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A Proposal For Protecting Executive Communications With Corporate Counsel After Corporate Client Has Waived Its Attorney-Client Privilege

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**A PROPOSAL FOR PROTECTING EXECUTIVE
COMMUNICATIONS WITH CORPORATE
COUNSEL AFTER THE CORPORATE CLIENT HAS
WAIVED ITS ATTORNEY-CLIENT PRIVILEGE**

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INTRODUCTION

A corporation's communications with counsel may be protected by the attorney-client privilege.¹ This privilege belongs to the corporate entity alone.² The executives who communicate acquire no personal privilege.³

Consequently, if a corporation waives its privilege, its executives' communications become discoverable.⁴ Not only may those communications, thereafter, be used as evidence against the corporation, but they may also be asserted against the executive who made them.⁵ In a criminal investigation, for example, the corporation can strike a deal with prosecutors conditioned on full government access to corporate records, with a corresponding waiver of privilege.⁶ Subsequently, the executives who communicated, whether they understood the limits of corporate privilege confidentiality or not, might find that their statements formed the basis of criminal charges brought against them, as individuals.⁷

Executives thus face a dilemma. If they avoid cooperating with corporate counsel, they risk adverse job consequences. On the other

1. See *Upjohn v. United States*, 449 U.S. 383 (1981); see generally JOHN GERGACZ, *ATTORNEY-CORPORATE CLIENT PRIVILEGE* (3d ed. 2000) (Supp. 2007).

2. E.g., *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1978) (en banc) ("Ordinarily, the privilege belongs to the corporation and an employee cannot himself claim the attorney-client privilege and prevent disclosure of communications between himself and the corporation's counsel if the corporation has waived the privilege." (citing *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D. Mich. 1977))); see generally GERGACZ, *supra* note 1, at §§ 2.04-.09.

3. See *Diversified Indus., Inc.*, 572 F.2d at 611 n.5.

4. See *United States v. Stein*, 463 F. Supp. 2d 459, 462 (S.D.N.Y. 2006); *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 335 (4th Cir. 2005); see generally GERGACZ, *supra* note 1, at § 2.09.

5. See *Stein*, 463 F. Supp. 2d at 465-66 (denying defendant-employee's motion for relief from an alleged violation of attorney-client privilege, which defendant claimed existed by virtue of the attorney's representation of her employer).

6. See *United States v. Stein*, No. S1 05 CRIM 0888, 2006 WL 1063295, at *1 (S.D.N.Y. Apr. 5, 2006) (mem.).

7. Cf. *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975) ("The corporation has waived its privilege and since a corporation can act only through its officers, Vesco cannot assert the attorney-client privilege as to matters involving the affairs of the ICC, or embracing his role or activities as an ICC officer or director.").

hand, providing unreserved, frank, veracious information could leave them vulnerable if the corporation later waives its privilege. What are they to do? The law of attorney-corporate client privilege does not provide an adequate answer. This Article will suggest one.

At the outset the current law concerning executive-corporate counsel relationships will be examined. Although a personal attorney-client privilege can arise for the executive, the conditions apply only in atypical situations.⁸ In most cases, the executive's dilemma remains.

Thus, a change in the law is warranted: one that provides protection for communicating executives while respecting the boundaries of the attorney-corporate client privilege. To that end, a proposal will be offered. This proposal will neither provide a separate communicating executive privilege nor will it ease the dual representation standards. Instead, this Article advocates limiting the scope of corporate privilege waiver. This limit recognizes the particular nature of corporate client privilege and the complex relationship that exists between executives and their corporate employers.

I. BRIEF OVERVIEW: ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege keeps certain otherwise relevant information from being disclosed. Its origins have been traced to Roman law and, within the common law, to Elizabethan England.⁹ It has always been a part of American law.¹⁰ Under the privilege, confidential communications between attorney and client are not

8. See *Stein*, 463 F. Supp. 2d at 465 (acknowledging that, in very limited circumstances, communications implicating personal liability for acts within the scope of an individual's employment may be protected by individual attorney-client privilege, but only upon a showing that the individual's communications implicated her interests alone and were segregable from those involving the employer's interests).

