



6-1-1999

Sanctofying Secrecy: The Mythology of the Corporate Attorney-Client Privilege

Elizabeth G. Thornburg

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Elizabeth G. Thornburg, *Sanctofying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 Notre Dame L. Rev. 157 (1993).

Available at: <http://scholarship.law.nd.edu/ndlr/vol69/iss2/5>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

ARTICLES

Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege

*Elizabeth G. Thornburg**

The attorney-client privilege is a well-established feature of the American legal system. One prominent scholar suggested that any proposal to abolish the privilege would arouse "such strenuous opposition from the Bar that [abolition] would be futile to attempt."¹ Nevertheless, the privilege is built on shifting sand. Over the years, supporters of the privilege have made varying claims justifying its existence; as one lost popularity, another rose to take its place.² Despite this changing history, current American beliefs about the purpose and effect of the attorney-client privilege have reached mythic proportions.³ These myths, in turn, shape debate about the proper scope of the privilege,⁴ exceptions to the privilege,⁵ and the very existence of the privilege. Furthermore, myths

* Associate Professor of Law, Southern Methodist University. B.A., College of William and Mary, J.D., Southern Methodist University.

1 Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 20 (1942). See also Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1062 (1978) ("[T]he issue concerning the attorney-client privilege is not whether it should exist, but precisely what its terms should be."); 24 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5476, at 144 (1986) ("In the current political climate it seems unlikely that any court will seriously entertain the question of whether a corporation ought to be considered 'the client' for purposes of applying the privilege to corporate communications.").

2 See, e.g., Hazard, *supra* note 1, at 1070-91 (asserting that the privilege's foundations are not as firm as Wigmore suggests).

3 A myth is defined as "an ill-founded belief held uncritically especially by an interested group." WEBSTER'S NEW COLLEGIATE DICTIONARY 762 (G. & C. Merriam Co. 7th ed. 1976). A myth involves an inherently conservative view of the world insofar as it reflects an existing ideology. "Myths are agents of stability and call for absolute assent . . . : A fair definition of myth is consolatory nonsense. It tells us how society says we must live, rather than teaching us how we might learn to live." Carolyn Heilbrun, *What Was Penelope Unweaving?*, in HAMLET'S MOTHER AND OTHER WOMEN 103, 110 (1990).

4 *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

5 See, e.g., George A. Davidson & William H. Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637 (1986); cf. Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1619-27 (1986) (arguing that analyzing the purposes

developed in the context of human clients have been transferred uncritically to corporate clients. Myths developed to protect trial testimony have been transferred just as uncritically to issues of discovery in civil cases. Now is the time for the power of these myths to come to an end.

There are three traditional kinds of myths about the purpose of the attorney-client privilege: (1) the privilege is necessary to encourage clients to fully and honestly confide in their lawyers; (2) the privilege is necessary to encourage lawyers to thoroughly advise and interview their clients; and (3) the privilege is necessary to protect the relationship between the lawyer and the client. There is also a traditional myth about the effect of the privilege: the privilege is virtually cost-free because it does not deprive the trier of fact of any relevant information.

Recently, the traditional mythology has been challenged by an aspiring replacement myth suggested by law and economics scholars. Having both purpose and effect components, this myth claims that the additional cost to opponents caused by the privilege motivates clients to communicate fully with their lawyers. Moreover, the privilege actually benefits the judicial system by discouraging perjury, because well-informed lawyers steer their clients away from baseless claims and defenses.⁶

This Article will examine both the traditional myths and their law and economics would-be replacements in the context of the corporate⁷ attorney-client privilege in civil⁸ litigation,⁹ and espe-

of privilege is not a good basis for determining waiver issues).

6 See generally Ronald J. Allen, et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359 (1990). For a discussion of the work product claims made by these theorists, see Ronald J. Allen, *Work Product Revisited: A Comment on Rethinking Work Product*, 78 VA. L. REV. 949 (1992); Elizabeth G. Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1545-50 (1991) and Elizabeth G. Thornburg, *Work Product Rejected: A Reply to Professor Allen*, 78 VA. L. REV. 957 (1992).

7 When I use the word corporation in this Article, I use David Luban's definition for "legal organization." I refer to an entity: (1) "[whose] 'control group'—the people who make its executive decisions—and the employees who carry out the control group's decisions are more-or-less distinct from each other, and (2) [whose] control group is small relative to the total number of people working for the organization." DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 217 (1988). Thus, a corporation that is functionally indistinguishable from the people involved is not within my definition of corporation, while a large, bureaucratic organization, such as a business, a government, or a school, is treated as a corporation for purposes of this Article. Cf. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 123 cmt. c (Tentative Draft No. 2, 1989) [hereinafter RESTATEMENT].

8 The Article does not consider the corporate attorney-client privilege in the context of criminal cases. See, e.g., LUBAN, *supra* note 7, at 58-66 (distinguishing between the

cially in discovery. This examination will show that none of the purpose myths are valid when considered in light of the realities of modern corporate life and modern litigation. The article also examines the effect myths, and argues that far from being harmless or benign, the privilege actually does great harm to the truth-seeking function of litigation and imposes tremendous transaction costs on the litigants and on the judicial system as a whole.

When the myths fail, what remains? Nothing but an unnecessary protection whose costs outweigh its benefits. The remainder of the article considers whether limited changes in the scope of the privilege, or its exceptions, could solve this problem and save the privilege, while decreasing its harmful effects. The article concludes that such modifications would be inadequate. Only elimination of the corporate attorney-client privilege can free the court system from the distortion and expense that was created by expanding the privilege to include corporate secrets.¹⁰

I. THE TRADITIONAL MYTHS

A. *History: A Parade of Purpose Theories*

Since the current theories about the need for an attorney-client privilege are held with almost religious conviction, one would think they would have remained constant over time. The truth, however, is that while the privilege has existed for hundreds of years, the explanations offered to justify its existence have changed. When one reason has faded, the legal profession has offered up another to fill the gap.

criminal and civil paradigms).

9 The desirability of the privilege in non-litigation contexts is also beyond the scope of this article. The issue addressed is whether the privilege should protect information from an opponent during litigation, not whether attorneys should have a general duty to "blow the whistle" on client impropriety. *Cf. id.* at 226-34. While many of the arguments made here are also true of the attorney-client privilege for individuals in civil litigation, the article explicitly addresses only the corporate client.

10 By choosing to extend the privilege to corporations, the courts have made a decision that is political as well as procedural. "[W]hen the state creates and supports corporate 'persons,' it is the state itself which thereby also creates a form of political power. It is action by the state which grants that power to the limited number of natural persons who happen to have effective control over corporate structures." William Patton & Randall Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494, 501-502. See also SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 19 (1982) ("Conflicts over secrecy . . . are conflicts over power; the power that comes through controlling the flow of information.").

The original notions supporting the attorney-client privilege were not based on assumptions about the effect of the privilege. Rather, they were principles derived from the nature of the relationship between the attorney and the client. The roots of the attorney-client privilege can be traced to a Roman law concept of loyalty: advocates were incompetent to testify against their clients because such testimony would involve an immoral breach of duty, and such an immoral person was irrebuttably presumed to be unworthy of belief.¹¹ Thus the attorney's testimony was not prohibited in order to promote the client's candor, but because of the nature of the underlying relationship.

In Anglo-American jurisprudence, the privilege emerged along with the beginning of compulsory process in Elizabethan England. This time the privilege was based on claims of the lawyer's honor as a gentleman.¹² This privilege was not restricted to lawyers, and until the mid-1700's English courts granted a privilege to "gentlemen" from testifying if such testimony would violate a promise of secrecy.¹³ Again, this explanation for the attorney-client privilege was not based on the desire to accomplish some other goal, but on the client's interest in secrecy and the damage to the lawyer's honor should a vow of secrecy be broken.

By the time of the American Revolution, however, the oath of honor had been rejected as a basis for evidentiary privilege.¹⁴ In order for the privilege to survive, a new theory was required. According to Wigmore, the utilitarian argument gained popularity at this time and the lawyer, rather than the client, became the owner of the privilege.¹⁵ This new argument provided that the privilege existed neither to protect the lawyer's honor nor the client's secrets, but to encourage the client to speak freely and completely

11 Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 488-89 (1928).

12 Hazard, *supra* note 1, at 1070-71.

13 9 SIR WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 201-02 (7th ed. 1956); 8 JOHN HENRY WIGMORE, EVIDENCE § 2286, at 531 (McNaughton rev. ed. 1961). The privilege protecting against attorney testimony was "congenial with and parallel to the law, which prevailed in England until the mid-nineteenth century, that made parties to litigation themselves incompetent to testify, whether called as witnesses in their own behalf or by their adversaries." RESTATEMENT, *supra* note 7, at 74-75.

14 Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 217 (1989) (citing Trial of the Duchess of Kingston, 20 How. St. Tr. 355, 586, 589 (1776), and Trial of James Hill, 20 How. St. Tr. 1317, 1362-63 (1777)).

15 WIGMORE, *supra* note 13, at §§ 2290-91.

with her lawyer.¹⁶ Today, it is this theory on which lawyers, judges, and commentators primarily rely in justifying the existence of the corporate attorney-client privilege.

B. Purpose Myths

1. The Utilitarian Myths

Most purpose myths supporting the attorney-client privilege today are utilitarian ones.¹⁷ In other words, rather than claiming that the privilege is intrinsically good, these myths claim that the privilege furthers some other social policy. Also referred to as "instrumental" or "pragmatic" arguments,¹⁸ a utilitarian argument takes the form that "X is good because it will bring about Y."¹⁹ To be true, therefore, the utilitarian argument must convince the reader of two things: a moral judgment and a factual assumption. One must be convinced both that Y is good (the moral judgment) and that X will bring it about (the factual assumption) before the utilitarian argument can be convincing.²⁰ In the case of the attorney-client privilege myths, however, the moral judgment is often unstated and the factual assumption is mythic rather than factual.

(a) *Encouraging the Client.*—The most frequently invoked myth supporting attorney-client privilege posits that the privilege is needed to promote candor in client communications to her lawyer. This version of the myth often fails to articulate its entire message by failing to state why candor in client communications is desirable. A fuller version of the argument goes like this:

1. In modern America, citizens must use lawyers to determine the legality of their conduct and resolve disputes, and the lawyers must be able to represent clients effectively.
2. Attorneys can be effective only if they have all the relevant facts at their disposal.
3. Clients will not employ lawyers, or will not supply them with adequate information, unless all aspects of the attorney-client relationship remain secret.²¹

16 *Id.*

17 *See, e.g.,* RESTATEMENT, *supra* note 7, § 118 cmt. c; *id.* § 123 cmt. b.

18 23 WRIGHT & GRAHAM, *supra* note 1, § 5422, at 671.

19 *Id.* § 5422.1, at 214 (Supp. 1993).

20 *Id.*

21 Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 358 (1989).

All of these statements raise questions. The dispute resolution part of the first statement assumes the benefits of the adversarial system and the need for lawyers in that system.²² Many now believe that a less adversarial system would better resolve at least certain disputes.²³ The second statement undermines rather than supports the privilege in litigation, since it means that *all* attorneys, and not just the client's attorney, need access to all of the facts. But it is the third assumption on which this section of this article will focus, the assumption that corporate clients would not be completely honest with their lawyers without the benefit of the attorney-client privilege.²⁴

(i) *Empirical Research.*—This assumption—that clients need the privilege to encourage them to communicate—purports to be an empirical one. The modest amount of empirical data available, however, is equivocal at best and casts doubt on the truth of this assertion.²⁵ Taken together, these studies question the following assumptions: (1) that clients know about the privilege and can, therefore, be influenced by it; (2) that clients are influenced by

22 This is hardly indisputable. See, e.g., MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980) [hereinafter FRANKEL, *PARTISAN JUSTICE*]; DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); Edmund Byrne, *The Adversary System: Who Needs It?*, in *ETHICS AND THE LEGAL PROFESSION* 204 (Michael Davis & Frederick A. Elliston eds., 1986); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) [hereinafter Frankel, *The Search for Truth*]; John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. U. L. REV. 729, 738-40 (1906); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29. For purposes of this article, however, I argue that the privilege is undesirable even within the confines of our present adversary structure.

23 See, e.g., Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984).

24 See RESTATEMENT, *supra* note 7, § 118 cmt. c, at 75-76 (this assumption is the most controversial).

25 See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1474-75 (1985) (“[N]o solid empirical data exists to support the estimates of either critics or proponents as to either the costs or the benefits of privileges. In short, legal decision makers face a perhaps unavoidable empirical indeterminacy.”); 23 WRIGHT & GRAHAM, *supra* note 1, § 5422.1, at 214 (Supp. 1993) (Empirical assumptions are both incomplete and unprovable so that assignment of the burden of proof regarding the effects of privilege turns out to be the determinative factor in who gets a privilege. This tends to protect the long-established privileges and prevent the creation of new ones.)

the privilege in making disclosures; and (3) that clients, even with the privilege, are honest with their lawyers.

The first important empirical study appeared in the *Yale Law Journal* in 1962.²⁶ Its results showed widespread misinformation concerning privileges, especially the attorney-client privilege.²⁷ It also showed that lawyers were much more convinced than laypeople that the privilege encourages full disclosure.²⁸ It appeared that laypeople, in deciding what to disclose, were more influenced by the nature of the profession and the services to be provided, than by the existence of a privilege. For example, laypeople expressed more willingness to speak with divorce lawyers, even without the protection of a privilege, than with marriage counselors.²⁹ The Yale study concluded that while survey participants preferred nondisclosure rules, a substantial majority of laypeople would continue to use lawyers even if secrecy were limited.³⁰ This leaves open the possibility of a marginal increase in candor based on the privilege, but it does not support a belief that the privilege is a major factor in a client's decision to disclose information.

Another privilege study was conducted in Tompkins County, Iowa, in the 1980's. Its author concluded that clients routinely misunderstand or are not aware of the scope of the privilege,³¹ and thus base their decisions about disclosure on the need for assistance, rather than on protection from disclosure.³² Further, 11.3 percent of those clients surveyed admitted to withholding information from their attorneys even under the current confidentiality rules,³³ supporting an inference that privilege rules are not a determinative factor for client disclosure. The survey's author

26 Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

27 *Id.* at 1236.

28 *Id.* at 1232.

29 Yale Study reported in Zacharias, *supra* note 21, at 378.

30 *Id.* These results are consistent with an empirical study of the psychotherapist-patient privilege published in 1982. This survey found that 93% of the laypeople would have sought help for serious emotional problems regardless of the non-existence of a privilege, and that it was the nature of the patient's relationship with the therapist, and not the parameters of the privilege, that determined what was disclosed and what was not. Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 924-26 (1982).

31 Zacharias, *supra* note 21, at 382-83.

32 *Id.* at 384-85.

33 *Id.* at 386.

therefore concluded that the "critics of strict confidentiality are right to demand further empirical evaluation of the rules."³⁴

Two other studies focused on the privilege in the corporate context. A study performed by students at the University of Iowa Law School supported the Yale study's conclusion that the privilege was of more concern to lawyers than to clients. For example, while 69.3 percent of corporate attorneys reported that at some time they had raised confidentiality issues when interviewing corporate employees, employees showed concern over whether their communications would remain confidential only 28.8 percent of the time, with no statistically significant association between the attorney's raising the issue and the employee's concern.³⁵ The issue of confidentiality was thought most likely to be raised when litigation was likely or when the communication would most probably be disclosed if later sought through discovery.³⁶ This could be because absent litigation, no one asks for the information and compelled disclosure becomes a non issue. It could also be because confidentiality is raised not to encourage communication, but to bolster a later claim of privilege from discovery.

The most recent empirical study of corporate attorney-client privilege was completed in New York City in the late 1980's. The author surveyed 182 corporate attorneys, corporate executives, and federal judges regarding their attitudes and practices involving attorney-client privilege.³⁷ The lawyers surveyed believed that upper management was aware of the privilege;³⁸ that middle management was less aware of the privilege;³⁹ and that below the level of middle management, only a few employees believed their communications to be privileged or even considered the privilege.⁴⁰

34 *Id.* at 356.

35 Empirical Research Project, *Corporate Legal Ethics - An Empirical Study: The Model Rules, The Code of Professional Responsibility, and Counsel's Continuing Struggle Between Theory and Practice*, 8 J. CORP. L. 601, 622 (1983).

36 *Id.* at 623.

37 Alexander, *supra* note 14.

38 *Id.* at 235. Seventy-four percent of the lawyers thought that all, or nearly all, members of upper management believed that their communications with counsel were covered by the privilege, and another 15.17% said that a majority of upper management held this belief. *Id.*

39 *Id.* at 236. Only 40.2% of the lawyers were confident that middle managers knew of the privilege on a widespread basis, with 25.5% of lawyers being able to say only that awareness decreases when descending the corporate ladder. *Id.*

40 *Id.* at 236-37. "24.5% of the lawyers thought that 'only a few' employees believe privilege applies to their communications, 20.6% thought that knowledge at this level was less common than at the middle management level, and 23.5% opined that lower level

On the candor issue, the results of the survey were ambiguous. On the one hand, two-thirds of the lawyers said that they had explicitly raised privilege issues with clients to encourage candor, at least once during the preceding five years.⁴¹ This supports earlier studies' findings that lawyers believe the privilege to be important. On the other hand, seventy percent of the lawyers also indicated that their purpose often was *solely* to ensure nondiscovery in litigation.

