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Matthew M. Cronin

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Comments

Slow and Steady Wins the Race: Lessons Learned, and Why it is Time to Establish a Corporate Legal Advice Privilege

Matthew M. Cronin*

I. Introduction

The legal advice privilege has been shaped and reshaped at different times by different legal systems, but the underlying premise remains intact. As the methods of managing one's legal affairs have changed and grown increasingly complex, so has the legal advice privilege.

In much of the world, clients are no longer strictly individuals who seek legal advice to protect their interests. The legal advice privilege has evolved to protect a variety of legal "persons," such as business organizations. However, the privilege is not shared and belongs only to one particular client in any particular matter. That client alone may assert or waive the privilege.

This Comment identifies policy considerations that give rise to

* J.D., The Dickinson School of Law of the Pennsylvania State University, 2008; B.A. Organizational Studies, University of Michigan. Thank you to the *Penn State International Law Review* team for their dedication to the publication of a top quality journal. Special thanks to my family and friends for their patience, inspiration and constant support.

difficulties in application of the legal advice privilege in the United Kingdom, and its counterpart in the United States, the attorney-client privilege. Part I discusses the evolution of the legal advice privilege, as well as its existence and application in the corporate context. Part II addresses the evolution of the attorney-client privilege and difficulties encountered in applying it consistently to corporate clients. Part III compares the corporate legal advice privilege and the corporate attorney-client privilege, outlines the policies underlying each approach, and explains how both government investigators and corporate clients can benefit from clear recognition, and consistent application, of the corporate legal advice privilege.

II. Legal Advice Privilege in the United Kingdom

The legal advice privilege has maintained an enduring presence in some form or another in the jurisprudence of the United Kingdom for centuries.[1] In his judgment in *Three Rivers District Council and others v. Governor and Company of the Bank of England* ("*Three Rivers (No. 6)*"),[2] a case, which will be more thoroughly discussed *infra*, Lord Scott identified several features that underlie the policy reasons for the legal advice privilege.[3] Lord Scott noted that the legal advice privilege gives the person entitled to it the right to decline to disclose or to allow disclosure of the confidential communication or document in question.[4] Such an entitlement does not arise unless the communication or document for which privilege is sought is a confidential one; and if the communication or document qualifies for the privilege, the privilege is absolute.[5]

A. Scope of the Legal Advice Privilege in the United Kingdom

Until 1833, the courts recognized only one privilege, the legal professionals privilege, which protected communications between lawyer and client in connection with pending litigation.[6] In 1833, however,

1. *See* Minter v. Priest, (1930) [1930] A.C. 558 (H.L.) (appeal taken from Eng.); Great Atlantic Insurance Co. v. Home Insurance Co., (1981) [1981] 2 All E.R. 485, [1981] 1 W.L.R. 529; Wheeler v. Le Marchant, (1881) 17 Ch. D. 675 (Ch. D.); Greenough and Others v. Gaskell, (1833) [1824-1834] All E.R. 767, 1 My & K 98, 101-02 (Rev. Rep.).

2. Three Rivers District Council v. Governor and Company of the Bank of England (No. 6), [2004] UKHL 48, [2005] A.C. 610 (H.L.) (appeal taken from Eng.) [hereinafter *Three Rivers (No. 6)*].

3. *Id.* ¶¶ 24-27.

4. *Id.* ¶ 26.

5. *Id.* ¶ 25.

6. Three Rivers District Council v. Governor and Company of the Bank of England (No. 5), (2003) [2003] EWCA (Civ) 474, [2003] Q.B. 1556, ¶ 8 [hereinafter *Three Rivers*

Lord Brougham extended the privilege to communications where litigation was not contemplated:

> To force from the party himself the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely resorting to professional advice . . . the protection would be insufficient, if it only included communications more or less connected with judicial proceedings: for a person oftentimes requires the aid of professional advice upon the subject of his rights and liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry.[7]

Although the exact terminology had not yet been articulated, in so stating, Lord Brougham partitioned the legal professionals privilege into two related, but distinct privileges: the "legal advice privilege," and the "litigation privilege." The litigation privilege protects evidence obtained for the purpose of litigation,[8] and the legal advice privilege "attaches to advice upon the subject of a client's rights and liabilities"[9] without any other reference to litigation. The House of Lords recently emphasized the distinct nature of the two privileges and defined the scope of the legal advice privilege in *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)*.[10] The complex nature of the proceedings leading to this decision requires a short summary.

B. The Three Rivers *Cases*

The Bank of England ("the Bank") maintains regulatory authority over banks and financial institutions doing business in the United Kingdom.[11] Following the collapse of the Bank of Credit and Commerce International ("BCCI") in 1991, the Chancellor of the Exchequer announced the creation of the independent Bingham Inquiry Unit ("BIU"), consisting of three Bank officials.[12] Their task was "[t]o enquire into the supervision of BCCI under the Banking Acts; to consider whether the action taken by all the UK authorities was

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(No. 5)].

7. *Greenough*, [1824-1834] All E.R. 767 (Rev. Rep.).

8. *See generally* Anderson v. Bank of British Columbia, (1876) 2 Ch.D. 644 (appeal taken from Eng.) (discussing the litigation privilege).