9. JOHN HENRY WIGMORE, *WIGMORE ON EVIDENCE*, § 2290 (McNaughton rev., 1961); see also Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978); Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487 (1928).

10. See *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915).

The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.

Id.; see also *Hatton v. Robinson*, 31 Mass. (14 Pick.) 416 (1833); *Crosby v. Berger*, 11 Paige Ch. 377 (N.Y. Ch. 1844).

discoverable.¹¹ Thus, an adversary must build a case without access to the privileged information source.

Not every discussion involving an attorney and another person, however, qualifies as privileged. The often-cited *United States v. United Shoe Machinery* case sets forth a number of factors that distinguish privileged communications from non-privileged.¹² These factors can be arranged around three elements. First, the communicators must be an attorney and a client. The attorney must be acting as a lawyer¹³ and the client must be seeking legal advice.¹⁴ Failure to establish either attorney or client status will disqualify the communications from attaining the privilege.¹⁵ For example, not all individuals who communicate with an attorney are considered clients. A waiter taking a lunch order is not a client, nor is a bank teller who receives a deposit. Even a witness,

11. See *Jenkins v. Bartlett*, 487 F.3d 482, 490 (7th Cir. 2007) (“The attorney-client privilege protects communications made in confidence by a client to his attorney in the attorney’s professional capacity for the purpose of obtaining legal advice.”).

12. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

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

Id.

13. See, e.g., *Great Plains Mut. Ins. Co. v. Mut. Reinsurance Bureau*, 150 F.R.D. 193, 197 (D. Kan. 1993).

In sum, the court is satisfied that Great Plains’ attorney was acting in his capacity as an attorney during the relevant portions of the board meetings. The advice rendered by Great Plains’ attorney required the skill and expertise of an attorney. In addition, it appears clear from the minutes of the board meetings that the purpose of the conversations during the board meetings was to render legal advice, and that both Great Plains and its attorney understood that the purpose of the communications was to review and consider legal issues pertaining to Great Plains’ litigation with MRB.

Id.

14. See *Jenkins*, 487 F.3d at 490.

15. See, e.g., *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1390 (Fed. Cir. 1996) (“[T]he professional relationship for purposes of the privilege for attorney-client communications ‘hinges upon the client’s belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.’” (quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1390 (7th Cir. 1978))).

interviewed by counsel, falls outside the client requirement. Witnesses merely provide information. They do not do so in order to receive legal advice.¹⁶ Similarly, not every lawyer, when communicating, does so in a law-related role. A law professor might be licensed to practice in a given jurisdiction, but she communicates as a teacher while lecturing in the classroom. Further, no privilege arises when a lawyer works as an accountant.¹⁷ This lawyer would be communicating as a business adviser, not as a legal one.

The second *United Shoe Machinery* element focuses on the purpose of the information exchange.¹⁸ To qualify as privileged, attorney-client communications must further the provision of legal advice.¹⁹ Communications conducted for other reasons fail to satisfy this element.²⁰ For example, discussions of business strategy, divorced from legal implications, would not qualify as privileged.²¹ Further, conversing about the attorney's fees also falls outside the legal advice privilege requirement.²² Both illustrations pertain to information concerning business or financial matters rather than the law.

16. See, e.g., *Leer v. Chi., Milwaukee, St. Paul & Pac. Ry.*, 308 N.W.2d 305, 309 (Minn. 1981).

17. *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999) (finding that no privilege arises when lawyer acts as an accountant); see also *In re Spring Ford Indus., Inc* No. 02-15015DWS, 2004 WL 1291223, at *3 (Bankr. E.D. Pa. May 20, 2004) (finding that no privilege arises when lawyer acts as a language translator); GERGACZ, *supra* note 1, at §§ 3.22-.36.

18. *United Shoe Mach. Corp.*, 89 F. Supp. at 358.

19. See, e.g., *Status Time Corp. v. Sharp Elecs. Corp.*, 95 F.R.D. 27, 29-31 (S.D.N.Y. 1982) ("If documents containing considerable technical factual information are nonetheless primarily concerned with asking for or granting legal advice, as opposed to giving business or technical advice, they are privileged."); see also GERGACZ, *supra* note 1, at §§ 3.43-.47.