When clients' rather than lawyers' attitudes were studied, the New York survey found that the privilege is not the primary reason that corporate clients consult their lawyers. Business considerations and the corporate employee's relationship with the particular attorney may alone suffice to assure open communications.⁴² For example, when questioned about the effect of a privilege that was qualified, rather than absolute, 69.2 percent of the business executives interviewed stated that they would seek legal advice just as often. One of the executives noted: "The benefits outweigh the risks. You have to run a business and the attorney-client privilege is only one of many factors to worry about."⁴³ Once again, then, this study not only provides some evidence for a marginal increase in communication, but also some evidence that the communications would take place anyway. It shows that lawyers have a stronger belief in the privilege than clients,⁴⁴ and that those lawyers often seek the privilege for tactical litigation purposes, rather than to encourage client communication.

All of these surveys share a common, but probably inevitable, methodological flaw. All are based on questions asked of lawyers and their clients or potential clients: people with a personal stake in the preservation of the privilege. As one survey's author forthrightly noted, "The findings . . . do not directly measure the effect of the corporate attorney-client privilege; they measure only the respondents' feelings about the matter. One may reasonably suspect, therefore, that the role of the privilege as an incentive to candor was exaggerated by the participants."⁴⁵

employees simply 'don't think about privilege unless a lawyer brings it up.'" *Id.*

41 *Id.* at 243 (64 of 95 lawyers).

42 *Id.* at 263-64.

43 *Id.* at 370.

44 It also showed that house counsel were significantly less apt to believe that the privilege was needed for candor than were outside counsel. *Id.* at 276-82.

45 *Id.* at 263. See also *id.* at 197 ("I harbored no illusions that the type of information that I was likely to obtain in interviews of corporate lawyers and executives was the

Nor is a more reliable study feasible. Observing actual attorney-client communications would waive the privilege.⁴⁶ All United States court systems use the privilege in one form or another, so we cannot study states with and without the privilege, and foreign jurisdictions are so dissimilar in other ways that comparisons would be suspect at best.⁴⁷ Despite valiant attempts at empirical research, then, we are left where we began, with a myth that may or may not stand up to critical scrutiny.⁴⁸

(ii) *Facing Reality: The Impact of Uncertainty.*—Most versions of the utilitarian candor myth envision attorney-client communications as existing in some sort of magically protected zone in which lawyer and client can speak freely, secure in the knowledge that those communications will be repeated only when helpful to the client and only with the client's permission. This picture is no doubt comforting to lawyers and clients alike, but it bears only the vaguest resemblance to reality. For the candor myth to be true, however, the client needs to know, at the very moment she must decide whether to be candid, that the privilege will protect her. The theory, after all, holds that it is the expectation of the privilege, and not some court ruling upholding the privilege in the future, that causes the client to be fully honest. In real life, the existence of the privilege in future litigation is sufficiently uncertain at the time a communication must be made (or not), that the corporate employee must simply decide to reveal what she thinks best and take her chances, with the possibility of privilege playing at most a marginal role.⁴⁹

ideal form of empirical data about the corporate privilege As a consequence, I doubted that their answers to my questions would debunk the fundamental empirical propositions upon which the corporate privilege is based.") Cf. Zacharias, *supra* note 21, at 361 ("The extent to which the profession's personal or economic interests have influenced the scope of confidentiality rules can never be known. Yet their mere existence leads one to wonder whether the attorney-drafters of the strict codes—perhaps even unintentionally—have overemphasized the systemic justifications for confidentiality or undervalued the social benefits of less restrictive rules.").

46 See Danet, Hoffman & Kermish, *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 LAW & SOC'Y REV. 905, 912-13 (1980) (researchers' attempts to observe lawyer-client conversations failed because of lawyers' refusals to risk loss of privilege).

47 Alexander, *supra* note 14, at 199.

48 Cf. Marcus, *supra* note 5, at 1619 ("The first problem with the utilitarian analysis is that it rests on a shaky assumption. There has never been empirical evidence that the privilege's existence actually promotes disclosure by clients, and there are intuitive reasons for doubting that it often does so.").

49 Cf. Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Sug-*

The *ex ante* uncertainty of the privilege has two primary causes. First, the scope of the privilege is unclear as applied within jurisdictions and even more unclear in multi-state transactions. Second, numerous waiver doctrines and exceptions make it possible that discovery will be allowed even when the privilege would otherwise protect the communications.

In the case of a human client, the definition of attorney-client privilege is fairly clear. Wigmore's definition is still typical:

(1) Where 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.⁵⁰

Even with humans, the *application* of this definition can be far less clear. For example, courts have spent pages discussing when a client seeks legal advice [protected] rather than business advice [unprotected] and when the communications are made in confidence [protected] and when they are not [unprotected]. These issues also arise in the context of the corporate client, and here they are even more troublesome. Additionally, in the corporate setting they are joined by another issue: since the corporation is a fictitious entity employing human agents, it is more difficult to determine who is a "representative of the client" for purposes of generating protected attorney-client communications.

It is hornbook law that purely business communications between attorneys and their clients are not privileged.⁵¹ Drawing a line between legal advice and business advice is difficult even in the context of the individual client. In the case of the corporate client, and especially the corporate client with whom the attorney has an ongoing relationship, the problem is immensely more complicated. Both the content of the lawyer-client dialogue and the advice requested will often include both business matters and legal matters.⁵² Courts have struggled to separate the two, but with no

gested Approach, 12 HOFSTRA L. REV. 279, 281 (1984) ("The less certain the scope of the privilege, the less reliance clients can place upon it.").

⁵⁰ WIGMORE, *supra* note 13, § 2292, at 554.

⁵¹ CHARLES TILFORD MCCORMICK, EVIDENCE § 88, at 124 (J. Strong 4th ed. 1992); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(a)(1), at 503-23 to -25 (1993). See also *United States v. Huberts*, 637 F.2d 630, 640 (9th Cir. 1980), *cert. denied*, 451 U.S. 975 (1981).

⁵² In Professor Alexander's survey, 89.2% of the lawyers said that they would charac-

predictable pattern. Most courts resolve the issue of mixed communications by deciding whether legal or business motives "predominate."⁵³ This is hardly a bright-line test.

The problem is especially acute when a client communicates business information to counsel without specifically requesting legal advice. Some courts have denied the applicability of a privilege to a business memorandum sent by one corporate officer to another with a copy to counsel, if the communication is found to be merely part of a business transaction.⁵⁴ Conversely, other courts have characterized sending business correspondence to lawyers as an implied request for legal advice and have found the communication to be privileged.⁵⁵ Faced with this uncertainty, a corporate executive cannot confidently predict when she communicates with the lawyer whether or not that communication will be privileged. It seems unlikely, therefore, that this will encourage candor in those communications.

Confidentiality is another issue that generally clouds attorney-client privilege. With human clients, an eavesdropper can destroy the privilege.⁵⁶ With corporate clients, problems arise both as to who can be parties to the original communication,⁵⁷ and who has access to documentary communications after they are created. Again, courts are split and results are unpredictable on the question of what precautions, if any, a corporation must take to justify a finding of confidentiality.⁵⁸

terize some of the advice they give to their corporate clients as business advice, and 78.8% of the corporate executives said that they wanted business advice from their lawyers. Alexander, *supra* note 14, at 339-40. Further, 72.5% of the attorneys reported that corporate employees frequently sent them copies of business correspondence without specifically requesting legal advice. Only 8.8% of the lawyers surveyed had never received such communication. Also, 42.3% of the corporate executives stated that company employees routinely sent copies of business correspondence to in-house counsel without a specific request for legal advice. *Id.* at 343.

53 See, e.g., *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 34 (N.D. Ill. 1980); *Barr Marine Prods. Co. v. Borg-Warner Corp.*, 84 F.R.D. 631, 635 (E.D. Pa. 1979).

54 See, e.g., *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403-04 (8th Cir. 1987).

55 See, e.g., *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 144 (D. Del. 1977); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 37 (D. Md. 1974).

56 See WIGMORE, *supra* note 13, § 2326, at 633-34 (traditional view—eavesdropper can testify to privileged conversation); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 6.3.7, at 264-65 (1986) (eavesdropper can testify if client and lawyer failed to take reasonable precautions to assure privacy).

57 See *infra* text accompanying notes 62-63 for a discussion of who can be a client representative in the corporate context.

58 See, e.g., Dennis J. Block & Sanford F. Remz, *After 'Upjohn': The Uncertain Confidentiality of Corporate Internal Investigative Files*, in *CORPORATE DISCLOSURE AND ATTORNEY-CLI-*

Jurisdictions following a control-group approach to corporate privilege generally hold that disclosure to anyone outside that group waives the privilege. Thus, all of the problems about who is in the control group apply not only to the initial communication, but also to later distribution and disclosure.⁵⁹

In jurisdictions using a subject matter test, the matter is even less clear. Some courts find sufficient confidentiality if access is restricted to employees who "need to know,"⁶⁰ an amorphous standard. Even then, it is also unclear whether it is enough to show that unnecessary employees did not actually see the document, or whether the corporation must show that the privileged documents were segregated so that unnecessary employees could not gain access to the privileged documents.⁶¹ This uncertainty about confidentiality, then, adds another layer of unpredictability, making it less likely that the potential existence of a privilege can serve as a significant incentive to corporate employee-attorney communications.

One of the most fundamental uncertainties surrounding the privilege arises because only certain corporate employees can be a "client representative" and thereby generate privileged communications. There are two predominate approaches to the issue in American courts, although each is subject to local variations. One approach is an anthropomorphic kind of analysis, generally referred to as the "control group" test. This approach analogizes the corporation to the human client, and the courts attempt to decide which employees are the functional equivalent of the human brain. Thus, only employees high enough in the corporate hierarchy to have authority to seek legal advice and to decide whether to use it on behalf of the corporation fall within the control group. The identity of these people may be clear at the very highest levels of corporate management; however the uncertainty increases as one descends the corporate ladder. Lower-level employ-

ENT PRIVILEGE 1984, at 73 (PLI Law and Practice Course Handbook Series No. 450, 1984) ("[T]here are few guidelines of predictable applicability to assist counsel and the corporation in protecting the confidentiality of investigative files.")

59 See, e.g., *Natta v. Hogan*, 392 F.2d 686, 693 (10th Cir. 1968); *Jarvis, Inc. v. AT&T*, 84 F.R.D. 286, 292 (D. Colo. 1979).

60 See *Diversified Indus. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc).

61 Some courts have viewed the failure to implement specialized filing systems as a lack of confidentiality. See, e.g., *Hardy v. New York News*, 114 F.R.D. 633, 644 (S.D.N.Y. 1987); *In re Grand Jury Proceedings Involving Berkley & Co.*, 466 F. Supp. 863, 870 (D. Minn. 1979); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954).

ees are clearly not within the control group, so the attorney-client privilege is not available to encourage their communications with counsel. The Supreme Court rejected the control group test for federal courts, but many state courts continue to use a control group approach.⁶²

The other predominant approach to identifying client representatives is generally referred to as a "subject matter" test. In this test, the court looks at all the circumstances surrounding a communication, including the identity of the persons who instigated the communications and the lawyer's need to communicate with the particular employees in order to get the needed information. Employees outside the control group can generate privileged communications under this approach, but its parameters are far from clear.⁶³

To add to the confusion, the corporate employee cannot predict in advance the forum in which the issue of privilege might be litigated. Many corporate transactions cross state lines or affect people living in different states. If those states have varying privilege rules, a communication might be privileged in one jurisdiction, but not in another. The privileged status of the communication then becomes an unpredictable result of choice of forum and choice of law rules.⁶⁴ Even in transactions confined to one state, the choice of state or federal forum can change the privilege

62 The federal case most often cited for applying a control group test is *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom.* *General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). For state cases using a control group approach, see, e.g., *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993); *Langdon v. Champion*, 752 P.2d 999 (Alaska 1988); *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982).

63 The most-cited federal case applying a subject matter test is *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608-11 (8th Cir. 1977) (en banc).

64 Under traditional choice of law rules, questions of privilege were generally considered procedural and the law of the forum applied. *RESTATEMENT OF CONFLICT OF LAWS* § 597 (1934). If suit is filed in a state following this approach, the state would apply its own attorney-client privilege law. More modern choice of law rules may be slanted toward disclosure. The *RESTATEMENT (SECOND) OF CONFLICT OF LAWS*, for example, analyzes situations in which a communication is privileged in one jurisdiction but not in another. The result under the Restatement's approach in these situations is generally a finding of no privilege unless there is some strong reason to apply the law of the state that would privilege the communication. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 139 (Supp. 1989). A jurisdiction using interest analysis would try to determine which states had an interest in applying their privilege rules, often with unpredictable results. In either case, the corporate employee or corporate attorney, deciding whether to disclose, will not be able to determine what choice of law rules apply, much less the effect of their application, until after suit is filed.

rules. Since the state court may use a control group test and the federal court a subject matter test, the employee contemplating candor will not be able to predict which will ultimately apply. Even if all of these matters could be determined at the time a communication is made, later events, also unpredictable, can result in a loss of the privilege. For example, privileged communications may be inadvertently revealed to opposing counsel in litigation, resulting in loss of the privilege.⁶⁵ In addition, if a party is held to have placed a matter "in issue," that party may have waived its privilege as to communications on that subject.⁶⁶ There is also the chance that a court may find that the communication was made in pursuance of a crime or fraud, thus voiding the privilege.⁶⁷ If a litigation opponent seeks sanctions for bad faith pleading under Rule 11, privileged communications may have to be revealed in order to justify the corporation's litigation posture and avoid sanctions.⁶⁸ Each of these possibilities adds an additional layer of uncertainty, making it less and less likely that a rational corporate employee can rely on the attorney client privilege to provide secrecy and encourage candor.

(iii) *Facing Reality: Limited Protection.*—In addition to uncertainty in the creation and maintenance of the corporate attorney-client privilege, there exists another reason to disbelieve the candor myth. Remember that the attorney-client privilege does not (at least in theory) protect the litigant from supplying relevant

65 See, e.g., *Granada Corp. v. Honorable First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992). Litigation counsel may also waive the privilege by failing to assert it in a timely manner, or by using privileged documents in preparing witnesses to testify. See, e.g., *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987) (waiver of right to claim privilege because objection untimely); *City of Denison v. Grisham*, 716 S.W.2d 121 (Tex. Ct. App. 1986) (use of writing to refresh memory of witness while testifying on deposition waives privilege).

66 See generally Marcus, *supra* note 5; Elizabeth G. Thornburg, *Attorney-Client Privilege: Issue-Related Waivers*, 50 J. AIR L. & COM. 1039 (1985).

67 See, e.g., MODEL CODE OF EVIDENCE Rule 212 (1942); UNIF. R. EVID. 26(2)(a), both quoted in 24 WRIGHT & GRAHAM, *supra* note 1, § 5471 nn. 35 & 37. The issue, as usual, is more difficult in the corporate setting. It is unclear whose knowledge is relevant when the crime or fraud exception is invoked against a corporation. See *Duttle v. Bandler & Kass*, 127 F.R.D. 46, 53 (S.D.N.Y. 1989) (showing that corporate officials aware of fraudulent nature of transactions is adequate); *Leybold-Heraeus Tech. v. Midwest Instrument Co.*, 118 F.R.D. 609, 615 (D. Wis. 1987) (intent can be inferred from acts of any corporate employee).

68 Cf. Thornburg, *Rethinking Work Product*, *supra* note 6, at 1570-71 (discussing loss of work product immunity through Rule 11 procedures).

facts to its opponent; the privilege protects only the communication and not the underlying information. If a corporate employee discloses harmful information to the lawyer, and the corporation's opponent seeks that information by interrogatory or deposition, the information must be disclosed.⁶⁹ Thus, the attorney-client privilege cannot provide an incentive for the employee to make complete disclosures to the attorney, because the information disclosed cannot be guaranteed protection.

Consider an example: Smith, an employee of XYZ Corporation, writes a memo to XYZ's lawyer. The memo says, "I am in charge of testing our new widget. The widget design is defective and it will occasionally blow up and harm consumers. I informed my supervisor and he told me to mind my own business. I'm afraid someone will be hurt and XYZ will be sued. What should I do?" In later litigation arising out of an exploding widget, the plaintiff's lawyer may not be able to use a document production request to get this document. If Smith can be treated as a "representative of the client" and if this is considered a request for legal rather than business advice, and if the memo has been kept sufficiently confidential, the memo is likely to be privileged. However, the information contained in the memo may not be protected. If the plaintiff deposes Smith and asks, "Did you know there were problems with the widgets?" Smith will have to answer the question. If the plaintiff sends an interrogatory asking whether any XYZ employees believed that the widget was defective, XYZ would probably have to answer the question.⁷⁰

The attorney is lying if she promises the client that the privilege guarantees secrecy. Although the privilege will undoubtedly make discovery of the underlying information more difficult and expensive, it creates no privilege for the information itself and if asked the right question, the lawyer will have to disclose the information.

69 Often, of course, the adversary may not be able to ask the question that unlocks the harmful information or learn the identity of the employee with the information. In that case, the attorney-client privilege may operate in fact to conceal information from the opponent and from the trier of fact, although it is not supposed to operate that way in theory. See *infra* Part I(C).

70 Some litigants might still claim attorney-client privilege if the corporate management's belief was acquired only through information filtered through the corporate lawyers. See 24 WRIGHT & GRAHAM, *supra* note 1, § 476.

(iv) *Facing Reality: Not the Employee's Privilege.*—The myth of encouraging candor faces another obstacle in the case of corporate employees: the privilege does not belong to those employees. It is very clear that in the corporate setting it is the entity—the corporation—that is the lawyer's client and not the individual employees of the corporation.⁷¹ Therefore, any confidentiality inherent in the employee-lawyer communication will last only as long as it is in the corporation's interest.