9. *Greenough*, [1824-1834] All E.R. 767 (Rev. Rep.).

10. *See Three Rivers (No. 6)*, [2004] UKHL 48, [2005] A.C. 610 (H.L.) (appeal taken from Eng.).

11. *See* Banking Act, 1979 (Eng.); Banking Act, 1987 (Eng.).

12. *Three Rivers (No. 6)*, [2004] UKHL 48, [2005] A.C. 610, at ¶ 5 (H.L.) (appeal taken from Eng.).

appropriate and timely; and to make recommendations."[13] The Bank hired Freshfields, a London-based law firm, to advise the BIU generally on all of the Bank's dealings, and Freshfields retained counsel to assist in that process.[14]

1. *Three Rivers (No. 5)*

Following the publication of the Bingham Inquiry's Report on October 22, 1992, the Three Rivers District Council ("the Council") and others sued the Bank to recover losses incurred from the collapse of BCCI.[15] In 2002, the Council requested documents created by employees of the Bank during the course of the inquiry, which were meant to be passed to Freshfields.[16] The Bank claimed that it had the right to withhold the documents on the grounds of the legal advice privilege.[17] The trial court held that the documents were privileged[18] and the Council appealed.[19]

The Court of Appeal narrowly construed the legal advice privilege holding that:

> The 19th century authorities established that legal advice privilege was a well established category of legal professional privilege, but that such privilege could not be claimed for documents other than those passing between the client and his legal advisers and evidence of the contents of such communications.[20]

Significantly, the Court of Appeal also addressed the question of who can properly be considered the client.[21] As a preliminary matter, the court noted third party material is not protected by the legal advice privilege.[22] The court did, however, recognize that a corporation can only act through its employees, who are not to be treated as third parties for the purposes of privilege.[23] The court ultimately held that the legal advice privilege was not available to protect the documents in question because they were not prepared for communication to the Bank's lawyer

13. *Id.*
14. *Id.* ¶ 6.
15. *Id.* ¶ 7.
16. *Id.* ¶ 8.
17. *Three Rivers (No. 6)*, [2004] UKHL 48, [2005] A.C. 610, ¶ 8 (H.L.) (appeal taken from Eng.).
18. *See* Three Rivers District Council v. Governor and Company of the Bank of England (No. 5), (2002) [2002] EWHC 2730.
19. *See Three Rivers (No. 5)*, (2003) [2003] EWCA (Civ) 474, [2003] Q.B. 1556.
20. *Id.* ¶ 21.
21. *Id.* ¶ 31.
22. *See Three Rivers (No. 6)*, [2004] UKHL 48, [2005] A.C. 610, at ¶ 46 (H.L.) (appeal taken from Eng.).
23. *See id.*

to obtain legal advice.[24] Instead, they were prepared for communication to the BIU, *and the BIU is the client.*[25] The Bank appealed to the House of Lords and leave was denied.[26]

2. *Three Rivers (No. 6)*

Following the decision of the Court of Appeal in *Three Rivers (No. 5)*, the Council renewed its request for documents, and the Bank once again claimed privilege.[27] The trial court ordered disclosure of those documents that were not inconsistent with the declaration of the Court of Appeal in *Three Rivers (No. 5)*.[28] The Bank appealed and the appeal was dismissed.[29]

The judgment dismissing the appeal did not address the existence of a corporate legal advice privilege. The House of Lords granted leave to appeal on the narrow issue, "whether the communications between the BIU and Freshfields or counsel relating to the Inquiry are protected by the legal advice privilege."[30]

On appeal, the House of Lords reexamined the scope of the legal advice privilege and unanimously overruled the Court of Appeal.[31] In his judgment, Lord Scott stated that the "[l]egal advice privilege should, in my opinion, be given a scope that reflects the policy reasons that justify its presence in our law."[32] The House of Lords took an approach that had been criticized by the Court of Appeal in *Three Rivers (No. 5)*[33] by adopting the language of *Balabel v. Air India*.[34] The House of Lords held "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."[35] The judgments of all five Law Lords rejected invitations to comment on the Court of Appeal's decision in *Three Rivers*

24. *Id.* ¶ 37.
25. *Three Rivers (No. 5)*, (2003) [2003] EWCA (Civ) 474, [2003] Q.B. 1556, at ¶ 31.
26. *Three Rivers (No. 6)*, [2004] UKHL 48, [2005] A.C. 610, at ¶ 15 (H.L.) (appeal taken from Eng.).
27. *Id.* ¶ 16.
28. *Id.* ¶ 18.
29. *See* Three Rivers District Council v. Governor and Company of the Bank of England (No. 6), (2004) [2004] EWCA (Civ) 218, [2004] Q.B. 916.
30. *Three Rivers (No. 6)*, [2004] UKHL 48, [2005] A.C. 610, at ¶ 20 (H.L.) (appeal taken from Eng.).
31. *See id.*
32. *Id.* ¶ 35.
33. *Three Rivers (No. 5)*, (2003) [2003] EWCA (Civ) 474, [2003] Q.B. 1556, at ¶¶ 30-31.
34. Balabel v. Air India, [1988] 1 Ch. 317, 330 (1988).
35. *Three Rivers (No. 6)*, [2004] UKHL 48, [2005] A.C. 610, ¶ 38 (H.L.) (appeal taken from Eng.) (quoting *id.*).