20. See, e.g., *Foseco Int'l Ltd. v. Fireline, Inc.*, 546 F. Supp. 22, 24 (N.D. Ohio 1982) ("Communications made in the routine course of business, however, such as transmittal letters or acknowledgment of receipt letters, which disclose no privileged matters and which are devoid of legal advice or requests for such advice are not protected." (citing *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44 (N.D. Cal. 1971))); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1975).

21. See, e.g., *In re Grand Jury Subpoena Duces Tecum*, 732 F.2d 1032, 1037 (2d Cir. 1984) (recognizing that it is well established that attorney-client communications related to areas other than legal counseling, such as business advice, are not privileged).

22. See, e.g., *In re Two Grand Jury Subpoenae Duces Tecum*, 793 F.2d 69, 71 (2d Cir. 1986); see also GERGACZ, *supra* note 1, at § 3.50.

United Shoe Machinery's third privilege element is confidentiality.²³ Privilege confidentiality has two parts: First, the communications must occur privately;²⁴ Second, they must remain confidential thereafter.²⁵ For example, attorney-client discussions that take place in a crowded restaurant do not satisfy the initial confidentiality component. Others could readily overhear their conversations. As for the second component, clients who reveal to others communications they have with their lawyers forfeit any privilege that may otherwise have applied.²⁶ Attorney-client privilege does not safeguard private communications that clients later reveal.

The law has long-embraced an attorney-client privilege because it is considered essential for the effective operation of the adversary system.²⁷ Law is complex and guidance is needed to make decisions based on its precepts. Attorneys provide this guidance. To do so

23. *United Shoe Mach. Corp.*, 89 F. Supp. at 358.

24. *See, e.g.*, *Exxon Corp. v. Dep't of Conservation and Natural Res.*, 859 So. 2d 1096, 1103 (Ala. 2002) ("Whether a party intended the communication to be confidential is dependent on who was privy to the legal advice."); *GERGACZ, supra* note 1, at §§ 3.50-.66.

25. *See, e.g.*, *United States v. Bell*, 776 F.2d 965, 971 (11th Cir. 1985) (holding that to determine whether a particular communication is confidential and protected by the attorney-client privilege, the privilege holder must prove the communication was "(1) intended to remain confidential and (2) under the circumstances was reasonably expected and understood to be confidential"); *United States v. Naegele*, 468 F. Supp. 2d 165, 170 (D.D.C. 2007) (stating that communications from the client which reveal information that was not meant to remain confidential are not protected by the attorney-client privilege).

26. *See, e.g.*, *In re Penn Cent. Commercial Paper Litig.*, 61 F.R.D. 453, 463 (S.D.N.Y. 1973) ("It is hornbook law that the voluntary disclosure or consent to the disclosure of a communication, otherwise subject to a claim of privilege, effectively waives the privilege."); *GERGACZ, supra* note 1, at §§ 5.01-.64.

27. *See Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833).

This principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in the courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser, and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall for ever be sealed.

Id.

adequately, counsel must be informed about the matters. Otherwise, the quality of legal advice will suffer.

Often, the client has the best information.²⁸ To encourage the client to be forthcoming, a special relationship with counsel, based on trust and candor, must exist. The privilege fosters this relationship by cloaking attorney-client communications with confidentiality. Without this protection, clients would face the daunting prospect that what was candidly disclosed to counsel could later be discovered by their adversaries. Clients would soon learn that communicating with counsel was a two-edged sword, on the one hand promoting sound legal advice, but on the other, creating a treasure trove of discoverable evidence. Consequently, clients would be tempted to hold back when communicating with counsel. Thus to promote client candor, the law protects privileged communications from disclosure.

II. CORPORATIONS AND THE ATTORNEY-CLIENT PRIVILEGE

Corporations may have privileged communications with counsel.²⁹ The privilege belongs to the entity alone.³⁰ The individuals who communicate on its behalf do not acquire any personal privilege.³¹

28. See *Crosby v. Berger*, 11 Paige Ch. 377, 377 (N.Y. Ch. 1844).

The object of the rule, protecting privileged communications from being disclosed by the attorney or counsel, is to secure to parties who have confided the facts of their cases to their professional advisors, as such, the benefit of secrecy in relation to such communications; so that the client may disclose the whole of his case to his professional adviser, without any danger that the facts thus communicated to his attorney or counsel will be used in evidence against him, without his own consent.