Even without litigation, the lawyer can report the employee's communication to the employee's superiors.⁷² Based on that information, the corporation could choose to punish the employee, fire the employee, or sue the employee for damages.⁷³ If the employee has confessed to violating government regulations, the corporation could choose to turn the employee over to the authorities in return for more favorable treatment for the corporation.⁷⁴

During litigation, the corporation has the right to waive the privilege, even over the objection of the individual whose communication is in issue,⁷⁵ and even if disclosure of the communication hurts that employee. This is true even for employees who are high in the corporate hierarchy:

[E]ven though the officers might have relied upon the privilege in communicating with counsel, the corporation may waive the privilege. If some officers or directors are suspected of wrongdoing, they might be disqualified from participation in the decision-making concerning any investigation into their conduct. Thus, the privilege might be waived without their participation.⁷⁶

71 John William Gergacz, *Attorney-Corporate Client Privilege*, 37 BUS. LAW. 461, 475 (Jan. 1982).

72 See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1983) [hereinafter MODEL RULES]; ABA Comm. on Professional Ethics and Grievances, Formal Op. 202 (1940).

73 Saltzburg, *supra* note 49, at 305 n.128. See, e.g., *Admiral Ins. Co. v. District Court*, 881 F.2d 1486, 1492-93 (9th Cir. 1989) (corporate executive made scapegoat and fired).

74 Saltzburg, *supra* note 49, at 305; *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. Ct. App. 1991) (after telling employee that they were his attorneys as well as the corporation's, lawyers turned employee's statement over to prosecutor).

75 Gergacz, *supra* note 71, at 475 n.60. See also *In re Bevill*, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 124-25 (3d Cir. 1986); *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986); *United States v. Keplinger*, 776 F.2d 678, 699-701 (7th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986); *Odmark v. Westside Bancorporation, Inc.*, 636 F. Supp. 552, 556 (W.D. Wash. 1986).

76 Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and*

Although corporate officials might feel confident that the corporation would not abandon them, this confidence could be misplaced. The corporation may choose its own well-being over an employee's. Changes may also occur. A subsequent owner, management team, or board of directors could choose to waive the privilege. Additionally, if the corporation goes into bankruptcy, the trustee may waive the privilege even for management's pre-bankruptcy communications with counsel.⁷⁷ Finally, in shareholder litigation, the shareholders may be allowed to discover the communications, even over the objections of the corporation's management.⁷⁸

For the individual employees, then, the privilege is an illusion. The employee's interest is protected only by the corporation's grace, not by the attorney-client privilege. Some commentators have therefore suggested that corporate counsel should actually warn employees about the limits of the protection, and honesty would seem to require this kind of accurate information, rather than a misleading promise of privilege.⁷⁹ Once again, a truthful picture about the limits of the corporate attorney-client privilege would not generate much candor.

(v) *Facing Reality: Other Incentives for Candor.*—Since the protection provided by the corporate attorney-client privilege is weak, we must look elsewhere for the corporate employee's motivation to talk to the lawyer. Life in a modern bureaucratic organization provides those motives. First, the organization has methods other than privilege claims for compelling employee cooperation. Second, the corporation has sufficient motivation to use its power of compulsion: (1) to get general legal advice in order to determine the legality and potential impact of proposed conduct; (2) to get legal advice concerning the legality and potential impact of past conduct; and (3) to help its attorney during litigation. This Article focuses on the desirability of the privilege during litigation. However, because the absence of a privilege during litigation

Similar Cases: Garner Revisited, 12 HOFSTRA L. REV. 817, 835 (1984).

⁷⁷ *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985).

⁷⁸ See, e.g., *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), cert. denied sub nom. *Garner v. First Am. Life Ins. Co.*, 401 U.S. 974 (1971).

⁷⁹ See, e.g., Samuel Fedders, *Corporate Criminal Responsibility—Conducting an Internal Investigation*, in 3 CRIMINAL DEFENSE TECHNIQUES ch. 62, at 62-52 n.33 & 62-54 to 62-57 (Matthew Bender ed. 1979); Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits of Confidentiality*, 39 CATH. U. L. REV. 441 (1990).

could, in theory, affect prelitigation communications, those situations are discussed as well.

A corporation does not need the attorney-client privilege to encourage employees to talk.⁸⁰ Employees depend on the corporation for their jobs and may feel great personal loyalty to their employer. Even if they do not, they will suffer grave consequences if they refuse to cooperate in an investigation, or be honest with counsel.⁸¹ A corporate employee who refuses to confide in the corporation's attorney at his employer's request risks disapproval, demotion, and discharge.⁸²

The corporation, in turn, has adequate incentives to cause employees to confide in the corporate lawyers. If the corporation needs legal advice (and it is only here that a privilege exists), it needs reliable legal advice. The corporation can only get that advice if the employees tell the attorney both helpful and harmful information.⁸³ Any legal advice based on a partial picture of relevant facts, and especially legal advice based only on "good" facts, could be extremely unreliable. A rational corporation, then, needs to risk the candor to secure the needed advice.⁸⁴

In the area of preconduct advice, proponents of the privilege argue that a privilege is necessary to promote lawful corporate conduct. The corporation, so the argument goes, will consult the lawyer, and if the proposed conduct is illegal, the lawyer will advise against the conduct and the corporation will behave. This theory holds that without a privilege the corporation would forge blindly ahead, without advice, and risk breaking the law. This argument contains several flaws. First, its policy basis is question-

80 And, as noted above, the privilege can provide only limited comfort to the individual employees. See *supra* text accompanying notes 71-79.

81 See Alexander, *supra* note 14, at 276-77 (house counsel report that employees would be candid without the privilege and would be fired if not honest with counsel); *In re Crazy Eddie Sec. Litig.*, 131 F.R.D. 374, 377 (E.D.N.Y. 1990) (lower level corporate employees make communications to attorney out of fear for their jobs).

82 Saltzburg, *supra* note 49, at 304.

83 See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1142-43 (1988) ("People would have ample incentives to disclose adverse information to counsel even without confidentiality safeguards because they are honest and law-abiding, because they cannot make reliable judgments about when it is in their interests to withhold, or because in many business contexts they risk liability by failing to seek good legal advice More dramatically, even sophisticated people often volunteer self-inculpatory information to the police after *Miranda* warnings, apparently from a natural compulsion to vindicate themselves.")

84 GEOFFREY C. HAZARD JR., *ETHICS IN THE PRACTICE OF LAW* 140-41 (1978) (describing compelling pressures to get legal advice).

able. If the corporation consults about prospective conduct, learns that it would be illegal, and so changes its plans and acts legally, the communication and the advice are not incriminating. There is therefore no disincentive to communicate, and no likelihood of litigation and forced disclosure. If the corporation gets legal advice, learns that its proposed conduct is illegal, and goes ahead with the plan, there seems little reason to protect the information when someone later sues the corporation based on the illegality.

Second, as noted above, the need to have accurate information about the law's requirements provides the primary incentive to consult the attorney and provide full information. The heavily-regulated nature of some businesses also requires information to be divulged regardless of the existence of a privilege.⁸⁵

Third, empirical research indicates that attorneys are unlikely to play a major role in deterring improper corporate conduct. The corporations themselves have some economic incentive to push the law at least to the limit. For example, studies have shown that corporate executives are "willing to ignore extremely strong evidence of social irresponsibility and legal obstacles when making business decisions involving the introduction of dangerous and unsafe products."⁸⁶ Corporate executives' risk of punishment by the corporation for nonprofit-oriented behavior is much greater than their risk of punishment by the legal system for illicit conduct.⁸⁷ The house counsel and outside counsel who advise the corporation have limited ability and inclination to moderate that conduct. The author of a study of large Chicago law firms concluded that:

these lawyers enthusiastically attempt to maximize the interests of clients and rarely experience serious disagreement with the

85 Where disclosure is already required by government regulation, no additional incentive should be required to persuade the attorney to acquire the information. See, e.g., *Charles Pfizer & Co. v. Federal Trade Comm'n*, 401 F.2d 574 (6th Cir. 1968), cert. denied, 394 U.S. 920 (1969) (duty to present adverse facts to hearing officer in patent case, even if it might result in denial of patentability). See generally GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.6:201-1 (2d ed. 1992) (duty to disclose material information to government agencies concerning matters within their jurisdiction).

86 John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 395 (1981).

87 *Id.* at 410. While illegality is certainly not universal, it clearly exists. A Fortune magazine survey learned that 11% of the 1,037 major companies surveyed were involved in bribery, criminal fraud, illegal political contributions, tax evasion, or price fixing between 1970 and 1980. Irwin Ross, *How Lawless Are Big Companies?*, FORTUNE, Dec. 1, 1980, at 56-58.

broader implications of a client's proposed course of conduct. The dominance of client interests in the practical activities of lawyers contradicts the view that large-firm lawyers serve a mediating function in the legal system.⁸⁸

Especially as law firms become increasingly competitive for clients, lawyers are even less likely to refuse many client demands. "They are more likely to press for the maximum advantage of their clients in order to attract future business."⁸⁹

During litigation, the incentives for corporate candor should be even stronger. When litigation begins, the corporation as an entity probably has access to three kinds of information: information it believes to be helpful; information it believes to be harmful; and information of unknown impact. No incentive is needed to encourage disclosure of helpful information; the corporation will hasten to provide its lawyers with this type of knowledge. The presumed need to encourage disclosure comes in the other two categories, but the advent of civil discovery has largely eliminated any incentive to hide even harmful information from the corporation's lawyer. Even now, with the privilege in place, opponents with sufficient resources have the ability to discover this harmful and doubtful information. Since the opponent can discover it, the corporation's own lawyer will certainly need this information in order to properly represent her client.⁹⁰ It is better to be prepared to deal with harmful information than to be surprised by its sudden appearance. The information may even turn

88 Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 504-05 (1985). Nelson studied 224 lawyers in four Chicago firms, each firm with at least fifty lawyers. He learned that despite the overall diversity of the firms' clients, individual lawyers in the large firms were likely to spend a considerable portion of their time working for particular clients, and therefore needed to keep those clients happy to preserve their income and their prestige within the firm. *Id.* at 530. He further found that very few (16.22%) of the lawyers had ever refused potential work as contrary to their personal values and that, indeed, the lawyers' values tended to be the same as those of their clients. *Id.* at 537.

89 *Id.* at 544. See also Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1266 (1991) ("A century ago, lawyers were predominantly engaged in the representation of business and property interests, interests with which they were politically sympathetic. Today's lawyers are still predominantly engaged in such representation, and generally have corresponding political sympathies.").

90 Cf. Charles W. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 842 n.123 (1977) ("It is doubtful . . . that many advocates would be willing to keep themselves in ignorance of evidence that might be offered against a client in order to permit them to offer a client's suspect testimony in a semblance of compliance with antiperjury rules.").

out to be helpful for reasons not understood by the corporate client. In addition, a lawyer fully armed with harmful information, even without a privilege, could be expected to better use "carefully crafted responses, limited testimony, and the adversary's inability to conceive of . . . every possible question"⁹¹ to help the client conceal this information from the litigation opponent.⁹² It is thus in the corporation's interest to confide fully in its litigation attorney.

(vi) *Encouraging the Client: Summary.*—One commentator has noted that "nobody would argue that the corporate attorney-client privilege produces *no* additional communication at all,"⁹³ and I do not argue that here. I do believe, however, that a properly understood corporate attorney-client privilege adds little to the existing incentives to communicate with counsel. If approached honestly, a corporate employee would be told something like this:

I want you to tell me everything you know, because that's the only way I can give your company reliable legal advice. It's possible that your conversations with me are privileged, although the information you give me can be discovered by the company's opponent if there's a lawsuit. Here's how the privilege works: If you are the right kind of employee, and what you are about to tell me concerns the right kind of legal issue, and if nobody sees or hears it that shouldn't, then maybe what you tell me will start out as privileged. Then if the corporation doesn't lose the privilege by accidentally showing it to the wrong person or putting the substance in issue in litigation it may stay privileged. Keep in mind, though, that the privilege isn't yours to assert or not, it's the corporation's, and they may choose to waive it anytime they want to, even if it would hurt you to do so. Finally, let me assure you that if you don't tell me everything you know, you will be transferred to East Nowhere and never see a promotion again.

91 Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 567, 573 (1989).

92 Of course, to the extent this is possible under either a privilege or non-privilege system, its consequences are unattractive. "[T]here is no obvious reason to believe that advice supplied ex post is socially valuable, however strongly clients desire it and however much the legal profession profits by providing it." *Id.* at 614. See *infra* Part I(C).

93 John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 468 (1982).

The incentive provided by the privilege here is marginal at best, and the belief that the privilege encourages substantial additional candor with counsel is nothing but a myth.⁹⁴

(b) *Encouraging the Lawyer.*—Although the traditional utilitarian myth explaining attorney-client privilege focuses on the client's motivation, a newer myth has also arisen that focuses instead on the lawyer's motivation. Mixing the attorney-client privilege with the work product immunity, this myth states that, without the privilege, the lawyer will not probe thoroughly for information and will not give "full and frank legal advice" to clients.⁹⁵ The Supreme Court adopted this approach, at least in part, in *Upjohn*. The Court noted, for example, that absent a privilege the lawyer would face a "Hobson's choice" if communications with lower-level employees were not covered by the privilege, and the Court followed *Hickman v. Taylor*,⁹⁶ the case that created work product immunity.

As to deterring accurate legal advice, the myth seems far-fetched. First, the lawyer has an ethical duty to provide honest and accurate legal opinions.⁹⁷ Second, the corporation would not want such misleading advice (although they might prefer that certain parts be delivered orally, in a less discoverable form). Incomplete or inaccurate legal advice, provided before the corporation acts, subjects it to unnecessary liability. Incomplete or inaccurate advice, provided after the corporation acts, can increase the chances for exposure, decrease the potential for mitigation, and

94 The marginal increase, if any, in communication must also be balanced against the cost of the privilege. See *infra* Part I(C).

95 *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981). See also RESTATEMENT, *supra* note 7, § 118 cmt. c, at 76.

96 329 U.S. 495, 516 (1947).

97 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. (1983):

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981) ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations."). Failure to provide adequate legal advice might also result in malpractice liability.

lead to litigation defeats. A lawyer is not likely to be motivated to provide these results.

As to deterring thorough investigation, the argument mirrors that made for work product.⁹⁸ The answer here is related to the answer above: if the attorney wants to give accurate advice, she must have access to all relevant facts. Indeed, the traditional argument for the privilege depends on this premise. The need to give reliable legal advice and, in litigation, the pressures within the adversary system to compete and win cases supply the motivation for a thorough investigation.

As with work product immunity, this myth seems to have two explanations for the need for a privilege. One version predicts that without privilege, lawyers could avoid doing their own investigation and merely appropriate their opponents' cases (the "lazy lawyer" model). This scenario applies only to litigation, because absent litigation there is no "opponent" from whom one can acquire a substitute investigation. The other version worries about "bad facts" and predicts that attorneys would incompletely interview their clients because they fear developing adverse information in the process. Both versions of the myth are unpersuasive.

There are a number of forces within the legal profession that make the lazy lawyer myth unlikely. First, attorneys' jobs and professional success depend in large part on the attorneys' reputations for skill and integrity, both with their peers and with potential clients.⁹⁹ The lazy lawyer model of behavior would emerge only if it would lead to equivalent professional success and esteem. But the lawyer who does not thoroughly learn all relevant facts will give the client bad advice. A sophisticated corporate client will insist on accurate advice and will abandon counsel who give bad advice or lose lawsuits through inadequate effort. And the notion that a litigator could simply take her opponent's preparation and effectively try a case is ludicrous. Although knowledge of an opponent's strategies and information may be helpful, it is no substitute for independent development of a theory of the case, investigation of relevant facts (including all relevant facts held by one's own client), and structuring of proof. An attorney who has prepared her own case thoroughly will, over time, be more successful

98 For a more complete discussion of the weaknesses in the claims made by proponents of the work product immunity, see Thornburg, *Rethinking Work Product*, *supra* note 6.

99 D. Christopher Wells, *The Attorney Work Product Doctrine and Carry-Over Immunity: An Assessment of Their Justifications*, 47 U. PITT. L. REV. 675, 687 (1986).

than one who has merely appropriated an opponent's information.¹⁰⁰ Second, thoroughness furthers the lawyer's own financial interest when the lawyer bills the client by the hour.¹⁰¹

The bad facts myth also fails to ring true. Bad facts, as well as good, are needed to give accurate legal advice. And once litigation is involved, even the current attorney-client privilege does not protect the litigant from supplying its adversary with the underlying harmful facts.¹⁰² Unless the client has sole access to the bad facts, there is always the danger that the opponent will, on her own, discover those bad facts and use them at trial. These bad facts can be minimized or manipulated effectively only to the extent that the litigant is aware of them. Therefore, there is value in trial preparation leading to awareness of bad as well as good facts.¹⁰³ And since the current privilege rules do not make this underlying information secret, the privilege cannot provide an incentive for the lawyer to go forward with a totally-thorough interview of corporate employees any more than the adversary system itself can encourage such investigation.

100 Kathleen Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 WIS. L. REV. 305, 331. It is possible, however, that without a privilege lawyers would try to employ discovery tactics that involve timing: a lawyer might try to delay her internal investigation so that she could obtain an opponent's communications before having to divulge her own.