(No. 5)[36]—that the BIU could be regarded as the client.[37] As a result, *Three Rivers (No. 5)* remains the guiding precedent on the existence of a corporate privilege, and the operation of the privilege is plagued by uncertainty.[38]

C. *An Evaluation of the Current Treatment of the Legal Advice Privilege*

In reaching this conclusion, but refusing to overrule the Court of Appeal's recognition of the privilege as applicable to the BIU, the House of Lords answered some questions related to the scope of the privilege, but left several others unresolved.

1. What is a "Relevant Legal Context"?

The privilege protects communications between a lawyer in his professional capacity and his client, but only if the communications are confidential and were initiated for the purposes of seeking or giving legal advice.[39] Lord Scott recognized there was no way of avoiding difficulty "when deciding, in marginal cases, whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege."[40] In cases of doubt, the judge called upon to make the decision should ask, "[i]s the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply?"[41] Unfortunately, the Law Lords did not address whether confidential communications between corporate clients and their lawyers for the purpose of seeking or giving legal advice is a relevant legal context.

2. Who is the "Client"?

In *Three Rivers (No. 5)* the Court of Appeal held that communications between the lawyers and third parties were not

36. *See id.*

37. *Three Rivers (No. 5)*, (2003) [2003] EWCA (Civ) 474, [2003] Q.B. 1556, at ¶ 31.

38. Joan Loughrey, *Legal Advice Privilege and the Corporate Client*, 9 IJEP 183, 183 (2005) (considering question of which corporate communications attract legal advice privilege).

39. *See* FRESHFIELDS BRUCKHAUS BERINGER, LEGAL ADVICE PRIVILEGE: HOUSE OF LORDS CLARIFIES POSITION (2004), www.freshfields.com/practice/disputeresolution/publications/pdfs/10059.pdf.

40. *Three Rivers (No. 6)*, [2004] UKHL 48, [2005] A.C. 610, at ¶ 38 (H.L.) (appeal taken from Eng.).

41. *Id.*

protected;[42] only communications between Freshfields and the BIU could qualify.[43] The BIU consisted of three people, all of whom were considered the client because the BIU was established to deal with inquiries and to seek and receive Freshfields' advice.[44]

On the other hand, certain officers and employees of the corporate client were considered third parties.[45] Unfortunately, the Court of Appeal did not express any opinion about how many individuals, or which individuals, may comprise the client under other circumstances.

D. Practical Considerations Implicit in Identifying the "Client"

The Court of Appeal gave no guidance on the privilege's practical application in the corporate context. But because corporations can act only through their agents, it is important to define who the client is for the purposes of seeking and receiving advice at a very early stage.[46]

Under the current regime, the only avenue available to corporations is to nominate and document at the outset which employees are to be considered the client.[47] Also, "care needs to be taken to ensure that only the client deals with the lawyers."[48] To increase the chances that communications will be protected, it is also important to give careful consideration to the system by which relevant information is collected.[49] The client must be aware that any information prepared for the lawyers by third parties will not be subject to privilege.[50] No documents containing information relevant to the seeking of legal advice should be created without approval from the client, and such documents should never be copied to anybody other than the client.[51]

Close attention to the evolving application of the attorney-client privilege in the United States can serve as a tool to guide government authorities and corporations in the United Kingdom when evaluating whether to change the current approach and what the next step should be.

III. The Attorney-Client Privilege in the United States

In the United States, the attorney-client privilege is "one of the

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42. *Id.* ¶ 46.
43. *Id.*
44. *Id.* ¶ 31.
45. *Three Rivers (No. 6)*, [2004] UKHL 48, [2005] A.C. 610, ¶ 31 (H.L.) (appeal taken from Eng.).
46. PINSENT MASONS, PRIVILEGE: SOME PRACTICAL CONSIDERATIONS (2005), www.pinsentmasons.com/media/1627356748.pdf.
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*
51. *See* PINSENT MASONS, *supra* note 46.

oldest recognized privileges for confidential communications."[52] The common law justification for the attorney-client privilege is the notion that "permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."[53]

In 1972, the United States Supreme Court promulgated the Federal Rules of Evidence setting forth specific categories of privileges, including an attorney-client privilege.[54] Congress chose not to adopt various privilege rules as promulgated by the Supreme Court, but rather adopted a general rule allowing the federal courts to establish privilege in light of the common law.[55] Federal Rule of Evidence 501 states: "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[56]

Today, the generally accepted purpose of the privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and the administration of justice.[57] . . . The privilege recognizes that such advice or advocacy depends upon the lawyer's being fully informed by the client."[58] Although originally recognized as a privilege vested in natural humans, the attorney-client privilege has now been extended to a variety of legal entities.[59]

A. Corporate Criminal Liability

It was not until 1962 that federal courts in the United States began to formally recognize that a corporation may be held criminally liable for the acts of its agents.[60] All that is required is that an agent act within the scope of its employment, and that such an act benefit the corporation, even if the benefit is slight.[61] In the intervening years, the scope of corporate criminal liability was expanded to the point that liability became the rule, not the exception.[62] As a result, once corporate counsel

52. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998).
53. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 918 (8d Cir. 1997).
54. *See generally* FED. R. EVID.
55. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 928.
56. FED. R. EVID. 501.
57. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
58. *Id.*
59. *Id.*
60. *See* Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962).
61. *Id.* at 127.
62. *See* Lance Cole, *Corporate Criminal Liability in the 21st Century: A New Era?*, 45 S. TEX. L. REV. 147, 148-50 (2003) (discussing new laws and law enforcement

was made aware of questionable behavior by agents of the corporation, internal investigations were often initiated.[63] Government investigators frequently requested the results of such internal investigations, which led to complications in the application of the attorney-client privilege.[64]

B. Corporate Attorney-Client Privilege

In 1981, the Supreme Court, in its ruling in *Upjohn Co. v. United States*,[65] recognized that the privilege exists to protect not only the giving of professional advice to those who can act on it, but also the sharing of information with the lawyer to enable her to give sound and informed advice.[66] Therefore, the Court extended the protection of the attorney-client privilege to the corporate form.[67] The Court pointed out that protecting against compelled disclosure communications made by corporate employees to corporate counsel in an effort to secure legal advice for the corporation is "[c]onsistent with the underlying purposes of the attorney-client privilege."[68]

C. U.S. Government's Approach to Criminal Prosecution of Corporations

Increased attention to corporate behavior by the U.S. Department of Justice ("DOJ") and regulatory bodies such as the Securities and Exchange Commission, as well as the perceived increase in requests by the DOJ for waiver of the corporate attorney-client privilege have led many commentators to fear that the privilege is being eroded.[69] In response, however, it was contended that the DOJ's consideration of waiver was based squarely on the definition of "cooperation" set forth in the Federal Sentencing Guidelines for Corporations ("Organizational Sentencing Guidelines").[70]

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policies that have altered rules of game for counsel defending white-collar criminal cases involving corporations and securities law violations).

63. *Cf. Upjohn*, 449 U.S. at 383.

64. *Id.* at 389.

65. *See id.*

66. *Id.* at 390.

67. *See id.*

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

69. *See, e.g., generally* Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003) (discussing federal government's policy of encouraging corporate cooperation with government investigations).

70. *See, e.g., generally* Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587 (2004) (discussing how privilege waivers impact DOJ's assessment of cooperation, while addressing its most frequent criticisms).

1. The Organizational Sentencing Guidelines

In 1991, the United States Sentencing Commission enacted the Organizational Sentencing Guidelines after several years of critical discussion. The introductory commentary to Chapter Eight of the 2005 Organizational Sentencing Guidelines stated that the guidelines were "designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."[71]

Subsequent provisions suggested that timely and thorough cooperation by a corporation under government investigation should be grounds for reducing a sentence after conviction:

> To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization . . . However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. . . . *Waiver of attorney-client privilege and work product protections is not a prerequisite to a reduction . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.*[72]

The DOJ has followed the lead of the U.S. Sentencing Commission by putting its rationale into effect in the pre-conviction phase of criminal prosecution.[73]

2. The Department of Justice

In 1999, then-Deputy Attorney General Eric Holder issued a memorandum[74] ("Holder Memo"), which provided guidance to federal prosecutors in deciding whether to charge a business organization with an offense. In 2003, then-Deputy Attorney General Larry Thompson issued a revised version of the Holder Memo ("Thompson Memo").[75] A feeling of necessity to revise the Holder Memo was the result of limited resources that resulted from law enforcement's response to the terrorist

71. U.S. SENTENCING GUIDELINES MANUAL § 8A1.1 (2005).

72. *Id.* § 8C2.5 cmt. n.12 (emphasis added).

73. *See* Memorandum from the Dep't of Justice, Eric H. Holder, Deputy Attorney General, to All Component Heads & U.S. Attorneys (June 16, 1999) (on file with author).

74. *See id.*

75. *See* Memorandum from the Dep't of Justice, Larry D. Thompson, Deputy Attorney General, to Heads of Department Components & U.S. Attorneys (Jan. 20, 2003), *available at* www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

attacks of September 11, 2001, a series of corporate scandals, and the meltdown of the market cap of prominent corporations and significant losses by their investors.[76]

The main focus of the Thompson Memo's revisions was an "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."[77] Not unlike the Holder Memo, the Thompson Memo provided a loose analytical framework contained in "a number of general principles, with accompanying commentary."[78] It encouraged prosecutors to weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: "the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of non-criminal approaches."[79] But due to the nature of the corporate "person," the Thompson Memo set forth nine additional considerations to be taken into account.[80]

Commentary to the fourth factor—that the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work-product protection—emphasized that a waiver of attorney-client privilege, both with respect to its internal investigation and to communications between specific officers, directors, and employees and counsel, should be considered in evaluating the

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76. Larry D. Thompson, The Future of the Attorney-Client Privilege in White-Collar Prosecutions, Speech at the Heritage Foundation, Nov. 30, 2006, *available at* www.heritage.org/Press/Events/archive.cfm?startdate=12/31/2006&days=364.