Id.

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

30. *E.g.*, *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1978) (“Ordinarily, the privilege belongs to the corporation and an employee cannot himself claim the attorney-client privilege and prevent disclosure of communications between himself and the corporation’s counsel if the corporation has waived the privilege.” (citing *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D. Mich. 1977))); see also *GERGACZ*, *supra* note 1, at §§ 2.05-10.

31. See *In re Grand Jury Subpoena Issued to Powers (In re Powers)*, No. 94-56603, 1995 WL 608481 (9th Cir. Oct. 11, 1995) (“An employee of a corporation that holds an attorney-client privilege may not assert the corporation’s privilege for personal protection where there is no express agreement for personal representation or where the employee has not requested such representation.” (citing *United States v. Layton*, 855 F.2d 1388, 1406 (9th Cir. 1988))); *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333 (4th Cir. 2005); *United States v. Stein*, 463 F. Supp. 2d 459 (S.D.N.Y. 2006).

Further, only the corporate entity may waive or assert its privilege.³² Although this can only be done by a corporation's management, the power is not specific to any individual. It is attached to the organizational function. Thus, if an individual moves between positions or leaves the company altogether, the power to exercise the corporation's privilege does not follow; the power remains with the corporation's management, now occupied by someone else.³³

Consequently, the attorney-client privilege for corporate clients and for individual clients differ somewhat. For corporations, certain features of the privilege are split among the holder (the corporation), the one who communicates with counsel (e.g., an executive) and the one with power to assert or waive the protection (management).³⁴ For individuals, all three components are joined together; the individual, who communicates with counsel, is protected by the privilege and has the power to assert or waive it.³⁵

The client's candor, which the privilege is deemed to induce, also differs when the client is a corporation. For corporate clients, the confidentiality that the privilege promises as an incentive does not pertain to the executives who communicate on its behalf. The executive's communication remains confidential only if the corporation asserts its privilege.³⁶ Confidentiality for the executive is a by-product

32. *CFTC v. Weintraub*, 471 U.S. 343, 348 (1986) ("As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation.").

33. *Id.* at 349 ("Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties."); see *GERGACZ*, *supra* note 1, at § 2.36.

34. *Weintraub*, 471 U.S. at 348 ("[T]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors.").

35. See, e.g., *Newman v. State*, 863 A.2d 321, 334 (Md. 2004) ("[O]nly the client has [the] power to waive the attorney-client privilege.").

36. See, e.g., *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975) ("The corporation has waived its privilege and since a corporation can act only through its officers, Vesco cannot assert the attorney-client privilege as to matters involving the affairs of the ICC, or embracing his role or activities as an ICC officer or director."); see also *In re Grand Jury Proceedings*, 469 F.3d 24 (1st Cir. 2006); *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333 (4th Cir. 2005); *Stein*, 463 F. Supp. 2d 459; *United States v. Stein*, No. S1 05 CRIM 0888, 2006 WL 1063295, at

of this decision. The executive has no personal control over his statements.

This does not mean that there are no incentives for candid communication.³⁷ The incentives, instead, are organizational, focusing on how corporations process information. The corporate privilege encourages management to generate policies that give counsel access to a full range of information. An expansive information-flow policy enables counsel to provide sound legal advice, thereby advancing the interests of justice. A privilege for corporate clients furthers this end.

Consider the alternative, where no corporate privilege exists. Internal information, directed to counsel, could create a storehouse that adversaries could readily access. Although the corporation would still need legal advice, this need might be tempered by the risk that later disclosure could entail. Consequently, management might be deterred from providing the same level of information flow that exists under the corporate privilege. Nonetheless, corporate privilege excludes the executive who communicates from its protection. If the communicator cooperates with corporate counsel, he risks disclosure if the corporation waives its privilege. If the communicator evades, he risks adverse job consequences.³⁸

Under some circumstances, the law provides a personal attorney-client privilege for corporate executives.³⁹ When that happens, the executive's communications with counsel remain confidential until the executive decides to reveal them. The executive's communications are thus uncoupled from those of the corporation. Although such a scenario can occur, it is not the usual outcome.⁴⁰

*1 (S.D.N.Y. Apr. 5, 2006) (mem.).