This kind of tactical behavior does present a problem, but not one that requires a privilege to overcome. This kind of dispute renders discovery of attorney-employee communications a question of timing, and the courts can make rules directly governing timing issues in discovery. Courts can, as they already do, enter discovery scheduling orders. They can enforce these orders by imposing sanctions such as excluding evidence or taking certain matters as established. See FED. R. CIV. P. 37. Thus if our concerns are about timing, we can address those concerns directly, rather than in the guise of arguments about "confidentiality" or "client representatives." To the extent we have real concerns about attorney or client behavior, it would be preferable to regulate those issues directly rather than through surrogate issues.

101 Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 296 (1985).

102 See *supra* text accompanying notes 69-70.

103 Without the attorney-client privilege, lawyers could possibly choose to depose opposing counsel for purposes of harassment. This would be a legitimate problem, but should be addressed by direct regulation, rather than with a privilege rule. For example, the courts could (as many have done) adopt rules that prohibit harassment. Violators of such rules would be subject to appropriate sanctions, such as monetary sanctions, termination of the deposition, or loss of the ability to do discovery on certain issues. FED. R. CIV. P. 37. A jurisdiction wishing to provide even greater protection for attorneys could adopt a presumption against taking depositions of opposing counsel. This presumption could be overcome, however, upon a showing that the information sought is not readily available from other sources. Cf. FED. R. CIV. P. 26(b)(3) (ordinary work product).

As was true with the client, the uncertainty of the privilege prevents such privilege from becoming an important incentive for the lawyer. If the privilege has any effect on a thorough investigation, the effect stems from the attorney's belief about discoverability and confidence that information will be protected. These feelings will control the attorney's actions and encourage her to investigate, rather than a court's subsequent decision about the protection afforded to some particular client communication. An attorney who is aware of all of the variables involved in privilege and waiver issues is unlikely to regard the existence of the privilege as an important reason to investigate further.

The link between the attorney-client privilege and the quality and thoroughness of the lawyer's investigation and advice is simply not present. The legal profession provides too many other incentives for accuracy and completeness. Even without a privilege, corporate attorneys would still seek all possible information because there is no clear line between learning helpful facts and harmful facts. They cannot operate in ignorance and yet hope to function adequately. Although they would prefer to communicate in secret, attorneys would not cease to investigate if that secrecy were removed because too many forces require full and accurate information.

2. The Privacy and Relationship Myths

Not all of the myths about attorney-client privilege are utilitarian. As noted above, the oldest arguments, which survive today, are non-utilitarian. This kind of argument takes the form "X is intrinsically good," thus making a moral claim without a factual component.¹⁰⁴ The non-utilitarian justification for the privilege is based on the belief that courts should not compel revelation of attorney-client confidences.¹⁰⁵ Some theorists verbalize this belief as a concept of privacy¹⁰⁶ and some as a concept of loyalty.¹⁰⁷ In either case, the attorney-client privilege avoids an invasion of that zone of privacy or a violation of that covenant not to reveal

104 23 WRIGHT & GRAHAM, *supra* note 1, § 5422.1, at 214 (Supp. 1993).

105 *Id.* § 5472, at 77.

106 *See, e.g.*, 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE 506-07 (1978) ("[T]here are things more important to human liberty than accurate adjudication. One of them is the right to be left by the state unmolested in certain human relations."); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 483 (1977).

107 *See, e.g.*, Radin, *supra* note 11, at 488.

the client's secrets.¹⁰⁸ In the case of human clients, this myth has some intuitive appeal, although the unconditional nature of its requirements is often exaggerated. In the case of corporations, however, the human values that underlie these relationship-based myths do not apply.

(a) *Humans.*—The moral claim to confidentiality rests on three premises: human autonomy regarding personal information, respect for relationships, and respect for the promises that protect shared information.¹⁰⁹ The premise of autonomy allows people some control over secrecy and openness about themselves and assures a right to privacy. The second premise assumes that people should be allowed not only to keep secrets, but also to share them in a way that is limited to the person in whom one confides. This premise respects intimate relationships among humans. The third premise is based on the promise of confidentiality itself and the concept that once made, the promise should not be broken.¹¹⁰

For human clients, these moral claims have some force.¹¹¹ When elevated to the level of categorical imperative, however, they begin again to sound mythic. A person's interest in autonomy is important, but it is not unlimited because the interests of others must also be respected. "When the freedom of choice that secrecy gives one person limits or destroys that of others, it affects not only his own claims to respect for identity, plans, action, and property, but theirs."¹¹² Likewise the interest in relationships is important, but it is also insufficient to justify unconditional secrecy. The secret-keeper's duty to the relationship can conflict with other duties and it "can be undercut by the nature of the secret one is asked to keep."¹¹³ Thus the effect of the privilege on third

108 SWIFT, *THE LAW OF EVIDENCE* 94 (1810), *quoted in* 24 WRIGHT & GRAHAM, *supra* note 1, § 5472, at 77 n.56.

109 BOK, *supra* note 10, at 119-20. Bok also lists a fourth premise in the case of professional confidentiality: "the benefits of confidentiality to those in need of advice, sanctuary, and aid, and in turn to society." *Id.* at 120. This last premise is the utilitarian argument discussed above and will not be repeated here.

110 *Id.* at 120.

111 It is difficult to explain, however, how privacy and relationships could be at the heart of privilege when relationships, much more intimate than that of attorney and client, are not protected by a privilege. Friends, parents, lovers, and children, for example, have no testimonial privileges. *See infra* text accompanying notes 139-41.

112 BOK, *supra* note 10, at 26.

113 *Id.* For example, an attorney who is told by his client that the client was the true perpetrator of a murder, and that Mr. X has been wrongly convicted of that murder, is put in a morally difficult position that lawyers try to resolve with claims of role morality.

parties must be weighed when considering whether the moral values of the client's autonomy and the relationship between attorney and client justify the keeping of a secret. Finally, the interest in keeping a promise adds little to the debate about attorney-client privilege because it is circular. If we do not allow attorneys to make the promise of confidentiality, or if they make it in a much more limited form, then the promise is not broken by revealing the confidence.

When the attorney-client privilege becomes a means of covering up questionable practices, the moral claims to privacy and relationship have powerful competition. The client's interest in autonomy and loyalty must be balanced against the damage done by protecting the client's secrets.¹¹⁴ The issue for the privilege is not whether the values of trust and candor in human relationships are worth preserving, but to what extent those values can be reconciled with the interests of innocent third parties.¹¹⁵ "The pre-

When the client informs the attorney that the client is about to murder or defraud Mr. Y, even attorney codes recognize the difficulty and, under the crime/fraud exception to the privilege and its ethical counterpart, find that there is no duty to keep the secret. See, e.g., MODEL RULES, *supra* note 72, rule 1.6.

114 It is undoubtedly for this reason that lawyers' ethical codes recognize limits on the duty of confidentiality in such extreme situations as when keeping the secret will result in imminent death or serious bodily harm. *Id.* Additionally, recognition that the relationship and promise of secrecy can be unfairly misused forms the basis for the crime/fraud exception to the attorney-client privilege and the doctrine of issue-related waivers. *Id.*

Courts and lawyer codes have resisted balancing the perceived need for confidentiality against the harm done by secrecy in other instances. For example, the privilege itself is founded on an irrebuttable and generalized balancing test, concluding that the importance of the privilege in general outweighs the harm it causes. Courts, however, have generally rejected ad hoc balancing of a particular claim to privacy/relationship against a particular harm because they fear that such balancing would make the application of the privilege too unpredictable and thus unable to serve its utilitarian function. See RESTATEMENT, *supra* note 7, § 118 cmt. d, at 79. Also, lawyer ethics codes have resisted any increased duty to disclose based on the privilege's effects on others. For example, the final version of the Model Rules dropped provisions granting lawyers discretion to disclose evidence favorable to another party or to correct material misapprehensions. Disclosure is only allowed if failure to act would implicate attorneys in fraud. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 601 (1985).

115 Rhode, *supra* note 114, at 613. There can also be some moral damage to the lawyer as an individual in being required to keep certain kinds of secrets. Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51, 63 (1982) ("The assumption is that our attempts, as officers of the court, to promote truth-telling, will surely be futile. We assume that clients will accept our advice neither for its prudence nor for its virtue. If this cynicism is well-founded, it ought to make us more rather than less interested in saving our own souls. If, contrary to my own hopes and beliefs, our obligation to disclose evidence would achieve no net advance in accurate fact-finding, the decline in our role as accomplices would remain a boon.").

mises supporting confidentiality are strong, but they cannot support practices of secrecy . . . that undermine and contradict the very respect for persons and for human bonds that confidentiality was meant to protect."¹¹⁶

(b) *Corporations.*—The privacy argument has some validity for individuals, but it has no such validity for clients that are entities rather than human beings.¹¹⁷ The human claim to confidentiality stems from “human values and human traits shared by members of every society.”¹¹⁸ While corporations are in many instances treated as fictitious persons,¹¹⁹ they are not in fact persons,¹²⁰ and the arguments made for personal confidentiality cannot simply be transferred to corporate clients.

Corporations, unlike humans, have no right to individual autonomy, and “no legal or moral claims to dignity.”¹²¹ Individual privacy cannot exist in the context of communications between various employees of the corporation.¹²² The corporation has, at most, a property right. This kind of interest is entitled to consider-

116 Frankel, *supra* note 115, at 135.

117 24 WRIGHT & GRAHAM, *supra* note 1, § 5472, at 79; *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1482 (1985) (“[T]o the extent that privacy is valued as an end in itself, it appears inapplicable to organizations.”); James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege (part 2)*, 8 VILL. L. REV. 447, 494-96 (1963); John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 826 (1992) (“Referring to large organizations as ‘the client’ and ‘the lawyer’ enables the speaker to cast over them the aura of personal rights and personal service that traditionally accompanies the troubled client seeking help from a trusted lawyer.”); Rhode, *supra* note 114, at 608 (“[H]ighly abstracted encomiums to individualism fail to explain the wholesale appropriation of adversarial norms in the defense of organizational interests.”). See also *Radiant Burners, Inc. v. American Gas Assoc.*, 207 F. Supp. 771, 773 (N.D. Ill. 1962), *rev’d*, 320 F.2d 314 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963).

118 RUSSELL B. STEVENSON, JR., *CORPORATIONS AND INFORMATION* 51 (1980).

119 *But see* *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (because they have a collective impact on society through which they derive the privilege of acting as artificial entities, corporations cannot claim equality with individuals in the enjoyment of a right to privacy).

120 As Chief Justice Marshall correctly noted in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518, 636 (1819), “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.” One professor of business ethics has recently suggested that the “person” analogy has led to a confused analysis and a lack of appropriate moral culpability, and he suggests that we instead think of corporations as ships. Art Wolfe, *Corporations As Ships: An Inquiry Into Personal Accountability and Institutional Legitimacy*, 19 PEPP. L. REV. 49 (1991).

121 CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 6.5.3, at 283-84 (1986).

122 Gardner, *supra* note 117, at 496.

ably less weight and can be protected by compensation, if necessary, rather than by court-sanctioned secrecy.¹²³

The relationship arguments also fail when applied to the corporate client. While not a real person,¹²⁴ a corporation is an entity employing real people,¹²⁵ and those human employees might feel betrayed if the lawyer revealed their confidences. This argument, however, misrepresents the nature of the privilege in the corporate setting. As pointed out above, the privilege does not belong to those employees, it belongs to the entity. The lawyer owes her duty to the corporation, not to the employees, and she may in fact have to betray those employees if it is in the corporation's interest.¹²⁶ Furthermore, since business rather than personal affairs will be the subject of the lawyer-client communications, the exchanges will probably be less personal than would be the case with individuals.¹²⁷

The moral need to keep promises does not help us decide whether we should allow lawyers to promise complete confidential-

123 Sissela Bok argues that, beyond basic personal needs, the moral claim of exclusive right to property is weakened. BOK, *supra* note 10, at 143-44. "And it is especially difficult to stretch [Locke's] argument so as to justify large-scale corporate ownership." Further, it is morally questionable whether the rights that come with property go so far as to justify secrecy. While secrecy may to some extent be necessary to encourage innovation, the benefits "may be overridden by moral considerations or disputed on empirical grounds." *Id.* at 148.

124 "While the legal system was prepared to recognize corporations as actors it was not prepared to adjust to their presence by significant revisions of its human-oriented premises. Instead, corporations were generally assimilated into the preexisting general legal system by deeming them 'persons.' . . . This was the simplest way to deal with corporations. But not . . . the wisest or most effective . . . [T]here is no reason to suppose that the motives of a corporation, the way it will respond and adapt to external threats, the way it will scan its environment for information, the way it will calculate and weigh its pleasures against its pains—in sum, its decisions and the way it arrives at them—will coincide with those of any one person within it, not even necessarily those of the president." CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 2, 7 (1975). For a discussion of the assimilation of corporations to individuals in other contexts, see Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985).

125 See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1076 (1976) (arguing that the rights-based rationale of autonomy applies to both individual and corporate attorney-client relationships). See also Albert W. Alschuler, *The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67, 73 n.29 (1982).

126 Gardner, *supra* note 117, at 494, 496; Simon, *supra* note 83, at 1137 ("To be sure, lawyers have personal relations with individual representatives of these organizations, but they owe their professional duties not to these individuals, but to the impersonal organizational entity or to large numbers of beneficiaries, shareholders, or members with whom they have no personal relation at all.").

127 Gardner, *supra* note 117, at 494.

ity to all. As we have seen, when a lawyer gives the client an accurate picture of the corporate attorney-client privilege, this could, even under current law, be a qualified promise.

(c) *Privacy and the Legal Profession.*—This client-centered analysis omits the impact that eliminating the corporate attorney-client privilege would have on the lawyer's role and self-image. Lawyers might be very unhappy if they had to serve as conduits for information that proved harmful to their clients. The potential effect of the abolition of a testimonial privilege¹²⁸ on lawyer satisfaction and on the role of the legal profession also deserves attention.

Lawyers, from their first day of law school, are socialized into a way of thinking about the lawyer-client relationship that is rooted in an adversary model. Lawyer culture cherishes the "you and me against the world" ethic. This ethic holds that the lawyer owes virtually complete and undivided loyalty to the client without regard to any other values.¹²⁹ Any harm, short of death or serious bodily injury, that the lawyer knows her client will inflict on non-clients is not the lawyer's concern.¹³⁰ The lawyer needs to con-

128 As stated from the beginning, this Article is not suggesting that lawyers should never have a duty of confidentiality to clients. Rather, it argues that the duty, which is always subject to the requirements of law, should yield to the policies behind open discovery which are present in the litigation setting.

129 This is, of course, an exaggeration of the undivided nature of the lawyer's duty. It is, nevertheless, a key component of the lawyering mythology. The most famous expression of this concept is perhaps Lord Brougham's statement in Queen Caroline's case:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821), quoted in Frankel, *The Search for Truth*, *supra* note 22, at 1036. A modern-day corporate equivalent has been attributed to Elihu Root: "The client never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how." ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947* 667 (1946), quoted in L. Ray Patterson, *An Inquiry into the Nature of Legal Ethics: The Relevance and Role of the Client*, 1 GEO. J. LEGAL ETHICS 43, 67 (1987).

130 Again, this view of the role is certainly an exaggeration.

The trouble with the exclusively client-centered approach is that it has no logical or moral stopping place. Under this approach, if a client can win only by frivolous tactics, then those tactics are justified; if he can win only by fraud, then fraud is justified. Indeed, if the client's interest is unqualifiedly paramount, there

cern herself only with the client's desires, not with the client's ethical duties.¹³¹ To require the lawyer to divulge client confidences would require a change in this concept of lawyering, and for this reason, many lawyers strenuously oppose such a change. Their emotional investment in the undivided loyalty model is too firmly ingrained to budge.

To the extent that this is an argument about keeping lawyers happy, it must fail. Lawyers do not have a superior moral claim to having their own way. A corporate employee, for example, could easily be unhappy at having to divulge information harmful to her employer, but the law provides no privilege to protect the employee from this unhappiness. A privilege based solely on treating lawyers as a specially protected class for their own sake, rather than for the sake of the client or the judicial system, cannot stand.¹³²

The argument for privilege based on role morality improperly assumes the need for an unmodified version of the adversarial model. This model, after all, is not somehow intrinsically good, but instead has been justified by a claim that it is necessary to an effective adversary system, which in turn has been justified as an effective method of adjudicating disputes. An extended analysis of the adversary system and of the role of lawyers within that system is beyond the scope of this Article.¹³³ It is necessary, however, to note three things at this point: (1) the adversary model of lawyering was created to achieve a goal rather than because it was seen as inherently desirable; (2) the argument for the role is therefore utilitarian; and (3) this argument about adversary role morality, in the context of the attorney-client privilege, becomes the traditional utilitarian argument for privilege discussed in Part I. The lawyer's role, the argument goes, requires keeping all of her client's secrets, because if she does not do so, the client will not fully confide in the lawyer. This form of the "role of the lawyer" argument

is no *logical* reason why a lawyer should not literally become a 'hired gun' and simply assassinate inconvenient witnesses.

HAZARD & HODES, *supra* note 85, § 3.3:101, at 576-77.

131 Patterson, *supra* note 129, at 64-65.

132 In this sense, objections to eliminating the privilege come perilously close to being arguments against discovery. It may be that the attorney-client privilege persists because lawyers at heart never gave up their fondness for the element of secrecy and opportunity for surprise inherent in the pre-discovery adversary system. While our desire to be Perry Mason may explain our emotional attachment to the privilege, however, it is not a legitimate reason for keeping it. To the extent the argument depends on a protection of the client's moral interests, see *supra* Parts I(B)(2)(a) & (b).

133 For a thorough treatment of the issue, see LUBAN, *supra* note 7.

is therefore not a separate theory, but rather the traditional argument recast as an ethics issue rather than as a procedural issue, and it is no more compelling than its procedural counterpart.

