567 (W.D. Wash. 2003), an individual claimed the privilege, though the receiver of the entity had waived it. The court applied the *Bevill* factors as clarified by the First Circuit and stated that the individual had no personal attorney-client privilege because there was no showing that the communications were between the

example, the District Court for the Southern District of New York, in *United States v. Stein*, [233] embraced *Bevill* with the modifications made by the First and Tenth Circuits.[234] The individual in *Stein* was an employee of KPMG, a large accounting firm. The individual claimed that her personal attorney-client privilege protected certain communications she had with the attorney who represented KPMG, and thus those communications could not be used against her in an Internal Revenue

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person in his individual capacity and the lawyers and "segregable from issues relating to the corporate entities." *Id.* at 572.

In *United States v. Sawyer*, 878 F. Supp. 295 (D. Mass. 1995), an entity investigated gifts and spending on legislators. A Vice President of the entity discussed these matters with the entity's in-house counsel. The lawyer told the Vice President that he was acting as an attorney for the entity and that information could be disclosed to the State Ethics Commission. Another attorney told the individual that they were all a "team" but that interests could eventually conflict. *Id.* at 296. The court noted that the individual had a duty to talk with the in-house counsel and that the individual met with the attorney in that capacity. He was not individually seeking personal legal advice. The court stated that it "finds that there is no evidence that 1) Sawyer consulted Hancock's lawyers on a personal basis or 2) Hancock's lawyers agreed to represent him on a personal basis." *Id.*; *see also* MacKenzie-Childs LLC v. MacKenzie-Childs, 262 F.R.D. 241, 251 (W.D.N.Y. 2009) (quoting the *Bevill* factors but then noting that *International Brotherhood* did not clearly adopt *Bevill* for the Second Circuit and stating that in the tripartite-entity situation the individual must be clear with entity counsel that the individual seeks legal advice on personal matters); SEC v. Nicita, No. 07CV0772 WQH (AJB), 2008 WL 170010, at *5 (S.D. Cal. Jan. 16, 2008) (applying *Bevill*'s factors and denying application of the privilege to certain documents); SEC v. Credit Bancorp, Ltd., 96 F. Supp. 2d 357, 358–60 (S.D.N.Y. 2000) (following *Bevill* and *International Brotherhood* and denying individual privilege where sole shareholder, President, and Chief Executive Officer claimed that the general counsel for the entity was also representing him as an individual). *See generally* MJK Family LLC v. Corporate Eagle Mgmt. Servs., Inc., 676 F. Supp. 2d 584, 594–95 (E.D. Mich. 2009) (finding no attorney-client relationship after using the *Bevill* factors to determine the existence or absence of an attorney-client relationship between counsel for an entity and the principals for purposes of a disqualification motion).

Several cases decided before or at approximately the same time as *Bevill* reach similar conclusions. *See* United States v. De Lillo, 448 F. Supp. 840, 842–43 (E.D.N.Y. 1978) (denying an individual privilege where an entity waived privilege but the Chairman of the Board claimed an individual privilege, and stating the individual's responsibility to clarify whether a communication is personal and whether the lawyer has accepted in spite of the potential for conflicts); *In re* Grand Jury Proceedings, Detroit, Mich., Aug., 1977, 434 F. Supp. 648, 650 (E.D. Mich. 1977) (denying an individual privilege where an entity waived privilege and stating the individual's responsibility to clarify whether a communication is personal and whether the lawyer has accepted in spite of the potential for conflicts); *In re* Grand Jury Subpoena Duces Tecum, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975) (illustrating situation where an entity waived the privilege and where an individual had a privilege but not "as to matters involving the affairs of the [entity], or embracing his role or activities as an [entity] officer or director").

233. 463 F. Supp. 2d 459 (S.D.N.Y. 2006).

234. The First Circuit clarified that the individual may claim the privilege only if the communications "regarding individual acts and liabilities are segregable from discussions about the corporation." *In re* Grand Jury Subpoena, 274 F.3d 563, 573 (1st Cir. 2001). The Tenth Circuit clarified that an individual in the entity-tripartite situation can claim the privilege even if the general subject matter is the general affairs of the entity if the communication specifically concerns the individual's personal liability. Intervenor v. United Stated (*In re* Grand Jury Proceedings), 156 F.3d 1038, 1041 (10th Cir. 1998).