37. See GERGACZ, *supra* note 1, at §§ 1.19-.21, 3.58.

38. See *Stein*, 463 F. Supp. 2d at 461 (recognizing dilemma facing individuals who communicate on corporate employer's behalf).

39. See, e.g., *In re Grand Jury Proceedings*, 434 F. Supp. 648, 650 (E.D. Mich. 1977).

If the communicating officer seeks legal advice himself and consults a lawyer about his problems, he may have a privilege. If he makes it clear when he is consulting the company lawyer that he personally is consulting the lawyer and the lawyer sees fit to accept and give communication knowing the possible conflicts that could arise, he may have a privilege.

Id., *aff'd per curiam*, 570 F.2d 562 (6th Cir. 1978).

40. See e.g., *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001) ("The default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption." (citing *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*,

III. COMMUNICATING EXECUTIVES AND A PERSONAL
ATTORNEY-CLIENT PRIVILEGE

An executive who communicates about corporate matters can create a personal attorney-client privilege in two ways: First, by retaining a separate personal attorney;⁴¹ Second, by entering into an attorney-client relationship with corporate counsel.⁴² In this latter setting, corporate counsel will represent two clients—the executive and the corporation. In addition, under either backdrop, the communications must occur so the executive can obtain legal advice for himself. No personal privilege will arise if the communications merely further the corporation receiving legal advice.⁴³

A. Retaining a Personal Attorney

An executive who hires an attorney for personal representation will have his communications with that attorney protected by the privilege, even if the subject of those communications concerned corporate matters.⁴⁴ Basic tenets of the attorney-client privilege readily apply.⁴⁵ Counsel's client is solely the executive. Legal advice is provided to the executive rather than to the corporate employer. Communications with the executive further that end. Merely because the executive was an employee and business activities were the communication's subject does not change this conclusion.

Consider *Ex Parte Smith*.⁴⁶ In that case, outside directors of Just For Feet, Inc. retained separate counsel to advise them, personally, about

874 F.2d 20, 28 (1st Cir. 1989)).

41. *Ex parte Smith*, 942 So. 2d 356 (Ala. 2006).

42. *See, e.g., In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3d Cir. 1986); *Stein*, 463 F. Supp. 2d at 462-64.

43. *See In re Grand Jury Subpoena*, 274 F.3d at 573 (finding that no personal privilege arose because “the individuals’ allegedly protected communications with the [l]awyer did not appear to be distinguishable from discussions between the same parties in their capacities as corporate officers and corporate counsel, respectively, about matters of corporate concern”).

44. *See Ex parte Smith*, 942 So. 2d at 359-60.

45. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950) (listing elements needed to establish attorney-client privilege).

46. 942 So. 2d 356.

corporate matters.⁴⁷ The attorney was not retained to provide advice to the corporation nor was there any relationship between the attorney and Just For Feet, Inc. Just For Feet, Inc. paid the attorney's fee, however, and the board, as a whole, did not object to the arrangement.⁴⁸

The discovery dispute arose while Just For Feet, Inc. was in bankruptcy. The corporation's trustee in bankruptcy sought access to the outside directors' communications with their retained counsel.⁴⁹ The trustee argued that no personal privilege attached because the subject of those communications concerned corporate matters.⁵⁰ That being the case, the trustee contended only a corporate privilege could apply, and the bankruptcy trustee controlled it.⁵¹ The trial court agreed and ordered discovery.⁵²

The Alabama Supreme Court issued a writ of mandamus and directed the lower court to vacate its discovery order.⁵³ The court found that an attorney-client relationship existed between the outside directors and their retained counsel, and that Just For Feet, Inc. was not represented by that attorney.⁵⁴ Further, quoting with approval from *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, the court focused on the purpose of the communications at issue, rather than on the topics they covered.⁵⁵ Although *Bevill* was based on somewhat different facts (the officers sought a personal privilege for communications with corporate counsel),⁵⁶ the Alabama Supreme Court found its logic persuasive.⁵⁷

The court noted that communicating in order to obtain personal legal advice about corporate matters could create a personal privilege.⁵⁸ Communicating about the same topics, so the corporation could obtain legal advice, would not.⁵⁹ The reason for the executive's communication

47. *Id.* at 357-58.