A change in role might even decrease rather than increase lawyer unhappiness. Beneath the dominant model of undivided loyalty lurks a different kind of harm to lawyers and a different vision of the lawyer role. Some lawyers experience moral conflicts from keeping the client's secrets or from helping clients to achieve unworthy goals. A change in privilege rules could end up benefitting rather than hurting lawyer morale by eliminating this kind of psychic damage. These lawyers would prefer a kind of role morality that involves both loyalty and integrity; a role that requires a lawyer to try to win, if her client should win based upon all relevant information, but not to win at any price.¹³⁴ This concept of lawyering envisions the lawyer as connected not only to her client but also to the community, with a duty to assert the client's interest but not to hide information.

In addition, the lawyer morality argument may be an excuse rather than the real point. As far as the lawyers are concerned, the personal arguments ignore the commercial dimension of most law practices. "In substantial part, lawyers are in it for the money,"¹³⁵ and there is a direct link between advancing client interests and the financial success and professional status of the lawyer.¹³⁶ Interestingly, when the lawyer's own financial interest is at stake, the privilege goes away.¹³⁷ Curiously, lawyers purport to be-

134 *Id.* at 47 (duty of loyalty to client should be modified to the extent that it interferes with duties of candor to the court and fairness and truthfulness to others). *Cf.* Leubsdorf, *supra* note 117, at 841 ("[O]bscuring the distinction between clients and nonclients . . . would undermine the grounds that make it seem natural for lawyers to dedicate themselves to the single-minded pursuit of the interests of clients.").

135 *Símon, supra* note 83, at 1138.

136 Rhode, *supra* note 114, at 594. *See also* Frankel, *supra* note 115, at 55 ("The preference for client confidence over fair disclosure suggests that in our value scheme loyalty to the customer is a more binding tie than loyalty to what should be equally close 'friends' who have not retained us. Loyalty to clients is good for lawyers in the crass sense of serving our convenience, our ease, and our cash flow."); Zacharias, *supra* note 21, at 359 (noting that confidentiality rules serve the personal interests of lawyers in that they can save lawyers from the psychological costs of having to make difficult ethical decisions, provide financial benefit, and avoid the cost of bad publicity and community disapproval of lawyer conduct).

137 MODEL RULES, *supra* note 72, Rule 1.6 (breach of confidence allowed to establish a claim between lawyer and client); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c) (1980) (breach of confidence allowed to collect lawyer's fee). *See also* Rhode, *supra* note 114, at 615 ("[E]ven the most fervent defenders of unqualified confidentiality have seldom pursued the logic of their position when attorneys' own interests are at

lieve that disclosures to protect third persons involve a breach of loyalty, while revelations to protect the attorney's financial interests do not.¹³⁸

Examining privileges as a group, one could easily conclude that the law is not primarily concerned with personal values and intimate relationships. Communications between parents and children, brothers and sisters, lovers, and friends are not protected by a testimonial privilege.¹³⁹ Instead, the law favors various professionals, especially lawyers, and gives privileges to communications with professionals much more readily than to communications with intimates:

One of the things we see in the development of testimonial privileges through time is our capitulation to professionalism—the law serves as a cultural signal that the only persons, other than one's spouse, with whom it is "safe" to speak about intimate matters are those with professional credentials Indeed, the present scheme of privileges actually denigrates the general importance of private intimate relationships.¹⁴⁰

Control over secrecy and openness gives power and control. The capacity to keep secrets allows human beings a sense of identity and the possibility of community. But this capacity can also cause great harm, both to those who keep the secrets and to persons whose lives and choices are affected by the secrets. The risk of harm exists in every case, but it is "greater still when it is joined to unusual political or other power and to special privileges of secrecy such as those granted to professionals."¹⁴¹ We should

issue. Few of the Model Rules evoked greater consensus than the provision allowing lawyers to reveal information necessary to collect fees or to establish their own position in a dispute with the client."); Kaplow & Shavell, *supra* note 91, at 599 ("It is . . . in the economic interest of the legal profession to foster the private demand for legal services.").

138 Perhaps the argument here is more of a "he did it first" kind of playground thing. Since the client has already breached the duty of loyalty, as by not paying or by attacking the quality of the lawyer's services, the relationship is no longer worthy of protection, and the lawyer can speak without breach of duty. The utilitarian argument faces the same dilemma; it should have to explain why disclosure in the interest of third persons will discourage client candor but disclosure to protect the lawyer's fee or reputation will not.

139 Professor Levinson notes, for example, the irony of Professor Fried's "friend" analogy since the "law entitles friends, as such, to awesomely little protection against the inquisitiveness of the State." Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 640.

140 *Id.* at 647.

141 BOK, *supra* note 10, at 282. *See also id.* at 109 ("Secrecy can diminish the sense of personal responsibility for joint decisions and facilitate all forms of skewed or careless

be very careful indeed when resting attorney-client privilege on a privacy theory; in the context of corporate secrets, the privacy argument is merely a myth.

C. *Effects Myths*

Most of the myths surrounding the attorney-client privilege focus on the imagined purpose, or benefits, of the privilege. A few writers, however, have created a separate, but related kind of myth, which is about the effect, or cost, of the attorney-client privilege. The traditional effects myth maintains that the privilege is virtually cost-free because it protects only communications that would not exist, but for the protection of the privilege.

This section of the article will discuss the traditional myth and then explain why in practice the privilege leads to truth-garbling, inappropriate risk-shifting, and gigantic societal costs. This section will then demonstrate that the costs of the privilege will tend to be distributed unevenly across the spectrum of litigants, benefitting corporate litigants at the expense of individual litigants and benefitting frequent litigants at the expense of "one-shot" litigants.¹⁴²

1. The Myth

The traditional myth follows the utilitarian argument from the world of cause and into the world of effect. The concept, after all, is that the client will not communicate with the attorney without the protection of the privilege. Therefore, if there is no privilege there will be no communication: thus protecting the communication with a privilege results in no net loss of information, but merely denies the litigation opponent access to information that would not otherwise have existed.¹⁴³ This is a pretty theory, but

judgment, including that exhibited in taking needless risks. It offers participants a shield against outside criticism, and can obscure the possibilities of failure—especially if the decision

makers come to think that the situation resembles a game.”).

142 For the first use of this terminology, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

143 RESTATEMENT, *supra* note 7, § 118 cmt. c, at 77 (“If the behavioral assumptions behind the privilege are well-founded, much, perhaps most of the evidence that the privilege keeps out of trials would not come into existence if no privilege existed.”); Saltzburg, *supra* note 76, at 823 (“[N]o tribunal can demonstrate that had the client been denied a privilege, the additional communications would exist. The assumption of the privilege is that they would not.”). One commentator, based on this theory, suggested

even as a theory it works only as well as the utilitarian purpose myth. And in reality, it fails to recognize the extremely powerful potential for truth-garbling that the privilege provides during civil discovery.¹⁴⁴ Even if the privilege results in a greater exchange of information between lawyers and clients, it does not result in the tribunals' receiving more information.

2. The Truth

(a) *Loss of Information.*—One common result of the corporate attorney-client privilege is the suppression of relevant information. While in theory the privilege protects only the communication and not the underlying information, in practice the privilege may prevent a litigation opponent from discovering the information. This could be true for a number of reasons. First, the person seeking discovery may be unaware of the existence of the information embodied in the privileged communication and therefore may not ask for it. Second, a discovering party may fail to learn information due to evasive conduct coupled with a privilege claim.¹⁴⁵ For example, when a corporation uses the attorney-client privilege to

that the privilege should exist only "[i]f a communication would not have existed *but for* the pursuit of legal advice" because then no otherwise extant evidence is lost by suppressing it. Perhaps because of the difficulty of applying such a test, no court has shown an inclination to adopt the "but for" approach. Glen Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899, 902 (1980).

144 While the attorney-client privilege can also garble truth at trial, its potential for harm took on a far greater significance with the rise of discovery. See Lasky, *Lawyer-Client Privilege*, 38 CAL. S.B.J. 427 (1963). At trial, a person with knowledge has been located and is on the witness stand. The privilege will prevent asking directly about conversations with counsel, but these may have been inadmissible hearsay in any case. RESTATEMENT, *supra* note 7, § 118 cmt. c, at 77. During discovery, however, the privilege prevents direct access to conversations and documents containing invaluable information about the facts in dispute and about persons with knowledge of the facts, blocking both discovery of relevant information and clues that might lead to the discovery of further relevant information.

145 See Kaplow & Shavell, *supra* note 91, at 573 ("The combination of carefully crafted responses, limited testimony, and the adversary's inability to conceive of (or to expend the resources to ask) every possible question may well result in a significant gap between the information learned by the adversary's lawyer and that possessed by the client's."); Allen et al., *supra* note 6, at 363 ("[T]he lawyer may give the client guidance in how to respond honestly but craftily to an interrogatory, thus making the adversary's task of obtaining complete information more difficult."). Cf. David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979) (showing the difficulty of discovering information helpful to the opponent based on the doctrine of work product. Shapiro's hypotheticals could easily be adapted to show at least as great a loss of information in a case involving corporate attorney-client privilege.).

protect information in one form, and then evades attempts to discover the information in non-privileged form, the result easily may be that the information will never be discovered.¹⁴⁶ Such evasive conduct is common. Sixty-one percent of the attorneys surveyed by the American Bar Foundation complained about evasive tactics.¹⁴⁷ One of the attorneys surveyed admitted that “[t]he purpose of discovery . . . is to give as little as possible so [your opponents] will have to come back and back and maybe will go away or give up.”¹⁴⁸ A discovering party, failing to ask exactly the right question, in exactly the right words to force a revelation of the information, may never gain access to the relevant information.

The problem is much more serious when the party claiming privilege and evading discovery is a corporation. “Unlike individuals (who will find it extremely difficult to shield information from discovery by speaking to an attorney), a corporation can structure even its routine transactions so that information is not rendered in any discoverable form until it is transmitted to the corporation’s attorney.”¹⁴⁹ The discovery difficulties stem from a combination of the diffusion of corporate knowledge and the problem of identifying “client representatives” in the corporate setting. A few examples may serve to illustrate the problem.

(i) *The Straight Privilege Claim.*—Let’s return to XYZ Corporation, the manufacturer of consumer widgets, and its employee Smith. A consumer who was injured by the widget has sued and alleges that the widget is defective. Assume that Jones, the president of XYZ, instructs Green, the vice-president, to call the corporate attorney and tell him that Smith has admitted that the widget was known to be defective before it was marketed. If the plaintiff

146 An American Bar Foundation study found that many lawsuits are terminated with serious information gaps. Participants reported that 25% of smaller, less complicated lawsuits were terminated (by settlement or trial) with at least one party believing it knew something of significance about the case that the other parties had not discovered. Also, over half of the larger, more complex cases, were said to be closed with at least one party believing it knew something of significance that opposing parties did not know. One of the reasons for the knowledge gap is the effect of discovery privileges. Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 219, 234.

147 Wayne D. Brazil, *Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789, 829.

148 *Id.*

149 Sexton, *supra* note 93, at 478.

deposes Green and asks what the president said to Green or what Green said to the attorney, both Green and Jones would be held to be "representatives of the client" and the privilege would allow Green to refuse to answer the question. This direct method of learning about Smith's warning is thus closed to the plaintiff.

If the plaintiff instead deposes Jones, the president, and asks him what Smith said, the president should be required to testify about what Smith told him because the communication went straight from employee to employee for business purposes. Unfortunately, the claims and the case law are not so clear. Many corporations would still claim a privilege based on the attorney's need to gather information. The argument goes like this: no single corporate employee is likely to have all the information the lawyer needs to advise the corporation, and so corporate employees need to be able to gather this information for the lawyer. If there is no privilege for what Smith told Jones, Jones will be reluctant to seek out this information for fear that it will be used against the corporation, and the attorney will not get all the information needed to represent the corporation. After all, if the attorney interviewed Smith directly, their conversations would be privileged.¹⁵⁰ Therefore, inserting Jones as investigator/lawyer's helper should not change the character of the conversation. Smith is still providing information for the lawyer, and Jones is serving as a mere conduit.¹⁵¹

This approach can be multiplied by the number of corporate employees and corporate records needed to provide information for the lawyer. When the lawyer or client representative consults the corporate records or other employees in order to answer a question from a corporate attorney (or from opposing counsel through deposition or interrogatories), all of the collected information is treated like lawyer-client communications, and either the client representative being deposed, or the corporation in answer to interrogatories, claims privilege and refuses to answer.¹⁵²

How, then, can the plaintiff learn anything if such privilege claims are sustained? He will need to somehow identify those

150 That is, they would likely be privileged in a jurisdiction using some variant on the subject matter test.

151 Jones might be characterized as another "client representative" or even as a "representative of the attorney" when this argument is made.

152 Once the corporation anticipates litigation, any documentation of the information-gathering process will also be claimed as work product, so there is a double obstacle to discovery. *See, e.g.*, FED. R. Civ. P. 26(b)(3).

employees who have personal knowledge of the relevant facts and depose each one. He must also identify and seek production of those documents that never went near the lawyer's office. For a plaintiff suing a small corporation, this requires a more expensive and cumbersome discovery method, but it is possible. For a large corporation, the problem may be insuperable. The plaintiff can request the corporation to designate deponents with knowledge of certain areas,¹⁵³ but if it has any choice the corporation will never designate Smith. In addition, the designated deponents would still claim privilege as to any knowledge acquired through investigative activities. Plaintiff can also ask the corporation by interrogatory to list all persons with relevant knowledge and proceed to depose them.¹⁵⁴ For a small corporation this will increase plaintiff's discovery costs, but should work. However, a large corporation could list more people than a plaintiff could ever afford to depose, and Smith may easily get lost in the shuffle.

(ii) *The Structured Flow of Information.*—A corporation that anticipates and plans for litigation can do an even better job of hiding information, even in a control group jurisdiction. The key is to channel the flow of information through the corporate attorney wherever possible and to eliminate any paper trail that is not in privileged form. Suppose that XYZ Corporation is concerned about its widgets and wants to do an internal investigation, even before anyone has actually been injured or threatened to sue. How can the corporation maximize the protection of information?

Jones, the president, will contact the corporate attorney and ask for an investigation. The attorney, personally or through other corporate employees,¹⁵⁵ will investigate and interview all of the

153 FED. R. CIV. P. 30(b)(6).

154 Under the proposed disclosure rules, both parties would be required even without a request to identify at least some of those persons, although the duty is limited to people likely to have "discoverable information relevant to disputed facts alleged with particularity in the pleadings." Proposed FED. R. CIV. P. 26(a), scheduled to take effect on December 1, 1993, 113 S. Ct. CC, CDV (S. Ct. order of April 22, 1993). Therefore, although the disclosure rules could reduce the "you asked the wrong question" problem, it is unlikely to provide all the necessary information because the language of the rule limits the defendant's automatic disclosure duty to subjects already known to plaintiff in some detail when suit is filed. And note that the disclosure requirements are still subject to privilege claims. See, e.g., FED. R. CIV. P. 26(b)(3).

155 It would be safest to have the entire investigation done by lawyers and the lawyers' employees, but an investigation done by corporate employees working at the

employees with knowledge of relevant facts. This investigation will be documented in the form of interview notes, which will be provided directly to the attorney's office. The employees will be instructed not to memorialize their discussions with counsel in any writings or records, and not to prepare any writings or records in preparation for meetings with counsel. The lawyer will take all of these investigatory materials and prepare a written report to corporate management. The report will synthesize and analyze the facts uncovered during the investigation and analyze the relative strengths and weaknesses of XYZ's position. The report will not contain mere verbatim transcripts or recordings of employee interviews or documents. Rather, to the extent possible, the notes and findings from either employee interviews or document reviews will be expressed in terms of the attorney's own impressions, opinions, conclusions, and legal analysis. Then, if the lawyer can bring herself to do it, she will destroy the original interview notes.

During the investigation, the lawyer may also do a "litigation audit" and recommend the destruction of any preexisting documents that might harm XYZ should litigation ensue.¹⁵⁶ If the procedure is done thoroughly, all that remains is a non-discoverable privileged report and the prospect, noted above, of identifying and deposing every employee with needed information.

(iii) *Privilege Claim Plus Deception.*—The procedures and privilege claims above can sometimes be used to hide unfavorable information from the litigation opponent while purporting to provide it. Consider XYZ again. Assume that a plaintiff/consumer has sent an interrogatory asking whether XYZ adequately tested the widget. Assume further that there are five engineers in XYZ's research and development department, including Smith. Smith has told the corporate attorney that inadequate testing was done; that some of the documentation making it appear that tests were done is actually falsified; and that the tests themselves were structured

lawyer's direction may also be protected, as discussed above.

156 See generally Peter M. Saporoff & Kerry F. Hemond, *Legal Audits and Voluntary Internal Corporate Investigations*, in CORPORATE DISCLOSURE AND ATTORNEY-CLIENT PRIVILEGE 117, 122 (PLI 1984) ("The audit is also intended to inform company officials of the manner in which they can preserve their legal privileges; to advise certain procedures for the retention of records and other documents . . . [The attorney] may then recommend methods by which documents can be handled more efficiently or retained for a shorter period without prejudice to the users."); Thomas H. Gonser & Eileen I. Wilhelm, *A New Direction in Preventive Law: The Litigation Audit*, 68 A.B.A. J. 446 (1982).

so as to avoid exposing a known problem in the widget's design. The other four engineers told the lawyer that the testing was fine. All of these conversations are privileged. XYZ answers the interrogatory merely by saying that the widget was adequately tested. If requested, it will provide the documentation on the tests. XYZ further identifies the other four engineers as persons with knowledge of the testing procedures. XYZ does *not* mention Smith's opinion.