Service matter. KPMG had waived its entity privilege.[235] The individual could not prove that the communications involved her interests alone or that the communications were segregable as required by the First and Tenth Circuit precedent.[236] As a result, the court did not recognize individual privilege protection for the employee.[237]

Interestingly, the *Stein* court recognized at least one facet of the unfairness of the *Bevill* approach. The court noted that individuals in the entity-tripartite situation are often unaware of the untoward consequences of talking with the lawyer for the entity. The court perceived that individuals may misapprehend the situation as the result of the entity's or the attorney's intentional or inadvertent deception, or on the basis of his or her own mistakes of understanding.[238] The court noted that lawyers could clarify any confusion by telling individuals that the lawyer represents the entity, not the individual, and that the individual has no attorney-client privilege with regard to communications with the lawyer. The court observed, however, that years after the necessity of such a warning has been made clear, the lawyers involved in the matter before the court had not given such warnings.[239] The court speculated that in cases of true deception, perhaps the entity should bear the cost since the entity has much to gain by that deception.[240]

C. *Courts Using a More Traditional Reasonable-Belief Approach*

A few courts have followed a more traditional path in the tripartite-entity context and have applied a test of individual attorney-client privilege that turns on the reasonable belief of the individual involved. In *Under Seal v. United States (In re Grand Jury Subpoena: Under Seal)*,[241] the Fourth Circuit evaluated the claim of three employees of AOL Time Warner (AOL). AOL's in-house counsel and outside counsel had done an investigation of a matter that later became the subject of an SEC investigation. In the course of the investigation, the lawyers talked with the three individuals. Later, AOL waived any privilege regarding the lawyers' communications with the three individuals so that the com-

235. *Stein*, 463 F. Supp. 2d at 459–60.

236. *Id.* at 465–66.

237. *Id.* The individual alleged that she had been represented jointly by the lawyer engaged to represent KPMG in two earlier lawsuits. *Id.* at 461. The court noted that in both of these representations the individual was a witness only, not a party. Thus, the prior representations did not create a reasonable belief of representation when the individual was a party. *Id.* at 466.

238. *Id.* at 462.

239. *Id.* at 460. The individual stated that she did not recall having been told that the lawyers represented only KPMG or that KPMG could waive any privilege without the individual's consent.

240. *Id.* at 462 n.13.

241. 415 F.3d 333 (4th Cir. 2005).

munications could be disclosed to the SEC. The employees then claimed that each one of the three had an individual attorney-client privilege that protected the communications with the lawyers from disclosure.[242]

The Fourth Circuit applied a traditional reasonable-belief test. The court stated that "the putative client must show that his subjective belief that an attorney-client relationship existed was reasonable under the circumstances."[243] The claims of privilege failed, however, because the court opined that the individuals could not have believed that the lawyers represented them.[244] The lawyers, before interviewing the individuals, told them they represented AOL and that the conversations were privileged. The lawyers also told the individuals that the privilege belonged to AOL and could be waived by AOL. In addition, the lawyers told the individuals that they were free to consult with their own lawyers at any time. The lawyers stated that they *could* represent the individuals unless a conflict arose.[245] The lawyers did not state that they represented the individuals nor did the individuals ask the lawyers to represent them.[246]

This case is a good example of how the reasonable-belief approach properly protects the interests and rights of the individual and at the same time does not do violence to the interests and rights of the entity. The analysis does, however, synchronize well with the lawyers' ethical obligations and provides an approach that is fair to all. These lawyers behaved forthrightly, and the individuals were not misled. Unlike what is true with the *Bevill* approach, with the reasonable-belief approach, the lawyer rightfully has the burden to act appropriately and clarify the situation to the people with whom the lawyer deals. The attorney-client privilege analysis does not subtly encourage or tolerate less than candid dealings.

Two cases decided without consideration of *Bevill* are also helpful. In *Wylie v. Marley Co.*,[247] the former executive vice president sued the company for breach of his employment agreement.[248] The executive

242. *Id.* at 335–37.

243. *Id.* at 339.

244. *Id.*

245. *Id.* at 336.