77. *See id.*

78. Sean R. Berry, *Revised Principles of Federal Prosecutions of Business Organizations: An Overview*, UNITED STATES ATTORNEYS' BULLETIN, Nov. 2003, at 5.

79. Thompson, *supra* note 75, at pt. II.A (citing USAM § 9-27.220).

80. *Id.* (stating that prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target: (1) the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime; (2) the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management; (3) the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it; (4) *the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work-product protection*; (5) the existence and adequacy of the corporation's compliance program; (6) the corporation's remedial action's, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies; (7) collateral consequences, including any disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution; (8) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and (9) the adequacy of remedies such as civil or regulatory enforcement actions).

completeness of a corporation's disclosure.[81] Buried in a footnote to the Thompson Memo, however, was the direction, "[e]xcept in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation."[82]

As pointed out above, the policy of encouraging corporate cooperation with government investigations was first formally articulated by the Holder Memo. It has been argued, however, that changes in the corporate culture required a new emphasis on corporate cooperation.[83] This shift has led to increased requests for corporations to waive their attorney-client privilege,[84] as well as to the increased popularity of deferred prosecution agreements.[85]

In essence, deferred prosecution agreements create a contractual relationship between the DOJ and the corporation being investigated. In exchange for, *inter alia*, voluntary disclosure of information revealed during the course of corporate internal investigations, and the pledge of continued cooperation with the government investigation, the DOJ agrees not to prosecute the corporation for a specified time period and to drop all charges upon expiration of the agreement.[86]

"Failure to disclose to the government the results of an internal investigation and waive attorney-client privilege . . . is deemed evidence of less-than-authentic cooperation."[87] Therefore, corporations are faced with a very difficult decision: do they assert the privilege and risk indictment, or do they waive the privilege in exchange for leniency? An indictment can have devastating consequences on an organization, potentially eliminating the ability of the organization to survive post-indictment or to dispute the charges against it at trial.[88]

Opponents to the DOJ's policy have suggested that the DOJ is contemptuous of legal privilege.[89] More specifically, some critics have

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81. *Id.* at pt. VI.B.

82. *Id.* at pt. VI.B n.3.

83. Thompson, *supra* note 75.

84. *See* AM. CHEMISTRY COUNCIL, ET AL., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT (2005), *available at* http://www.acc.com/Surveys/attyclient2.pdf.

85. Thompson, *supra* note 75.

86. *See, e.g.*, DAVID N. KELLEY, KPMG DEFERRED PROSECUTION AGREEMENT (Aug. 25, 2005), http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf.

87. George J. Terwilliger & Darryl S. Lew, *Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations*, ENGAGE: THE J. OF THE FEDERALIST SOC'Y'S PRAC. GROUPS, March 2006, at 25, 26.

88. Attorney-Client Privilege Protection Act of 2006, § 2(a)(7) (2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/attorneyclient_privilege_protection_act_12_6_06_hen06g74_xml.pdf (legislation never introduced).

89. *White Collar Enforcement (Part) I: Attorney-Client Privilege and Corporate Waivers, Committee on the Judiciary*, 109th Cong. 1 (2006) (statement of Robert D.

opposed the DOJ's "routine" practice of seeking to obtain waivers[90] despite the Thompson Memo's clear directive not to seek waiver "[e]xcept in unusual circumstances."[91] Indeed, some feared the very basis of the adversarial process was being undermined.[92]

In response to such criticism, in 2005, then-Acting Deputy Attorney General Robert McCallum issued a memo ("McCallum Memo")[93] requiring each U.S. Attorney's Office to institute a written waiver review policy that facilitated supervisory approval before seeking a waiver of the attorney-client privilege.[94] Even though the McCallum Memo imposed additional procedural requirements upon federal prosecutors, it nevertheless continued to endorse the practice of seeking waivers as an exercise of appropriate prosecutorial discretion.[95] Critics of the new policy recognized that, although well-intentioned, the McCallum Memo "likely will result in numerous different waiver policies being established throughout the country, many of which may impose only token restraints on the ability of prosecutors to demand waiver."[96]

D. Recent Developments in Treatment of Corporate Attorney-Client Privilege

Despite the rapid succession of changes in DOJ policy, there has recently been a wave of further developments that will have a significant impact on the future of the attorney-client relationship in white-collar prosecution.

McCallum, Jr., Associate Att'y Gen. of the United States), *available at* http://judiciary.house.gov/media/pdfs/mccallum030706.pdf.

90. *See generally* ABA Task Force on Attorney-Client Privilege, *Recommendation 111* (2005), *available at* www.abanet.org/buslaw/attorneyclient (supporting the preservation of attorney-client privilege as essential to maintaining confidential relationship between client and attorney).

91. Thompson, *supra* note 75, at pt. VI.B n.3.

92. *See generally* Earl J. Silbert, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225 (2006) (discussing impact of corporate waivers on adversarial system).

93. Memorandum from the Dep't of Justice, Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Department Components & U.S. Attorneys (Oct. 21, 2005), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf.