Is this response a lie? Not really. But it is an incomplete picture of the information available to XYZ and clearly misleading to the plaintiff. The privilege contributes to the scenario by letting the lawyer and corporate entity decide which of the employees' conflicting stories to believe and to present this as the only available information. While presenting its favorite version of the facts, the corporation simultaneously claims privilege as to any document reflecting Smith's concerns (if these documents did not hit the shredder long ago) and as to any conversation between Smith and the lawyer. If documents do exist and the lawyer acts ethically, the corporation will acknowledge that documents exist, but claim privilege. Less responsible lawyers may make a "silent assertion" of the privilege.¹⁵⁷ Thus, the corporation makes and rules on its own privilege objection, and the plaintiff may never know that the information exists in order to pursue it in nonprotected form.

Limits on discovery affect the adversary system's ability to function as an accurate fact-finding process. When information is successfully suppressed during discovery, its ultimate fate depends on whether it is helpful to the party holding the information or harmful to the party holding the information. If the case is settled, the information will never be disclosed and whatever impact it might have had on the settlement is lost. If the case goes to trial, there is still a problem. If the information is helpful to the party claiming privilege, that party can wait until trial and produce the information as a surprise to its opponent. Trial by ambush is resurrected by virtue of the corporate attorney-client privilege. If the information is harmful to the party claiming privilege, it will never see the light of day. The party with the information will not present it to the trier of fact, and the adversary system will not

¹⁵⁷ See Brazil, *supra* note 146, at 224 (defining "silent assertion" as "withholding information in response to discovery requests . . . without informing the discovering party either that additional information exists or that the party responding to the discovery is claiming that the information is protected against disclosure by a privilege.").

function effectively because the fact-finder is deprived of relevant information.

(b) *Information in Less Useful Form.*—The attorney-client privilege admittedly denies parties access to certain documents and oral communications. Its mythology claims, however, that the substantial equivalent of the privileged material is discoverable if a party properly frames its discovery request. As discussed above, that may not be the case. And even when a carefully worded question or request retrieves related information, it may be in less useful form.

This will often occur when employees with knowledge are interviewed by the corporate attorney or her representative. In many cases, the corporation takes statements from employees when the relevant information is fresh in their minds. If a lawsuit is filed by or against the corporation, its opponent will be denied access to the privileged communications themselves, and the opponent is left to interview¹⁵⁸ or depose the employees to try to get equivalent information. Such interviews and depositions, however, may be taken weeks, months, or even years after the relevant events occurred. The employee-witnesses' recollections may have weakened over time, or may have been enhanced or shaped by intervening conversations with management or the corporate attorney. It also seems probable that the employees will be less forthcoming with opposing counsel than they were with the company lawyers.¹⁵⁹ This information, then, even if discovered, is apt to be in less helpful form than the statements themselves.¹⁶⁰

158 Depending on the identity of the employee, however, ethics rules may prohibit ex parte interviews of an opponent's agent. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1980); *Niesig v. Team I*, 558 N.E. 2d 1030 (N.Y. 1990) (counsel may not interview corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation, or whose acts are imputed to the corporation for purposes of its liability). But see John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683, 708 (1979) ("The public interest in obtaining testimony should not be frustrated by the massive embargo that a warned employer could impose."). In addition, a corporation may discourage its employees from talking to opposing counsel informally. Therefore, opposing counsel will probably be denied the opportunity to interview the employee without the potentially "chilling" presence of a corporate representative. The opponent will likely be left with only the more adversarial and expensive deposition procedure to get information from the employees.

159 *Upjohn Co. v. United States*, 449 U.S. 383 (1981), serves as a good example here. The corporation resisted giving the Internal Revenue Service documents reflecting its internal investigation. While blocking access to this information, Upjohn simultaneously claimed the right to determine which questions its employees would answer.

160 Unlike the work product exemption, there is not even a substantial need/undue

(c) *Information Available at Greater Cost.*—Information in documents protected by the attorney-client privilege can be obtained in other forms only at greater cost in time and money. This is true for at least two reasons. First, when a document or conversation is protected by privilege, the discovering party must locate and use formal discovery to obtain equivalent information. A party which is denied a memorandum from corporate employee to corporate lawyer must instead depose the employee, and cannot ask what the employee told the corporate lawyer, but must instead know to ask a substantive question to get the information.¹⁶¹ A party denied an investigative report often must use multiple waves of discovery, including interrogatories, depositions, requests for admission, and document production requests to ferret out the information contained in that report. In these situations, and in others, the information ultimately may be available to the discovering party, but is clearly available only at a higher cost.¹⁶²

Second, disputes about what should be protected as privileged increase the parties' cost of discovery. When a corporate litigant claims that the attorney-client privilege protects material and resists discovery, the opponent will be able to discover that material, if at all, only by filing a motion to compel discovery, usually accompanied by a brief and an evidentiary hearing. Even if the document ultimately is provided to the discovering party, erroneous claims of privilege increase the discovering party's cost of obtaining the information. The uncertain parameters of the attorney-client privilege exacerbate this second problem because the uncertainty makes numerous privilege claims colorable and thus engenders numerous privilege battles.¹⁶³

hardship exception to the privilege for cases in which employee memories have faded since the statement was made.

161 A deposition requires, at minimum, filing a notice of deposition with the court and serving it on other parties to the lawsuit. Taking a deposition also requires paying a court reporter, a cost that will easily run into the hundreds of dollars. Furthermore, if the corporation chooses to fight the deposition of some particular employee, the cost of getting the information will also include the costs of litigating a motion for protective order. If it chooses to object to particular questions on the basis of attorney-client privilege, the cost of getting the information will also include the costs of moving to compel answers to the questions.

162 See also the hypothetical situations described in *supra* Part I.C.

163 This complexity also tends to favor wealthier litigants. "[A]s the process becomes more complex, increasingly it can be used effectively only by players who can deploy the resources to play on the requisite scale." Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and*

The cost to the parties of privilege disputes is also compounded by the willingness of many attorneys to use discovery for tactical purposes. For example, eighty percent of the attorneys surveyed in the American Bar Foundation poll stated that gaining time or slowing down part or all of an action had been a factor affecting their use of discovery tools, including technical or questionable objections to discovery.¹⁶⁴ Seventy-seven percent of the attorneys also indicated that their desire to impose "work burdens or economic pressure" on another party or attorney affected their discovery behavior, such as asserting objections to discovery.¹⁶⁵ One attorney commented that "by being an obstructionist you can avoid providing about 80 percent of the information because it's expensive for [an] opponent to go to court to compel discovery."¹⁶⁶

The combination of a complex doctrine, adversarial attorney behavior, and the potential importance of privileged materials make disputes about corporate attorney-client privilege inevitable. And the mere fact of having to litigate the discoverability of the information, even if the information is ultimately held to be discoverable, increases the cost of that information to the discovering party.

(d) *Risk Shifting*.—Even true believers in the utilitarian myth of attorney-client privilege have to face one effect of the privilege. The choice to encourage communication with the attorney, at the expense of litigation opponents or the public generally, operates to shift a risk. One commentator has noted "[b]y encouraging client disclosure through secrecy guarantees, the state protects clients who otherwise would jeopardize their case by withholding information."¹⁶⁷ Rather than letting those clients decide whether they want to hide information and leaving them to face the consequences, we provide them with a privilege and allow their opponents to face the consequences. The attorney-client privilege thus shifts the cost of potentially harmful information from the client withholding information, to the opposing party who will be harmed by the nondisclosure. We do this "even though the only

Litigious Society, 31 UCLA L. REV. 4, 45-46 (1983).

164 Brazil, *supra* note 147, at 852 & n.99.

165 *Id.* at 856-57.

166 *Id.* at 856.

167 Zacharias, *supra* note 21, at 366.

thing we know about the client is that she is irresponsible, and we know nothing about the opposing party."¹⁶⁸

This misallocation of risk shifts the potential cost of unfavorable information from the corporate client to the litigation opponent. This in turn allows the corporate client to pursue claims and defenses not merited by the facts, with a decreased risk that the unfavorable information will be discovered, and with a certainty that its opponent will face higher litigation costs. This both misallocates costs and benefits to the litigation opponents and can adversely affect the judicial process by changing case outcomes, as discussed below.

(e) *Societal Costs*.—The preceding sections discussed the cost that the corporate attorney-client privilege imposes on the parties to the litigation. The privilege also imposes costs on society.¹⁶⁹ First, during litigation, the privilege requires a duplication of efforts, which imposes costs not only on the litigants who must pay for the preparation, but also on society.¹⁷⁰ This duplicate expenditure of time and money wastes resources on preparation for litigation.

Second, privilege claims tend to generate disputes separate from the merits of the case. Forcing the courts to referee these disputes aggravates the problems of delay and docket backlog in the trial courts. When a decision about privilege requires that the court conduct an *in camera* inspection of the disputed documents,¹⁷¹ or an evidentiary hearing,¹⁷² even greater costs arise. All these costs are passed on at least partially to the public, both

168 Simon, *supra* note 83, at 1142. Cf. Zacharias, *supra* note 21, at 366 ("The client who receives bad advice because he fails to inform his lawyer has only himself to blame.").

169 Because taxpayers, rather than litigants, pay the operating costs of the courts, the social and private costs, even when measured in dollars, will diverge. David M. Trubeck et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 78-79 (1983) (studying 1,649 civil cases in federal and state courts).

170 Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 362.

171 An *in camera* inspection allows the court to examine the disputed documents to determine issues such as the identity of the writer, the identity of the recipients, the subject matter of the document, and the confidentiality of the document. Those inquiries determine whether the privilege applies.

172 An evidentiary hearing allows the court to hear evidence about issues such as the identity and corporate responsibilities of the writers and recipients of the allegedly privileged documents as well as the circumstances under which the documents have been kept since they were generated.

in terms of delayed case outcomes and in the increased costs of administering the judicial system.

Third, as noted above, corporations have the ability to structure their behavior in a way that maximizes the applicability of the attorney-client privilege. This behavior will often require increased use of attorneys as conduits for corporate information and as "litigation auditors" in an attempt to shield as much information as possible. The cost of additional attorneys is a direct cost for the litigants, but can also be passed on to shareholders and to consumers, thus becoming a cost to society.

Finally, the privilege imposes a nonmonetary cost on society. Successful privilege claims sometimes result in cases being settled or tried with parties to the cases missing relevant information.¹⁷³ This in turn can lead to inaccurate outcomes. In part, this will lead merely to errors in the division of stakes among the parties to a particular lawsuit.¹⁷⁴ Lawsuits, however, also take existing legal rules and apply them accurately to influence future behavior. This might be called the "general deterrence" function of litigation. "The more accurate the application of the rules in particular cases, the more effect the rule itself will have in influencing behavior."¹⁷⁵ Therefore, when privilege claims skew case outcomes by allowing information imbalance, they also decrease the general deterrent value of litigation for society.

The costs discussed above, both to litigants and to society, are more severe because they are unevenly distributed. The corporate attorney-client privilege tends to give corporate and repeat litigants an advantage over individual litigants, and to give defendants an advantage over plaintiffs. This impacts the disadvantaged parties, and also the judicial system as a whole because of its tendency to affect case outcomes more consistently. A corporation that can plan for the occurrence of claims against it has the advantage of being able to structure its information flow so as to maximize the chance that internal communications will be held to be privileged and thus shielded from discovery.¹⁷⁶ In many settings, then, a privilege claim is not a mere procedural rule. It is also, "in effect, an argument for a substantive advantage for generally identifiable interests."¹⁷⁷ For example, the literature for corporate lawyers is

173 See *supra* Part I.C.

174 Easterbrook, *supra* note 170, at 359-60.

175 *Id.* at 359.

176 See *supra* Part I.C. (strategies that can support later privilege claims).

177 Wolfram, *supra* note 90, at 839 ("A principle that works to the advantage of some

replete with articles recommending strategies for protecting communications with a privilege¹⁷⁸ and for performing "legal audits" to eliminate incriminating documents.¹⁷⁹ A corporation that is a repeat litigant can choose to litigate a privilege issue, whatever its expense, because it is able to spread that expense over multiple lawsuits. It can also choose to litigate those cases that are most likely to produce pro-privilege case law. As a class of litigants that are most likely to do early, extensive internal investigation, repeat corporate litigants are the primary beneficiaries of a privilege that protects the communications generated in those investigations from discovery.

Defendant corporations benefit when the privilege operates to prevent access to information. At the outset of a lawsuit, defendants are most likely to have the bulk of relevant information without the need for discovery, while plaintiffs tend to be without such information. Furthermore, defendants may even have enough internal information to eliminate the need to extract evidence from opponents to prove affirmative defenses.¹⁸⁰ Therefore, when the attorney-client privilege results in the plaintiffs' inability to

clients and their paid advisors and to the disadvantage of persons who are not parties to the secret relationship is obviously suspect. Behind a cloak of absolute secrecy an attorney and client can harm innocent parties and impose costs on the processes of courts, other agencies, and the public.").

178 See John William Gergacz, *Attorney-Corporate Client Privilege*, 37 BUS. LAW. 461, 512-14 (1982); Block & Remz, *supra* note 58, at 74-79. See also Roswell Page, III, *Privilege of Manufacturer Product Safety Quality Assurance Reviews*, in THE ATTORNEY CLIENT PRIVILEGE UNDER SIEGE: PRESERVING AND PROTECTING IT IN CIVIL CASES 131, 137-41 (1989); Candace L. Sutcliffe & Richard G. Holtkamp, Jr., "Captive" Law Firms and Upjohn Problems, *id.* at 322; Arvin Maskin, *Preserving the Confidentiality of Investigative Reports Prepared by In-House and Outside Counsel in Toxic Tort Litigation*, *id.* at 497-98 and 534-37; Jack L. Block & Stuart J. Chanan, *Protecting Attorney-Client and Work Product Privileges When Communicating with Underwriters, Underwriters' Counsel and Prospective Purchasers*, *id.* at 690.

179 See, e.g., Peter M. Saporoff & Kerry F. Hemond, *Legal Audits and Voluntary Internal Corporate Investigations*, in CORPORATE DISCLOSURE AND ATTORNEY-CLIENT PRIVILEGE 117, 121 (PLI 1984) ("Counsel conducting the audit attempts to predict the categories of documents which would be requested in any litigation in which the company might be involved. He then makes suggestions to prevent the occurrence of so-called 'hot documents'— documents which have been prepared and distributed carelessly or in which persons have thoughtlessly chosen their words or mischaracterized an act or transaction."); John J. Curtin, Jr. & Margaret Y.K. Woo, *Record Retention Program*, in CORPORATE DISCLOSURE AND ATTORNEY-CLIENT PRIVILEGE 455, 469 (PLI 1984) (documents can be destroyed as part of regular records retention program even if the reason for the program is to keep sensitive documents from investigation or official proceeding, as long as program is not intended to thwart any particular case); Thomas H. Gonser & Eileen I. Wilhelm, *The Litigation Audit*, 68 A.B.A. J. 446 (1982).

180 23 WRIGHT & GRAHAM, *supra* note 1, § 5422, at 674.

secure information, it has a disproportionate impact, because plaintiffs usually have the burden of proof.

A corporate litigant facing a human adversary may also benefit disproportionately from the increased discovery costs created by the privilege. A corporation that is denied access to attorney-client communications between its opponent and the opponent's attorney will have to spend more money to get the information, because it will have to depose the opponent or draft interrogatories that cover the desired information. An individual seeking information from a corporation faces considerably greater cost in securing substitute information, because he will have to locate the numerous people with relevant information and depose all of them. The larger the corporation, the bigger the increase in discovery costs that can be generated by protecting privileged communications.

Defendant corporations can benefit not only from actual privilege protection, but also from the ability to litigate privilege issues and thus delay the ultimate resolution of the lawsuit.¹⁸¹ Defendants can benefit from delay both by postponing the necessity to pay the plaintiff and by increasing the chances that the passage of time will impair the quality of evidence, making it more difficult for the plaintiff to meet her burden of proof.¹⁸² For a number of reasons, then, corporations, repeat litigants, and defendants (groups with substantial overlap) are better positioned to create communications protected by the attorney-client privilege, to benefit more from the substantive application of the privilege, and to benefit more from litigating privilege issues, than plaintiffs and one-shot litigants.

181 Empirical research regarding discovery behavior supports a belief that corporations and defendants benefit from privilege disputes. The American Bar Foundation study found that "attorneys who spent 50 percent or more of their time representing large corporate clients . . . were likely to have used discovery to 'gain time' in 30 percent (median) to 46 percent (mean) of their cases." See Brazil, *supra* note 147, at 852-53. Attorneys who receive most of their work from individual clients "used discovery for purposes of delay in only 10 percent (median) to 26 percent (mean) of their cases." *Id.* Similarly, "attorneys who committed 75 percent or more of their time to defendants' matters indicated that the desire to 'gain time' had affected their discovery in 28 percent (median) to 39 percent (mean) of their cases; those figures were 15 percent (median) and 27 percent (mean) for the group of predominantly plaintiffs' lawyers." *Id.* at 853. A different study demonstrated that some defendants' resistance to discovery often is unfounded, either because of a mistaken belief in the existence of a privilege, or because objections are being used for strategic purposes such as delay and harassment. Joseph L. Ebersole & Barlow Burke, *DISCOVERY PROBLEMS IN CIVIL CASES* 44-47 (1980).