246. *Id.* at 339. The court expressed displeasure at the weakness of the disclosure. The court stated, "[O]ur opinion should not be read as an implicit acceptance of the watered-down '*Upjohn* warnings' the investigating attorneys gave the appellants." *Id.* at 340.

One of the individuals also claimed a common-interest privilege. While the individual and the entity did enter into a common-interest agreement such that the privilege would apply to communications after the agreement, the conversations at issue occurred before the parties agreed to pursue a common-interest arrangement. *Id.* at 340–41. For a discussion of a common-interest privilege, see text *supra* at note 8; *see also* Rice, *supra* note 6, §§ 4:22, :35.

247. 891 F.2d 1463 (10th Cir. 1989).

248. *Id.* at 1464.

claimed that the attorney-client privilege applied to a conversation he had with the entity's General Counsel and Chief Legal Officer.[249] This attorney had represented the executive in the negotiation of his employment agreement,[250] which was entered into in April of 1981.[251] The conversations at issue occurred in December of 1982.[252] The lawyer claimed that his practice was to refrain from giving personal legal advice to employees. The executive stated, however, that he had conversations with the lawyer about his employment agreement. He stated that he asked the lawyer about his rights under the employment contract and sought legal representation from the lawyer. The executive stated that he thought that the lawyer was still his lawyer. The lawyer denied that the executive requested legal advice and told the individual during the conversation at issue that he was not able to represent him. The lower court found that this statement occurred after the key communication.[253] The appellate court determined that the lower court had not abused its discretion in finding that the individual's privilege protected the conversation.[254] The lower court decided that the executive "could have believed that he could turn to [the lawyer] who negotiated his [employment] contract for the purpose of securing legal advice in the course of their relationship and in confidence."[255] The trial court had also noted that to hold otherwise would be unfair to the executive, who could have been "confused" by the situation.[256]

In another case, *United States v. Keplinger*,[257] the Seventh Circuit Court of Appeals looked first for a manifestation by the individuals of intent to seek legal advice from the attorneys who also represented the entity. The entity had waived its own attorney-client privilege. The court stated that absent a "relatively clear indication by the potential client to the attorney that he believed he was being individually represented," no attorney-client privilege can be found "without some finding that the potential client's subjective belief is minimally reasonable."[258] The court noted that the individuals "never explicitly sought individual legal advice, or asked about individual representation"; the lawyers never "indicated" that a relationship existed; and one lawyer told one of the

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249. *Id.* at 1471.
250. *Id.*
251. *Id.* at 1465.
252. *Id.* at 1466–67.
253. *Id.* at 1472.
254. *Id.* at 1471–72 & n.6.
255. *Id.* (quoting the lower court).
256. *Id.*
257. 776 F.2d 678 (7th Cir. 1985).
258. *Id.* at 701.

individuals that he did not represent him.[259] While the court focused on the conduct of the individuals in not clearly seeking individual representation, there is no doubt that the court did so upon a backdrop of applying a reasonable-belief-of-representation analysis.[260]

VI. Professional Responsibility Standards

The rules of professional conduct that govern lawyer conduct in the various jurisdictions must inform any consideration of the corporate-tripartite situation because these rules guide a lawyer in the appropriate conduct for the practice of law. Most jurisdictions have professional conduct rules patterned after the American Bar Association's Model Rules of Professional Conduct.[261] These rules establish a path of honesty and forthrightness for any lawyer dealing with individuals in connection with the representation of an entity, such as a corporation.

A. *Model Rule 1.13(a)*

Model Rule 1.13, the rule that specifically deals with representation of an organization, contains several provisions that are particularly helpful. First, Rule 1.13(a) provides that a "lawyer employed or retained by an organization represents the organization acting through its duly

259. *Id.* at 700. The individuals also claimed that the joint-defense doctrine protected the communications. The court expressed doubt that the entity and the individuals shared an interest. The court stopped short of analyzing the question, however, because the court opined that the statements, in any case, were not made in confidence. Thus, no attorney-client privilege applied. *Id.* at 701.