94. *See id.*

95. *Before the U.S. Sentencing Commission Public Meeting Regarding Chapter Eight Waiver of Attorney-Client Privilege & Work Product Protections* (2005) (statement of Dick Thornburgh), *available at* www.ussc.gov/corp/11_15_05/Thornburgh.pdf#search=%22McCallum%20Memo%22 (adhering to the principles of the Thompson Memo).

96. Letter from Griffin B. Bell, Former Att'y Gen., et al., to Alberto Gonzalez, U.S. Att'y Gen. (Sept. 5, 2006), *available at* http://www.acca.com/public/attyclientpriv/agsept52006.pdf.

1. Amendment of the Organizational Sentencing Guidelines

On April 5, 2006, after holding several public hearings, the U.S. Sentencing Commission voted to promulgate an amendment deleting commentary to the organizational sentencing guidelines.[97] The amendment has eliminated any mention of waiver of attorney-client privilege as a pre-requisite for an organization to receive credit for cooperation at sentencing, but leaves all other relevant language untouched.[98] Deletion of this language left the DOJ with no legal foundation to stand on aside from its own prior practice. The DOJ's policy was weakened further by Congress's recent involvement in the discussion.

2. Legislation

During November 2006, United States Senator Arlen Specter signaled he was prepared to introduce the "Attorney-Client Privilege Protection Act of 2006"[99] for consideration to the United States Senate.[100] The purpose of this legislation was to "place on each agency clear and practical limits designed to preserve the attorney-client privilege . . . available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization."[101]

Enactment of the legislation would have prohibited any agent or attorney of the United States from demanding, requesting, or conditioning treatment of the corporation on the disclosure of any communication protected by the attorney-client privilege.[102] The legislation would also have prohibited agents or attorneys of the United States from considering any valid assertion of the attorney-client privilege in making charging decisions or determining the organization's level of cooperation.[103] Enactment of this legislation would have

97. Press Release, U.S. Sentencing Commission, U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Firearms, and Steroids (April 11, 2006), *available at* www.ussc.gov/PRESS/rel0406.htm.

98. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5, cmt. n.12 (2006).

99. Attorney-Client Privilege Protection Act of 2006 (2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/attorneyclient_privilege_protection_act_12_6_06_hen06g74_xml.pdf (legislation never introduced).

100. Carrie Johnson, *Shift in Corporate Prosecution Ahead: Government to Stiffen Rules on Indicting Companies*, WASH. POST, Nov. 30, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/11/29/AR2006112 90131 6.html.

101. Attorney-Client Privilege Protection Act of 2006, § 2(b).

102. *Id.* § 3(a).

103. *Id.*

federalized the corporate attorney-client privilege,[104] a proposition that would have resulted in the DOJ having its own policy dictated to it by Congress. Senator Specter chose not to introduce the legislation, presumably because of the DOJ's subsequent revision of the Thompson Memo.

3. The McNulty Memo

No longer able to rely on the precedent set by the U.S. Sentencing Commission, and amidst criticism from the defense bar,[105] industry members,[106] former high-ranking DOJ officials,[107] and Congress,[108] the DOJ has once again changed its policy of considering waiver of attorney-client privilege in charging decisions.[109] On December 12, 2006, Deputy Attorney General Paul McNulty released revisions to the Thompson Memo[110] ("McNulty Memo").

The McNulty Memo makes clear that waiver of attorney-client protections is not a prerequisite to a finding that a company has cooperated in the government's investigation.[111] The McNulty Memo adopted a tiered approach detailing when a prosecutor may request that a corporation provide protected materials.[112] Under the current regime, prosecutors may only request waiver of attorney-client protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations.[113] "If a legitimate need exists, prosecutors should seek the least intrusive waiver necessary to conduct a complete and thorough investigation, and should follow a step-by-step approach to requesting information."[114]

It is important to note that the privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by

104. *See id.*

105. *See* ABA Task Force on Attorney-Client Privilege, *Recommendation 111*, *supra* note 90.

106. *See* AM. CHEMISTRY COUNCIL, ET AL., *supra* note 84.

107. *See* Letter from Griffin B. Bell, et al., to Alberto Gonzalez, *supra* note 96.

108. *See generally* Attorney-Client Privilege Protection Act of 2006 (2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/attorneyclient_privilege_protection_act_12_6_06_hen06g74_xml.pdf (legislation never introduced).

109. Memorandum from the Dep't of Justice, Paul J. McNulty, Deputy Attorney General, to Heads of Department Components & United States Attorneys (Dec. 12, 2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/mcnulty_memo.pdf.

110. *Id.*

111. *Id.* ¶ IV.B.2.