182 See Thomas W. Church, Jr. et al., *PRETRIAL DELAY: A REVIEW AND BIBLIOGRAPHY* 12-13 (1978).

The truth-garbling effects of the privilege are particularly pernicious, because instead of being random they assure that the favored litigants will, over time, consistently prevail in cases which they should have lost. Instead of a series of cases in which privilege claims evenly change the outcome of cases, the changes are primarily in a single direction — in favor of corporations, especially those who appear in court as repeat litigants and defendants.¹⁸³ This means that the potential deterrent function of litigation is not merely unreliable, it is slanted. Corporate defendants will be under-deterred from engaging in illegal conduct, because the privilege will allow them to escape the cost of their conduct. While this state of affairs makes the privilege attractive to the corporate clients, it makes it untenable for society as a whole.

II. AN ASPIRING MYTH: LAW AND ECONOMICS ANALYSIS

A. *The Myth*

A group of scholars at Northwestern University has recently put a new spin on the old myths.¹⁸⁴ These scholars disagree with traditional utilitarian myths and suggest a new one. In doing so, they agree with critics that the privilege increases the opponent's cost of discovery, but claim that this is the characteristic that gives the privilege its value. Further, they allege that the marginal increase in communication that occurs because of the privilege benefits the legal system by making it possible for attorneys to channel their clients away from perjured positions, and into alternative honest claims and defenses. Although this law and economics approach is admirable in its recognition of the costs of the privilege,¹⁸⁵ its analysis fails in the context of corporate attorney-client privilege.

The purpose portion of this theory acknowledges some of the costs imposed by the attorney-client privilege. "[I]f the privilege does not increase the other side's discovery costs, there is no con-

183 Those with established power in society tend to appear in court as defendants. See 23 WRIGHT & GRAHAM, *supra* note 1, § 5422, at 674.

184 Allen et al., *supra* note 6. Note, however, that this article is not specifically directed toward the privilege in a corporate context. Some of the comments that follow therefore address issues that the Northwestern authors have not specifically raised.

185 Perhaps for this reason, one prominent treatise has noted, citing the Northwestern article, that the privilege "has recently acquired some friends that may be the next best thing to enemies." 24 WRIGHT & GRAHAM, *supra* note 1, at 9 (Supp. 1992).

ceivable reason for it."¹⁸⁶ The authors find evidence of the increased costs in the continuing existence of privilege litigation;¹⁸⁷ in empirical studies indicating that litigation opponents fail to discover all relevant information;¹⁸⁸ and in the incentives created by the adversary system's tolerance of the "large gap between absolute candor and perjury . . . within which clients and attorneys may maneuver while blanketed with the protection of the privilege."¹⁸⁹ For the authors, however, these costs are not an unfortunate by-product of the privilege; rather, they are precisely the point. It is the ability to increase an opponent's cost of discovery that creates the incentive for the client to fully confide in his lawyer.¹⁹⁰

It is here that the effects portion of the law and economics myth emerges. Non-lawyer clients, they say, possess various pieces of information relevant to a legal dispute, and will perceive some of this information to be helpful and some to be harmful. No privilege is needed to convince the client to share the helpful information. Instead, the privilege is necessary to convince the client to divulge presumably unfavorable information.¹⁹¹ Otherwise the client, who is willing to compromise with truth, will either

186 Allen et al., *supra* note 6, at 363.

187 "If opponents could acquire information just as cheaply by alternative means, there would be little reason for them to litigate whether or not that same information is protected by the privilege." *Id.* at 363.

188 *Id.* at 364 n.9. See also studies cited *supra* notes 146-47.

189 Allen et al., *supra* note 6, at 364. For example, in the *Model Rules of Professional Conduct* concerning candor toward the tribunal, the limits on a lawyer offering evidence apply only when the lawyer *knows* the evidence to be false. MODEL RULES, *supra* note 72, Rule 3.3. While the lawyer may not practice deliberate self-deception, she may (indeed, should) give the client the benefit of the doubt. There are several weasel words in Rule 3.3 that give the lawyer considerable latitude. For example, the lawyer is not prohibited personally from making a false statement to the court unless it is "material." *Id.* Rule 3.3(a)(1). The lawyer need not disclose unmentioned facts to the tribunal unless those facts are "material" and disclosure is necessary to "avoid assisting a criminal or fraudulent act by the client." *Id.* 3.3(a)(2). And while the lawyer may not offer "known perjured or falsified evidence . . . it is only at a point not far short of such extremes that an advocate even has discretion to refuse to present such evidence, without risk of being challenged with malpractice or lack of diligence." HAZARD & HODES, *supra* note 85, § 403, at lxxvii. See also *id.* §§ 3.3:102, 3.3:201 & 3.3:208.

190 Thus while the law and economics theory relies on a different explanation for the source of added incentive, it shares with the traditional theories a belief that the non-privilege-based incentives for lawyer-client communication are insufficient to create a desirable level of candor. Likewise, the contingent claim theory is reminiscent of Wigmore's argument that in civil cases there is a mixture of good and bad acts and facts on both sides and absent a privilege, the bad ones might deter the client from consulting a lawyer and pursuing the good ones. See WIGMORE, *supra* note 13, § 2291, at 552.

191 Allen et al., *supra* note 6, at 362.

omit information or lie in the hope of defeating the opponent's claim. If the privilege allows the client to be completely candid with the lawyer, however, the lawyer may recognize the applicability of some legal principle (such as an affirmative defense) that was unknown to the client. This principle, which the authors refer to as a "contingent claim," will allow the client to prevail despite the bad facts. Therefore, the client will not need to lie and the court will be presented with the true contingent claim, rather than the falsified claim originally envisioned by the client. The judicial system will therefore experience a net decrease in untruthful information and an increase in appropriate applications of the law creating the contingent claim.

B. Facing Reality Again

1. Increased Opponent Cost as Incentive

In the context of corporate attorney-client privilege, there are different sets of decisionmakers, and their incentive structures vary. The corporation itself is actually the client and the potential benefit of increasing opponent cost will have one kind of effect on the corporation, thus potentially affecting the extent to which the corporation encourages attorney-employee communications. However, it is individual corporate employees who actually decide whether to talk to the attorney and how much information to divulge, and the incentive provided by the privilege affects them only indirectly. Further, these incentives are likely to have a different marginal impact on low-level and higher level employees. When all of these incentive structures are analyzed, it is clear that the additional incentive to communicate created by the privilege is very small.

If there were no privilege and no prospect of litigation-compelled disclosure, a corporation deciding whether to encourage some particular attorney-employee communication, or some type of attorney-employee communication, would make a prediction about the expected value of the communication to the corporation, and a prediction about the cost of the communication. If the expected benefit exceeded the expected cost, the corporation would encourage the communication.

When the communication involved a subject which could be expected to involve litigation, the corporation would also make a prediction about the expected cost of providing that information to a litigation opponent ("opponent value"). The corporation

would decide to encourage the communication whenever the expected value to the corporation exceeded the cost of the communication, plus the cost of providing the information to an opponent.

If the sheer cost of getting the information to the lawyer exceeds the expected value of the information (as, for example, if the proposed communication involves interviewing thousands of employees to get insignificant information), the corporation would not encourage the communication regardless of the prospect of litigation even if a privilege existed; it is simply more expensive than it is worth. In contrast, if the information is expected to be extremely valuable to the corporation, exceeding the combination of cost and opponent value, the corporation would encourage the communication even without a privilege. It is only when the specter of an opponent gaining harmful information is big enough to tip the equation that the presence or absence of a privilege could make a difference.

For purposes of illustrating this point, consider XYZ Corporation again. XYZ has been sued by a consumer injured by the widget and XYZ is deciding whom its attorney should interview and whether to encourage its employees to be candid with the corporation's lawyer. As discussed above, without a privilege, XYZ will encourage the communication whenever the expected benefit exceeds the combined expected costs. The fear of litigation disclosure will only occasionally be decisive, acting as a disincentive to the corporation only when expected value exceeds expected communication costs, but does not exceed the combined communication and opponent value costs.

The existence of the attorney-client privilege can, in theory, change this equation so as to make XYZ more enthusiastic about the communications. As the Northwestern authors correctly point out, the privilege increases the cost to litigation opponents of securing information. This can have two benefits to the corporation. First, simply forcing an opponent to spend more on litigation can be beneficial. Increasing discovery expenses in one area may limit discovery in others, or may limit the resources available to the opponent to acquire and organize trial evidence and witnesses. Increasing discovery expenses may also encourage an opponent to settle a case in a manner more advantageous to the corporation because the opponent cannot afford to expend any more resources on the litigation. Second, increasing the cost of acquiring information may, in effect, decrease the chances that the opponent will

acquire the information, and may even mean that the opponent does not get the information at all. It simply becomes too expensive to use other means to secure the information in non-privileged form. In these situations, the privilege provides not just an increase in cost, but also actual secrecy: the information communicated to the lawyer will not reach the opponent.

Though it is conceivable that the effects of the privilege will sometimes make a difference, I doubt that it often will. First, in most cases the expected value of learning the information will be very high relative to the costs of learning the information. Even when the expected effect of divulging the information is included as a cost, the corporation will still deem the expected value of the communication to exceed the expected cost and will encourage the employee and the lawyer to speak candidly. Before a communication takes place, the corporation will not know the extent to which the information to be gained from the communication will be helpful. The potential value will range from zero (for totally useless information) to a high value (for information expected to be very helpful to the corporation's litigation posture). Because the corporation's lawyers can prepare the corporation's case better when they are aware of bad, as well as good facts, even learning information helpful to the opponent will have value.¹⁹² While the facts themselves may be harmful to the corporation's case, *learning* the facts has positive value. Though the content of any particular employee's knowledge will not be known ahead of time, the corporation will try to predict the value of that information, or that type of employee.

For cases in a litigation posture, many of the prospective communications with counsel are so obviously relevant that the corporation will encourage them. For example, if a corporation employing a truck driver will be litigating a case arising out of an accident involving that truck driver, its lawyer will interview the truck driver. If a corporation running an airline will be litigating a

192 The attorney-client privilege, unlike work product immunity, does not require anticipation of litigation before communications attain privileged status. Therefore, these incentives also should be analyzed in the context of communications taking place when there is no prospect of litigation. In this pre-litigation posture, the corporation should place a high value on both good and bad information. At this point, the corporate attorney needs the bad information in order to give the corporation reliable advice, and in order to avoid or minimize whatever problems may have been created by the bad facts. It is possible that the cost of learning the information may be lower at this point as well, if certain types of communications with counsel are made routinely.

case arising out of a plane crash, its lawyer will interview all employee crash survivors. If a corporation running retail stores will be litigating a case arising out of an injury to a customer, its lawyer will interview all employees with knowledge of the injury.

This "need to know" applies in situations in which the employees' knowledge is farther removed in time from the plaintiff's injury. If a corporation manufactures widgets and will be litigating a case arising out of injury to a consumer, its lawyer will interview the employees involved in developing and manufacturing the widget. If a corporation will be litigating a breach of contract claim, its lawyer will interview the employees who were involved in the decisionmaking process. The relevance of the information possessed by these types of employees is simply too great for the corporation to risk keeping its lawyer in ignorance of the facts, whether they be "good" facts or "bad" facts. No privilege is needed to encourage these communications.

Second, the privilege incentive only exists when the added cost for the opponent and added possibility that the information will remain undiscovered are sufficiently strong to change the result of the corporation's cost/benefit analysis. This is most likely to be true only in cases in which the additional cost of discovery created by the privilege is least likely to benefit the judicial system.¹⁹³

Increasing an opponent's cost is most valuable when it affects either settlement or an opponent's ability to prepare for trial. If the cost to the plaintiff of finding alternative sources for the information is \$X, that cost will be the same whoever the plaintiff is, but the value to XYZ of imposing that cost on the plaintiff varies depending on the effect of that cost on the plaintiff. If the cost is sufficient to pressure the plaintiff into a less desirable settlement, or if it is sufficient to detract from the plaintiff's trial preparation in other areas, then the corporation will benefit substantially. The privilege, therefore, is most likely to be an important factor when the plaintiff has limited resources relative to the cost of thorough preparation.

When the additional costs imposed by the privilege become so high that they result in the corporation being able to protect its secrets (as, for example, when the resulting cost is so high that the plaintiff cannot undertake the discovery), they may sometimes be sufficiently important to motivate the corporation to encourage

193 See *supra* part II(B)(1) *passim*.

additional communications. Secrecy is of the greatest value to the corporation when the information to be kept secret is very relevant and very harmful to the corporation. In other words, the potential for continued secrecy will be most influential in cases in which the corporation has the power to hide from the plaintiff bad facts that remain relevant despite any "contingent claim."

From the corporation's perspective, then, there may be a limited number of situations in which the attorney-client privilege will produce a marginally greater incentive to encourage employee-attorney communications. The privilege is most likely to provide this increased incentive in cases where limited opponent resources will affect the case outcome, or where important facts can be kept from the opponent and therefore from the trier of fact. But the corporation is not the person actually deciding how complete and candid to be with the corporation's lawyer. The above analysis considers how much the corporation will encourage the communication, but from the standpoint of the employees deciding what to say, this is only one of many variables. As to the employees, the privilege works only indirectly as a motivation, because it is not their privilege.

Employees deciding what to communicate¹⁹⁴ have a different set of costs and benefits to consider. The employee's incentive to be candid with the lawyer stems both from the pressure exerted by the employer and from the vicarious expected value to the employee of providing information to the corporation's lawyer. The employee's disincentive to be candid comes from the potential personal consequences, should the lawyer reveal the employee's bad acts to the corporation, and from a vicarious fear that the employee could suffer if the corporation were harmed in litigation because the opponent gained access to the information.

To use the XYZ example again, imagine the same lawsuit between the plaintiff and XYZ Corporation, and assume that XYZ has a vice-president named Green and an engineer named Smith in its employ. With no privilege, the employee will be candid with the lawyer when the combined incentives exceed the combined disincentives. Could a privilege for the corporation affect any of

194 According to the second utilitarian myth (privilege needed to encourage the lawyer), we should also examine whether the increase in costs encourages the lawyer to seek greater candor from the employees. The Northwestern authors, however, do not make this argument for the attorney-client privilege. To the extent that this argument duplicates a work product analysis, see authorities cited *supra* note 6.

these variables? The important variables involving the expected value of the information and the personal vulnerability of the employee would remain unaffected by the privilege.¹⁹⁵ The other two variables, however, might be affected by the existence of a privilege claim. As discussed above, the privilege might under some circumstances make the corporation more likely to encourage employee communications. This, then, could increase the pressure asserted by the corporation on the employee. It seems more likely, however, that the corporation's added incentive would manifest itself in decisions about to whom the lawyer should talk rather than about how much candor the corporation expects from those employees who do talk to the lawyer.¹⁹⁶ A privilege could also affect the employee's perception of potential harm to the employer. In short, a privilege might marginally increase the incentives for an employee to communicate or might have no effect at all.

The expected corporate impact of harmful information, to the extent it has any effect, may be more significant for some high-level employees. Fear of harm to the corporation's litigation position seems likely to affect the employee's decision in an important way only if it will in some way affect the employee personally. This variable would affect people like Smith only if the information is so bad that it might cause the corporation not only to lose the lawsuit but also to suffer such significant financial harm that it might go out of business, lay off employees, or decrease employee

195 The potential personal consequences of revealing bad conduct to the lawyers may also vary depending on one's status in the corporate pecking order, but these consequences are unaffected by privilege claims. If Smith reveals to the corporation's lawyer that he falsified test results, the lawyer may (in fact, probably must) reveal that fact to Smith's corporate superiors. Remember, this is not Smith's privilege. Therefore, if Smith fears that he will be penalized by XYZ for his conduct, he may choose not to share the information with the lawyer, no matter what benefit the privilege offers to the corporation. In this situation the privilege becomes insignificant in the employee's decision. For Green, there are fewer corporate superiors to impose internal punishment and he is therefore less vulnerable to personal consequences. Green's fear of personal consequences will in most circumstances be less significant (although if the conduct was bad enough, this variable could be decisive even for Green). Neither employee's situation changes because of the presence or absence of a privilege.

196 A corporation would be ill-advised to tell its employees to talk to the lawyer and tell that lawyer only part of the relevant facts. Only if the corporation were convinced that it could hide these presumed bad facts permanently from everyone would the corporation benefit from hiding the facts from its own lawyer.

In a pre-litigation posture, the added incentive seems more likely to affect which employees the corporation allows or encourages to communicate with the corporation's attorneys than how honest it expects those employees to be.

compensation. Therefore, a decrease in this variable caused by a privilege claim becomes virtually irrelevant. The same is true for most executives. At least in smaller corporations, however, employees who are also owners or whose compensation is directly related to corporate profits are more likely to put some weight on this variable.¹⁹⁷ Again, the variable is most likely significant when the information is so bad that it would cause the corporation to lose or settle less favorably.

In summary, the incentive structure envisioned by the Northwestern authors will have only the most marginal impact on attorney-employee communications. The privilege can create an occasional increase in incentive for the corporate client to pressure employees into being candid with the lawyers, but this will only seldom occur, because generally the corporation's inherent interest in learning potentially relevant information will be so high that it will outweigh even the fear of disclosure to the litigation opponent. The increased corporate incentive, in turn, may have a small impact on the employees' willingness to be candid with the lawyer. For most employees, variables other than the effect of the privilege are likely to be much more significant than a marginal change in corporate incentives occasioned by the privilege. Most importantly, in both the case of the corporation itself and of the corporate employee, the privilege will most likely provide a significant incentive to communicate in cases in which information harmful to the corporation can be successfully hidden from discovery by the privilege.