260. In fact, in response to the argument that the scope of the attorney-client relationship "hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice," the *Keplinger* court stated, "we do not quibble with that statement." *Id.* at 701 (quoting Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978)). See also *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55 (S.D.N.Y. 1994). The court recognized that individual principals of a corporate client had standing to raise issues of attorney-client privilege. The court stated that an attorney-client relationship existed. "The individuals understood themselves to be subjects of any possible investigation, along with the corporation itself and the motivation for retaining the law firm to make the preliminary investigation extended to benefiting them individually, as well as their corporation." *Id.* at 59. The court concluded: "It would be slicing the salami unduly fine to claim that the individuals had no attorney client relationship." *Id.*

261. Forty-nine states and the District of Columbia use a form of the Model Rules. The ABA first adopted the Model Rules of Professional Conduct in 1983, and soon these rules became quite influential in the states. The Model Rules have been revised over the years, most substantially in the early 2000s as a result of a comprehensive review by the Commission on the Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission). *See* MODEL RULES OF PROF'L CONDUCT preface at ix–x (2009).

For an example of a set of state rules for lawyer professional responsibility almost identical to the Model Rules, see Legal Info. Inst., *Delaware Lawyers' Rules of Professional Conduct*, AM. LEGAL. ETHICS LIBR., http://www.law.cornell.edu/ethics/de/code/index.htm (last visited Sept. 10, 2010).

authorized constituents."[262] This statement is helpful in the tripartite situation because it clarifies that if an attorney represents the entity, then the attorney generally represents the entity and not those who speak and act for the entity. The acts and words of the agents are the acts and words of the entity for purposes of the attorney-client relationship, if those acts and words are acts and words of the agent *qua* agent and not the individual on his or her own individual behalf. Even lawyers can sometimes forget that the client is the entity. After all, lawyers deal with the individuals involved, and those lawyers form relationships with the individuals. This rule is a clarification and a reminder.

B. *Model Rule 1.13(b)*

Rule 1.13 continues in part (b) by discussing the lawyer's duty to an entity client. The rule states that representing the entity involves acting "as is reasonably necessary in the best interest of the organization."[263] This makes clear that the entity client has the same position in an attorney-client relationship as an individual has if a lawyer represented an individual.

C. *Model Rule 1.13(f)*

Because the corporate-tripartite situation is inherently confusing to the individual actors—lawyer and nonlawyer alike—and because this confusion was obvious to the drafters of the professional responsibility rules, Rule 1.13(f) further seeks to ameliorate the confusion. Rule 1.13(f) states: "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[264] So an attorney who is investigating a matter for his or her entity client has a duty when talking with officers, employees, and other such individuals to clarify whom the lawyer represents. The lawyer has this duty because rarely in the typical investigation are the interests of the individuals and the interests of the entity identical. In addition, even individuals who are sophisticated businesspeople perhaps do not easily understand how the interests of the entity and the interests of the individuals might diverge. The many cases discussed in this article certainly make this point perfectly clear not only with regard to a general divergence but also regarding the particular divergence that can occur when the entity wishes to disclose information

262. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2009).
263. *Id.* R. 1.13(b) (2009).
264. *Id.* R. 1.13(f) (2009).

that the individual wants to keep private. Unless the attorney explains to the individual not only that the lawyer represents the entity but also that the entity could decide to release the individual's communications with the lawyer to third parties and even law-enforcement authorities, the individual may not truly understand the nature and extreme extent of the possible divergence of interests.

D. *Model Rule 1.13(g)*

Rule 1.13(g) muddies the concept of representation of the entity a bit, especially with regard to the tripartite situation. Rule 1.13(g) states that "[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7."[265] This rule thus makes clear that it is *possible* for a lawyer to represent not only the entity but also individuals involved with the entity. The rule provides the caveat that, of course, such a representation should not occur if it violates conflict-of-interest principles. Representations of all kinds and in all sorts of settings occur with conflicts of interest, and these all violate professional responsibility rules.[266] Rule 1.13(g) simply clarifies that a corporate-tripartite situation can be the basis for a lawyer representing an entity and an individual or other constituent but that the general approval stated in Rule 1.13(g) is subject to the multiple representation being without impermissible conflicts of interest. In the tripartite setting this rule makes clear that a lawyer can represent both an entity and an individual as long as no impermissible conflict is created. Thus, a lawyer can, at least theoretically, do exactly what the individuals in tripartite situations often claim: that the lawyer representing the entity also represented the individual.