112. *Id.*

113. *Id.*

114. McNulty, *supra* note 109, at ¶ IV.B.2.

those who communicated with the attorney.[115] For instance, "[t]he 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 into his communication to his attorney."[116] For that reason, the McNulty Memo has created two categories of information relating to the underlying misconduct.[117]

Category I includes purely factual information, which may or may not be privileged.[118] Before requesting a waiver for Category I information, prosecutors must obtain written authorization from the United States Attorney.[119] "A corporation's response to the government's request for waiver of privileged Category I information *may* be considered in determining whether a corporation has cooperated in the government's investigation."[120]

Category II includes attorney-client communications, and may be requested only if the purely factual information provides an incomplete basis to conduct a thorough investigation.[121] Before requesting a waiver for Category II information, the United States Attorney must obtain written authorization from the Deputy Attorney General.[122] "If a corporation declines to provide a waiver for Category II information after a written request from the United States Attorney, prosecutors *must not* consider this declination against the corporation in making a charging decision."[123]

The McNulty Memo represents the DOJ's current approach to requesting waivers. It has overruled the McCallum Memo, and has made significant changes to the Thompson and Holder Memos, while still allowing for waiver requests under certain circumstances. Furthermore, by adopting a tiered approach that distinguishes between attorney-client communications and factual information underlying the misconduct, the DOJ is likely attempting to insulate its policy from attack on constitutional grounds.

IV. Crafting an Effective Corporate Legal Advice Privilege

It is evident that uncertainty in particular aspects of the corporate

115. *Upjohn Co.*, 449 U.S. at 395.
116. *Id.* at 396 (quoting Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).
117. McNulty, *supra* note 109, at ¶ IV.B.2.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. McNulty, *supra* note 109, at ¶ IV.B.2.
123. *Id.* (emphasis added).

privilege is not limited to the experience of the United Kingdom. Corporate clients doing business in the United States have experienced problems of their own. Many of the difficulties experienced by U.S. corporations, and foreign corporations in the United States, can serve as guidance for policy makers in the United Kingdom grappling with the task of defining the corporate legal advice privilege.

A. Common Justification

Although the corporate legal advice privilege and the corporate attorney-client privilege are at different stages in their development, they share a common foundation. Lord Scott, in his judgment for the House of Lords in *Three Rivers (No. 6)*, cited several cases within and without the United Kingdom discussing, in dicta, the justification for the privilege as applied to individual clients.[124] Scott noted that the common idea in all of the cited cases is that:

> It is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy-bodies or anyone else.[125]

As this statement indicates, the most fundamental policy shared by the legal advice privilege and the attorney-client privilege is that all clients should be able to seek advice from their lawyers without being subjected to scrutiny by others. If the legal advice privilege is to be given a scope that reflects the policy reasons that justify its presence in the law of the United Kingdom, it must be made available to communications between corporate clients and their lawyers.

Once it is conceded that corporate and individual clients are equally entitled to the advice of diligent counsel, there is no logical reason to restrict the privilege only to individual clients. As discussed *supra*, this premise was acknowledged by the U.S. Supreme Court in *Upjohn Co. v. United States* ("*Upjohn*"). In fact, it was one of the cases cited by Lord

124. *See Upjohn Co.*, 449 U.S. 383; Baker v Campbell (1983) 153 CLR 52; Jones v Smith [1999] 1 SCR 455; Commissioner of Inland Revenue v West-Walker [1954] NZLR 191; In R (on the application of Morgan Grenfell Ltd) v Special Commissioner of Income Tax [2003] AC 563; B v Auckland District Law Society [2003] 2 AC 736 at 757; and A M & S Europe Ltd v European Commission [1983] 1 All ER 705 at 913; Balabel v Air India [1988] Ch. 317.

125. *Three Rivers (No. 6)*, [2004] UKHL 48, [2005] A.C. 610, at ¶ 34 (H.L.) (appeal taken from Eng.).

Scott in support of the proposition above. Although acknowledging that *Upjohn* constitutes a valuable authority in a common law jurisdiction, Scott went on to comment, "whether (or to what extent) the principles there expressed should be accepted and applied in [the United Kingdom] is debatable."[126]

B. *Competing Policies Underlying Recognition of the Corporate Privilege*

In addition to recognizing that all clients are entitled to the advice of diligent counsel, other interests must be taken into account when evaluating the need for a corporate privilege, including: (1) fostering corporate self-policing and facilitating corporate compliance with the law; and (2) facilitating reasonable government enforcement.[127] The challenge is to accomplish these goals without sacrificing the core principles and protections of the legal advice privilege.[128] Recognition of the privilege in the corporate context can, however, serve to accomplish these important goals.

C. *Reconciling Competing Policies*

Clarity and consistency are the keys to creating a workable corporate legal advice privilege that benefits the interests of both corporate clients and government investigators. Clearly recognizing a corporate privilege, establishing its boundaries, and providing guidance on its consistent application would encourage corporations to create effective compliance programs, as well as allow corporate clients and their lawyers to interact in confidence. Additionally, clear recognition of the corporate privilege and its consistent application would foster corporate cooperation and minimize the expense of investigation.

1. Fostering Corporate Self-Policing and Facilitating Corporate Compliance with the Law

In the United Kingdom, corporate clients cannot be certain that any information they collect during internal investigations will be protected.[129] This may result in reluctance on the part of corporations to create comprehensive compliance programs, or to aggressively utilize them. Consistent application of a corporate privilege would provide incentive for corporations to create effective compliance programs and to

126. *Id.* ¶ 47.
127. Terwilliger & Lew, *supra* note 87, at 25.
128. *Id.*
129. PINSENT MASONS, *supra* note 46.

conduct comprehensive internal investigations.[130]

If corporate clients are unsure whether information shared with their lawyers will be subject to disclosure, they will be hesitant to aggressively police the behavior of their agents. On the other hand, if corporate clients are secure in the knowledge that privileged information will be protected, then they are more likely to create strong, reliable compliance programs. Such programs would be more effective in ferreting out misconduct, thereby facilitating corporate compliance with the law.