2. Benefits from Contingent Claims

Despite the cost of the privilege, and despite the marginal nature of the incentive it could provide, the Northwestern authors believe that the costs imposed on the judicial system by the privilege are outweighed by its benefits. These benefits are supposed to come from the legal knowledge gap between lawyers and lay people, and the benefit to the system of making sure clients take advantage of unanticipated legal theories.

Clients will have a certain pool of information that they believe to be relevant to their legal situation. They will believe that

¹⁹⁷ Jurisdictions that confine the privilege to communications with members of the control group are therefore in a stronger position in that they provide a privilege only for those communications in which the incentives might occasionally make a difference.

some of this information is helpful to their position and that some of it is harmful to their position. As explained above, the attorney-client privilege is supposed to provide the incentive to the client to share the presumed bad information with the lawyer. Assuming that this happens,¹⁹⁸ the Northwestern authors predict a benefit not only to the client, but also to the legal system. Sometimes, the client will share what he believed to be bad facts, and it will turn out that those facts actually help his case because of what the authors call "contingent claims." These contingent claims are primarily affirmative defenses and plaintiffs' avoidances of those affirmative defenses, but the authors state that a contingent claim exists whenever there is "any set of facts more favorable to the party than those which a typical lay person would think necessary."¹⁹⁹ Once the client divulges the facts and learns of the contingent claim, the authors believe the client will drop any perjured claim the client had and will instead pursue the honest contingent claim. The system would benefit from increased honesty and increased use of the legal doctrines behind the contingent claims.²⁰⁰ This theory seems unlikely to be very significant in real life, and unlikely to outweigh the costs of the privilege.

Note that the benefit will occur only occasionally, even in theory. Clients will not always have perjured positions, and they will not always have contingent claims. There are three possible situations: (1) the client has a good non-contingent claim and a good contingent claim; (2) the client has a perjured non-contingent claim and no contingent claim; and (3) the client has a perjured non-contingent claim and a good contingent claim. In the first situation, the client does not need a dishonest position to prevail, and it is unlikely that additional motivation would be needed to ferret out the contingent claim. In the second situation, the client's disclosure does not reveal any valid contingent claim which would discourage the dishonest non-contingent claim. In neither of these situations, then, does the privilege have the potential to lead to a decrease in perjurious testimony provided to

198 And I doubt it. See *supra* part II(B)(1).

199 Allen et al., *supra* note 6, at 367.

200 *Id.* at 366.

the trier of fact.²⁰¹ Only in the third situation is there even a possibility that courts will experience an increase in truth-telling.

This increase in truth will only occur if the client, having learned of the contingent claim, will drop the perjured non-contingent claim. For purposes of illustration, assume the most common situation in which the theory might apply: a defendant has a fallacious denial defense and a good affirmative defense. The Northwestern authors use the example of a driver-pedestrian accident where the driver/defendant falsely denies that he was negligent until he discovers that he may also prevail by claiming that the pedestrian was contributorily negligent. The court will only experience a decrease in perjury if the driver not only raises the contributory negligence defense, but also drops the false denial of his own negligence.

This seems unlikely. Remember that we began with a client who was willing to lie.²⁰² Now we are to assume that this same dishonest client will be willing to put all of his eggs in one basket, admit negligence, and rely solely on the affirmative defense. Our procedural systems do not require this kind of choice; our professional responsibility rules usually do not require the choice; and the dishonest client has no incentive to make that choice. It is much more appealing to argue in the alternative: I was not negligent *and* plaintiff was contributorily negligent; the product was not defective *and* plaintiff misused it; the contract was not breached *and* any claim on it is barred by limitations or the statute of frauds.²⁰³

Nor do ethics rules prevent the lawyer from presenting these alternative claims except in the most extreme cases in which the lawyer "knows" that the information to be presented to the tribunal is material and is false. As the Northwestern authors themselves point out, the rules of ethics create "a distinction between the client's and the lawyer's knowledge [that] encourages lawyers

201 It is possible, though, that in the first situation the client will pursue both the contingent and non-contingent claims, so that there may be some benefit to the system of having the contingent claim raised and applied. Privilege-based incentives are not necessary to learn the facts needed for these added contingent claims.

202 "We assume that individuals will sometimes be dishonest in pursuit of their self-interest." Allen et al., *supra* note 6, at 365.

203 See, e.g., FED. R. CIV. P. 8(e)(2) ("A party may set forth two or more statements of a claim or defense alternately or hypothetically . . .").

to learn of the client's information without fully 'knowing' it for purposes of the ethical rules."²⁰⁴

The ability to pursue both the denial defense (non-contingent) and the affirmative defense (contingent) seems even more likely in the corporate context. Here the corporate client's knowledge is diffuse, contained in the collective memory of numerous employees and multiple documents. The lawyer, after interviewing multiple employees, may have heard more than one version of the "facts." The widget was really tested; the widget was not really tested; the widget was partially tested. As long as these stories are not obviously false, the lawyer will take the position that she is not the trier of fact and will present to the court the story most helpful to her client. The non-contingent claim need not be dropped; the contingent one is just added to it.

Thus, in the only situation in which the addition of a contingent claim might conceivably decrease the amount of false testimony presented to the court, it is unlikely to do so. Even this, however, overstates the potential benefit of the attorney-client privilege because the privilege is not needed to encourage the assertion of contingent claims.

The Northwestern authors seem to assume that the client can be made aware of the contingent claims only after making a complete disclosure to the lawyer. In other words, they assume that the lawyer could not identify the contingent claim and advise the client about it without first learning the bad facts.²⁰⁵ This will only occasionally be the case. Most contingent claims are obvious and predictable. Pick up a hornbook or a legal encyclopedia, look up any topic, and there will be a list of the elements of the claim or defense and all of its associated affirmative defenses and avoidances. The competent lawyer can discuss these with the client and thereby assuage the client's fear of bad facts.²⁰⁶

204 Allen et al., *supra* note 6, at 364 n.10.

205 There is, unfortunately, the possibility that after the lawyer explains the potential contingent claims the client will create dishonest contingent claims that the client could not have created on his own. Cf. *Anatomy of a Murder*. This risk already exists under our current system, however, and the abolition of privilege rules should not add to the danger. Indeed, because the lawyer-client communication would not be protected it could become easier to detect the claim manufactured after legal advice. Cf. Wells, *supra* note 99, at 686 n.45 ("In proving that monkeys can be taught to speak English, for example, the fact that the scientist rehearsed a particular script with them may be of no great relevance. In proving that monkeys unvaryingly speak the truth, however, such a fact may be crucial.").

206 It is therefore the lawyer's ability to foresee the contingent claims rather than the

It is only the unimaginable, unanticipated kind of contingent claim that the lawyer could use only after learning the facts. In the context of the corporate client, where the same lawyer or firm represents the client over time, the prospect of an unanticipated contingent claim is even more remote. The continuing relationship allows the lawyer to become more familiar with the recurring legal issues relevant to the client's business. In many cases, the client representatives will also become well-informed with the legal doctrines and potential contingent claims available.

Clients may or may not have valid contingent claims. If there is no contingent claim, the privilege adds a cost to the client's opponent, a cost to the judicial system, and a benefit to the client, without benefitting the system. If there is a predictable contingent claim, the privilege adds a cost to the client's opponent, a cost to the judicial system, and a benefit to the client, without benefitting the system.²⁰⁷ Only if there is an unpredictable contingent claim can the privilege add not only a cost to the client's opponent and the judicial system, but also a benefit to the system by allowing the contingent claim to be asserted. The privilege always imposes a cost on the opponent and the legal system, always benefits the client, but only very occasionally could it conceivably create systemic benefits.²⁰⁸

The potential benefit from the privilege thus shrinks again: it could help *if* the privilege provides significant additional incentive for the corporation to encourage candor and *if* this incentive trickles down to the individual employees and *if* the client had a dishonest non-contingent claim and *if* the client would drop it after learning of a legitimate contingent claim and *if* the lawyer

client's ability to foresee the claims that is relevant, contrary to the position of the Northwestern authors. Cf. Allen et al., *supra* note 6, at 368 (privilege would not apply if a "relatively ignorant client" would know that communication could reveal no contingent claim). If the lawyer can predict the relevance of the contingent claim and so advise the client, the client should be willing to be candid with the lawyer. The theory of the contingent claim, after all, is that the client will be able to win its case despite (or because of) facts that without legal advice it believed to be bad ones. The contingent claim, however, means that those facts are no longer bad, and the client should need no promise of secrecy designed to encourage candor.

207 Not only is there no benefit to the system in these two cases, the legal system suffers harm when the additional cost to the opponent affects the outcome of litigation, and especially where the effects form a one-sided pattern.

208 This incentive structure inappropriately shifts the risk of the existence of a contingent claim from the client to the opponent. The client gets all the benefit and the opponent all the cost. See *supra* Part I(C).

would not have anticipated the relevance of the contingent claim absent client disclosure. Yet we protect all communications for those rare cases in which incentives encourage a client to reveal an unpredictable contingent claim.

III. LIFE WITHOUT MYTH

When all the mythology is stripped away, precious little remains. The corporate attorney-client privilege can provide only the most marginal increase in employee-attorney communications. In the great majority of cases, the privilege is needed neither to encourage the client to talk nor to encourage the lawyer to listen. The corporate privilege protects no moral interest in privacy or autonomy. Additionally it imposes tremendous costs not only on the litigants but also on the entire judicial system. Without the myths, we have to admit that we have nurtured a doctrine whose costs exceed its benefits, and we need to respond with change. The question remaining is not whether, but how much, change is required.

Options less drastic than entirely eliminating the corporate privilege could decrease the costs imposed by the privilege. None, however, would achieve a proper balance. Consider some examples:

(1) The corporate privilege could be limited to members of the control group,²⁰⁹ narrowing the scope of the privilege. Nevertheless, a well-prepared corporation could still structure its internal communications and its communications with counsel to achieve a large blanket of secrecy.²¹⁰

(2) The corporate attorney-client privilege could be narrowed to include only communications that would not have taken place in the absence of a privilege.²¹¹ In addition to being practically unworkable, however, this innovation still allows a privilege without any evidence that the greater information conveyed to the client's attorney would reach the trier of fact. It thus assures a benefit to the client but not to the judicial system.

209 See Saltzburg, *supra* note 49, at 306 (suggesting a privilege for all communications made for the purpose of securing legal advice for the corporation, in confidence, by a person or group of persons who have the authority to control the subsequent use and distribution of the communication).

210 See *supra* Part I(C).

211 Weissenberger, *supra* note 143, at 918.

(3) The corporate attorney-client privilege could be made conditional rather than absolute, allowing opponents to discover the communications only on a showing of need and hardship.²¹² As in work product situations, however, this leaves the privilege intact in most cases and imposes a heavy burden on the discovering party.²¹³

(4) The crime/fraud exception to the corporate attorney-client privilege could be interpreted to include fraudulent communications within the lawsuit itself.²¹⁴ This would be inadequate, however, because much of the shading of truth in litigation made possible by the privilege fails to reach the level of fraud, and because most litigation opponents would be unable to make the prima facie showing of fraud required to gain access to the privileged documents.²¹⁵

(5) The concept of issue-related waiver could be expanded so that the corporate attorney-client privilege is lost whenever the information contained in the privileged communication is relevant in the lawsuit, no matter who pleaded the issue creating relevance. This would be tantamount to doing away with the privilege in litigation, however, and a straightforward elimina-

212 Michael Rosenfeld, *The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client's S.E.C. Disclosure Obligations*, 33 HASTINGS L.J. 495, 548 (1982).

213 Thornburg, *supra* note 6, at 1558-60.

214 *See, e.g., Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343 (Tex. Ct. App. 1993).

215 Under current law, a party seeking to overcome his opponent's privilege claim by invoking the crime/fraud exception faces a fairly heavy burden. It is not enough to simply claim that the opponent consulted the attorney in furtherance of a future crime or fraud. Instead, the party must somehow make a prima facie showing of the crime or fraud before the opponent will even be required to submit the privileged information to the judge for an *in camera* inspection. *See United States v. Zolin*, 491 U.S. 554 (1989). Without access to the privileged communications, it is often difficult, if not impossible, to make the prima facie showing. Often, the party succeeds only if the opponent has inadvertently divulged a portion of the privileged information. *See, e.g., id.; Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992). Especially in civil cases, it is an unusual situation where a crime/fraud allegation prevails over a privilege claim.

The balance could be changed either by making it easier to trigger an *in camera* inspection, or allowing courts to scrutinize allegedly privileged materials for evidence of fraud while inspecting them for the privilege claim itself. This might reveal gross instances of lawyer-client collusion. *See Volcanic Gardens Mgmt. Co.* (plaintiff's first lawyer testified that plaintiff and second lawyer were conspiring to defraud defendant). *But see Cigna Corp. v. Spears*, 838 S.W.2d 561 (Tex. Ct. App. 1992) (defendant and its lawyers were merely defending themselves against fraud claims). The crime/fraud exception, however, is not aimed at a litigant whose only "fraud" is the shielding of relevant information from discovery or at the subtler shadings of testimony that are so well protected by the privilege. Nor would a more easily-invoked crime/fraud exception solve the problems that are created by the privilege even when no deception is involved.

tion would be more sensible than something that looks like an exception to a privilege.

Any half measure which shrinks the corporate privilege, without doing away with it, leaves one major problem intact: transaction costs. As long as a privilege exists, corporations and their lawyers will invoke that privilege in litigation. Therefore, the costs of privilege disputes will remain. Even if the court ultimately rejects the privilege claim, the corporation will have received much of the benefit of the privilege, by forcing the opponent to spend more money to acquire the desired information.

All of the half-reforms leave plenty to litigate. For example, if a control group test were adopted, the parties' disputes would revolve around control group membership (as well as other remaining privilege issues such as the nature of the advice sought and the extent of confidentiality). If a "but for" test were adopted, disputes would revolve around whether the communication would have been made absent a privilege. If the privilege were made conditional, litigation costs would actually increase, because the cost of attempting discovery by alternate means and the cost of litigating the exception would be added to the cost of litigating the application of the initial privilege.²¹⁶ With these half-reforms, the opponent's costs and the court system's costs would remain.²¹⁷ Limited changes in the reach of the privilege would merely shift the focus of the debate without eliminating the problems of truth-garbling and systemic cost created by the privilege.

Narrowed privileges or broadened exceptions could create other costs as well. Corporations might pour excessive resources into structuring their communications so as to maximize their ability to assert privilege claims.²¹⁸ With some privilege left, the corporation's lawyer would feel obligated to try to achieve protection. A corporation with sufficient resources might expend enormous energy trying to limit written communications with counsel to the control group, undertaking litigation audits, and employing more lawyers than necessary in order to maximize the application

216 Thornburg, *Rethinking Work Product*, *supra* note 6, at 1559-60.

217 Most people concerned about the systemic costs of discovery disputes try to attack the problem by narrowing the scope of discovery. If less is discoverable, they reason, there will be fewer objections and fewer fights. I think it preferable to eliminate the source of disputes in another way. If there are fewer discovery privileges, there will be less to fight about. Without the corporate attorney-client privilege, we could eliminate a whole category of discovery fights, saving time for the parties as well as the courts.

218 Marcus, *supra* note 5, at 1609-15.

of the limited privilege.²¹⁹ Eliminating the privilege eliminates the incentive to resort to this kind of behavior.

Without an available privilege, the corporation and its employees would have to communicate the information required to secure reliable legal advice and to protect the corporation's interests during litigation. The party possessing the bad facts would bear the risk of communicating or not communicating that information to its attorney. But there would be no point in creating labyrinthine processes to maximize some privilege, because no privilege would exist.

Therefore, it is time to bite the bullet and eliminate the corporate attorney-client privilege. The twentieth century is drawing to a close, and it would be fitting for the century that enshrined the privilege to be the one to debunk it. Without the mythology, we are left with an ugly edifice that helps organizations with wealth and power retain what they possess. Rather than "restating" the myths,²²⁰ so that they continue well into the next century, we need to face the truth bravely and let go of the myths.

219 *E.g., id.* at 1606, 1609-11 (explaining costly measures taken by IBM to try to avoid waiver by inadvertent production of privileged materials). Privilege and waiver doctrines that reward parties with greater resources also give disproportionate advantages to those litigants who can afford costly, attorney-intensive precautions. *Id.* at 1613-14.

220 Perhaps the traditional approach taken by the A.L.I. in its tentative draft of the Restatement of the Law Governing Lawyers is inevitable. Restatements of the law are, however, more than simple recitations of established law. When multiple lines of case law exist, they can try to "divine the better path, which is not necessarily the path more frequently trod. In fact, restatements have sometimes broken new ground." Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 *GEO. J. LEGAL ETHICS* 195, 196-97 (1987). Nevertheless, the A.L.I. in drafting a restatement seems to be more constrained by existing law than would a group writing on a clean slate. Certainly the tentative draft adopts a broad corporate privilege, and the comments recite the myths in a fairly uncritical way. As its chief reporter expected, the attorney-client privilege provisions do not "propose radical legislative or rulemaking reforms." *Id.* at 211.

If a Restatement, once adopted, were treated merely as an outstanding analysis of existing law, such a project could provide clarity and do no harm. Unfortunately, however, Restatements often play a prominent role in judicial decisions, thereby deterring the judiciary from making any further changes in the law. *Id.* at 204. Restatements as an institution thus serve a conservative function, even if not so intended by their drafters. By accepting and repeating the myths in a new Restatement, the A.L.I. will assure that they will survive, and indeed thrive, for many years. A more critical evaluation of the purposes and effects of the privilege is needed.