E. *Model Rule 4.3*

Another very helpful professional responsibility provision is Rule 4.3, which states:

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

265. *Id.* R. 1.13(g) (2009).
266. *See, e.g.*, *id.* R. 1.7(a), R. 1.9(a) (2009).

> have a reasonable possibility of being in conflict with the interests of the client.[267]

A lawyer in a tripartite situation must take care not to mislead the individual as to the lawyer's role. When an entity lawyer knows or, more likely in many situations, "reasonably should know" that the individual is confused about the lawyer's role, the lawyer should "make reasonable efforts to correct the misunderstanding."[268] Lawyers must be aware that in many, many situations, there is confusion.

F. *Model Rule 8.4(c)*

Finally, the Model Rules of Professional Responsibility demand that a lawyer avoid dishonest conduct. Rule 8.4 states, in part: "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[269] This rule leaves no doubt as to its meaning. A lawyer in a tripartite situation cannot act dishonestly. In other contexts such as contract law, taking advantage of another's confusion and not correcting that confusion can be treated as dishonest, deceitful conduct.[270]

VII. CONCLUSION: RESOLVING THE COGNITIVE DISSONANCE

There is cognitive dissonance in the tripartite situation and in the treatment the corporate-tripartite situation is receiving in the law and courts. One dissonance is the actions of lawyers in the tripartite situation when dealing with individual-entity actors against the backdrop of the relevant tenets of professional responsibility. A second dissonance is the treatment courts have given the individuals' claims of privilege when the context is the tripartite situation against a backdrop of the treatment that similar claims receive in other contexts.

A lawyer who is employed by an entity and who is investigating a sensitive matter for the entity must talk with various individuals affiliated as officers, directors, employees, or other constituents of the entity. The governing tenets of professional responsibility provide a backdrop of honesty and forthrightness on the part of lawyers. A lawyer dealing with an individual in a corporate-tripartite situation must not be dishonest and must not mislead. Such a lawyer must correct the individual's misapprehensions to the extent the lawyer reasonably should know of the misapprehensions.

Perhaps the individual with whom the lawyer is dealing is confused

267. *Id.* R. 4.3 (2009).
268. *Id.*
269. *Id.* R. 8.4(c) (2009).
270. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981).

about the nature of the representation and the implications that flow from the nature of the representation. Perhaps the individual does not understand that the lawyer represents only the entity. Perhaps the individual does not understand that his or her statements to the lawyer can be disclosed over the individual's objection. Even a sophisticated corporate actor may be confused on these points. Perhaps the sophisticated corporate actor who deals with counsel for the entity regularly is the individual who thinks of that lawyer as his or her own counsel. Perhaps it is this sophisticated corporate actor, not being a lawyer, who does not fully appreciate the rather esoteric rules of application and waiver of the attorney-client privilege. The rules of professional responsibility do not tell lawyers when they reasonably should know of the individual's confusion, but the tenor of the professional responsibility tenets makes clear that a lawyer in this situation should not mislead or otherwise act dishonestly and must, at that hard-to-determine point of reasonable belief, clarify the confusion of the individual with whom the lawyer deals.

One might expect lawyers dealing with individuals in the entity-tripartite situation to be exceedingly forthright and clear as to the rights and roles of the actors. For example, when conducting an investigation into entity activity, a lawyer could avoid impropriety by clearly stating to each individual with whom the lawyer communicates that the lawyer represents the entity, that the lawyer does not represent the individual, that conversations with the lawyer will be disclosed to the entity, and that the entity, not the individual, will decide if, when, and to whom the conversations are to be disclosed. A careful lawyer might provide the disclosure orally and in a writing that the lawyer requires the individual to sign. The rules of professional responsibility encourage a clear *Upjohn* warning.

But in case after reported case, there is no evidence of a written disclosure of this sort and often no evidence of even an oral disclosure or clarification.[271] Perhaps there are many reasons for this, but three in particular come to mind.

First, the bite of a violation of professional-conduct rules is not great. The chance that a lawyer will be reported to discipline authorities is low, and the chance and magnitude of a punishment are not great.

Second, obfuscating the tripartite situation allows the lawyer to gain more information for his or her client because the individuals related to the organization might be more willing to talk. So a lawyer who wants to do a good job for the entity client might have a tendency to err on the side of lack of clarity.