In crafting guidance for the application of a corporate privilege, the United Kingdom can learn from the experience of corporate clients in the United States. Historically, corporate clients in the United States have been uncertain whether they will be compelled to disclose the results of internal investigations. Once the government initiated an investigation, corporate clients were often faced with the difficult decision whether to assert the privilege and risk indictment or waive the privilege and turn over the results of internal investigations in exchange for leniency.[131] Furthermore, until the recent release of the McNulty Memo, the DOJ's policy of encouraging corporate cooperation through waiver requests was open-ended. Large corporations that did business in multiple federal districts were often subject to differing waiver request policies.[132] It has been argued that this inconsistency in application has chilled communications between corporate clients and their lawyers.[133]

Recognition of the corporate privilege in the United Kingdom, and clear guidance on its application, would avoid the problems experienced by corporate clients in the United States. This would create greater confidence by corporate clients that protected information will not be disclosed, and eliminate any disincentive to engage in aggressive self-policing activities. The net results would be a more responsible corporate culture, and increased compliance with the law.

2. Facilitating Reasonable Government Enforcement

Government investigators in the United Kingdom would also benefit from a corporate privilege that is clearly defined and consistently applied. It must be conceded at the outset that there is no reason to believe that corporate clients, as opposed to individual clients, will use the privilege as a device to "conceal wrongdoing or cloak advice on

130. Attorney-Client Privilege Protection Act of 2006, § 2(a)(4) (2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/attorneyclient_privilege_protection_act_12_6_06_hen06g74_xml.pdf (legislation never introduced).

131. *See* Silbert, *supra* note 92, at 1228.

132. Letter from Griffin B. Bell, et al., to Alberto Gonzalez, *supra* note 96, at 2.

133. *See generally* Cole, *supra* note 62.

evading the law."[134] Clearly recognizing the corporate privilege and establishing its boundaries would minimize confidentiality disputes, and foster cooperative relationships between government investigators and corporations under investigation.

If corporate clients were unsure whether information shared with their lawyers would be subject to disclosure, they would be hesitant to provide any assistance to government investigators. Investigators would be forced to expend significant resources to obtain the information they need to conduct a thorough investigation. On the other hand, if corporate clients were secure in the knowledge that privileged information would be protected, then they would be more likely to provide timely and thorough cooperation to government investigators.

Though the corporate attorney-client privilege is firmly rooted in the common law of the United States,[135] the DOJ's policy of allowing waiver requests has led to considerable revolt by corporations[136] and their attorneys.[137] Forcing corporate cooperation through compelled waiver has bred contention. It has also led corporate clients to fear the only way to limit their liability is to turn confidential information over to the investigators in exchange for leniency.

Consistent application of a corporate legal advice privilege would avoid the need to resort to compelled waivers. In those instances where misconduct is uncovered, investigators and corporations under investigation would know which information is protected and which information is subject to disclosure. Additionally, it would encourage timely and thorough cooperation, which would result in more effective, efficient, and inexpensive investigations.

V. Conclusion

The difficulties experienced by corporations in the United Kingdom serve as evidence of the need to develop a modern-day legal advice privilege that provides a workable basis from which lawyers and corporate clients can interact in confidence. If, as Lord Scott required in *Three Rivers (No.6)*, the legal advice privilege is to be given a scope that reflects the policy reasons that justify its presence in the law of the United Kingdom,[138] it must be made available to communications between corporate clients and their lawyers.

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134. Attorney-Client Privilege Protection Act of 2006, § 2(a)(9).

135. *See Upjohn Co.*, 449 U.S. 383 (1981).

136. *See* AM. CHEMISTRY COUNCIL, ET AL., *supra* note 84.

137. *See* ABA Task Force on Attorney-Client Privilege, *Recommendation 111*, *supra* note 90.

138. *Three Rivers (No. 6)*, [2004] UKHL 48, [2005] A.C. 610, at ¶ 35 (H.L.) (appeal taken from Eng.).

Justice is served only when all parties to litigation are represented by experienced and diligent counsel.[139] The corporate client is no less entitled to advice on what should prudently and sensibly be done than are individual clients. However, the nature of the corporate "person" requires that additional factors be taken into consideration when crafting a workable corporate privilege.

The twin policy goals of fostering corporate self-policing, thereby facilitating compliance with the law, and facilitating reasonable government enforcement can be accomplished without undermining the protections of the legal advice privilege. Clearly recognizing a corporate privilege, and establishing its boundaries would encourage corporations to create effective compliance programs, as well as allow corporate clients and their lawyers to interact in confidence. Additionally, consistent application of the privilege would foster corporate cooperation and minimize the expense of investigation. In this respect, the United Kingdom can learn important lessons from the frequently changing and often inconsistent application of the attorney-client privilege in the United States.

139. Attorney-Client Privilege Protection Act of 2006, § 2(a)(1).