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271. *See supra* discussion of United States v. Stein, 463 F. Supp. 2d 459 (S.D.N.Y. 2006), at notes 228–35.

Third, the treatment the majority of courts have given individual claims of attorney-client privilege in the corporate-tripartite situation actually *encourages* a lack of clarity. These courts—the Third Circuit in *Bevill* and courts that have followed *Bevill*'s approach with or without modification—require an individual claiming a privilege in a corporate-tripartite setting to make an almost impossible showing for the individual to succeed.[272] These courts erect this great wall in an effort to protect the entity and perhaps, consciously or unconsciously, the lawyer.[273] In so doing these courts have stepped away from traditional attorney-client privilege law[274] by imposing a test for application of the attorney-client privilege that is more onerous than the test used otherwise. The claimant must prove more.

In addition, these courts, in using this unique approach, reject traditional concepts with regard to the formation of the attorney-client relationship. The touchstone of the attorney-client relationship is whether the individual in the position of client honestly and reasonably believes that the lawyer represents the individual. This touchstone has been used throughout the law and in particular is a familiar concept with regard to applying the attorney-client privilege.[275] If an individual in an entity-tripartite situation claims an individual attorney-client privilege in these courts, not only is the proof exceedingly rigorous, but the individual's honest and reasonable belief of representation and related privilege is irrelevant. This attorney-client privilege analysis provides the lawyer laboring in this environment no incentive to be clear as to the lawyer's role and interest or the interest of the entity as it relates to the individual. In fact, because the typical court's analysis puts much of the relationship-development burden on the individual, the lawyer has no incentive to clarify the situation in the face of incentive to maximize information flow by obfuscation. An individual with an honest and reasonable belief that the lawyer represents or represented him has no port in the storm; the individual loses the privilege claim.

This leaves a situation in which professional responsibility rules teach forthrightness but attorney-client privilege application does not encourage forthrightness. This approach to applying the attorney-client privilege may even encourage the attorney to obfuscate when added with the obvious incentive for the lawyer to do whatever to help the client. A divergence such as this happens occasionally in the law if there is a strong rationale for it. In the tripartite situation in which the courts

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272. *See supra* Section V.

273. *See* Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 456 (2008) (noting that judges favor lawyers).

274. *See supra* Section III.

275. *See supra* Section IV.

devised a new rule delineating the application of the attorney-client privilege that is not anchored in tradition and in which the courts rejected the traditional teachings with regard to the formation of an attorney-client relationship, there is no strong rationale. The situation is quite the contrary.

The superior approach in the tripartite situation is to evaluate an individual's claim of personal privilege by measuring it against the customary test for application of the attorney-client privilege. No special proofs should be required. In addition, the honest-and-reasonable-belief standard regarding the attorney-client relationship should be used. The privilege should apply, as stated by Judge Wyzanski long ago in the *United Shoe Machinery*[276] case, if an individual in a tripartite situation can prove:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[277]

In this analysis the honest and reasonable belief of the individual should be given credence as is done in other areas of the law.

The courts that have developed the *Bevill* line of precedent with its special tests of privilege have been concerned about protecting the right of the entity to control its own privilege unfettered by the claimed rights of the individual. These courts have stated that in the interest of protecting the entity's rights, and in the interest of disclosure since usually the question occurs when the entity wishes to waive the privilege, any individual rights must be secondary. Contrary to the courts' fear, a return to traditional legal standards would protect the entity's interests as well as the individual's interests. A return to traditional law would also encourage adherence to tenets of professional responsibility and put the lawyer on stable footing vis-à-vis the entity and the individual.

If an entity lawyer wishes to eliminate any possibility of a claim of individual privilege, that lawyer need only act in accord with the rules of professional responsibility and clearly explain to the individual that the lawyer does not represent the individual, that the entity will be told of

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276. United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950).
277. *Id.* at 358–59.

the substance of any conversations, that the entity will decide the detail of disclosure of any of the individual's communications, and that the interests of the individual and the entity may diverge if on no other issue than disclosure. A careful lawyer can have a record of this statement. Then an individual in a corporate-tripartite situation cannot have a reasonable belief that the lawyer represents him or her even if the individual foolishly has a subjective belief of representation. The lawyer conducts himself or herself forthrightly, the entity's privilege rights are protected, and the individual is treated fairly. Harmony prevails.