48. *Id.*

49. *Id.* at 358-59.

50. *Id.*

51. *Id.*

52. *Id.* at 358.

53. *Id.* at 362.

54. *Id.* at 361.

55. *Id.* at 360 (quoting from *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986)).

56. *In re Bevill*, 805 F.2d 120.

57. *Ex parte Smith*, 942 So. 2d at 360.

58. *Id.* at 360-61.

59. *See id.* at 360 (referencing *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1041 (10th Cir. 1998)).

was the key, rather than the subject matter.⁶⁰ In *Ex Parte Smith*, the directors sought personal legal advice from their attorney.⁶¹ Consequently, a personal privilege attached, irrespective of who paid the attorney's fees.⁶²

Ex Parte Smith illustrates a straightforward means for executives to have privileged communications when discussing corporate matters. However, this tactic might not deliver much practical benefit. The only communications that are protected are those with a personal attorney. Discussing company matters with corporate counsel would not be affected. These latter discussions occur most often and *Ex Parte Smith* would not apply to protect them.

Further, the attorney-client privilege only covers the specific communications, not the information expressed therein.⁶³ The discovering party may acquire the same information from any non-privileged source.⁶⁴ Thus, if the discovering party can obtain the executive's communications under a waived corporate privilege, little solace would be provided if similar ones about the same topic had also been conducted with the executive's personal attorney. The cat would be out of the bag. Verily, although *Ex Parte Smith* provides some protection for communicating executives, for the most part, the dilemma remains. If the corporation waived its privilege, candidly communicating with the corporation's attorney still risks disclosure.

B. Create a Personal Attorney-Client Relationship with the Corporation's Counsel

Determining whether communications between the executive and corporate counsel are personally privileged is an arduous task. It requires that the executive becomes a client of his corporate employer's attorney, and that his communications occurred while seeking personal legal advice rather than advice for the corporation. Ordinarily, when an

60. *See id.*

61. *See Ex parte Smith*, 942 So. 2d 356.

62. *See id.* at 360.

63. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981); *see GERGACZ, supra* note 1, at § 3.51.

64. *Ex parte Smith*, 942 So. 2d at 360 (“[The officers] must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.” (emphasis omitted) (quoting *In re Beville, Bresler, & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir.1986))).

executive communicates with corporate counsel, no personal privilege attaches.⁶⁵ Corporate counsel only represents the corporation. The corporation conveys information to its attorneys through the communication of its executives. The executive is not seeking personal legal advice as information is provided as part of the executive's corporate role. Instead, while communicating, the executive personifies his corporate employer and does not act for himself. Thus, no personal attorney-client representation exists.⁶⁶

Upjohn v. United States, the leading corporate privilege case, referred to the executive's role as one factor in characterizing privileged corporate communications.⁶⁷ Under *Upjohn*, the employee must communicate within the scope of his job.⁶⁸ Doing so makes the communication a corporate one. For example, an employee-accountant who communicates about balance sheet entries does so as the corporation. That same employee, while interviewed about witnessing an accident involving a corporate van, communicates as an individual because observing accidents is not within the accountant's corporate role.⁶⁹ Thus, no privilege would attach.⁷⁰

If this corporate accountant wanted personal protection for the balance sheet entry communications, however, he must look beyond *Upjohn* and its corporate organization focus. To create a personal privilege, the accountant must first establish an attorney-client

65. *E.g.*, *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1978) ("Ordinarily the privilege belongs to the corporation and an employee cannot himself claim the attorney-client privilege and prevent disclosure of communications between himself and the corporation's counsel if the corporation has waived the privilege."); *see also* GERGACZ, *supra* note 1, at §§ 2.04-.09.

66. *In re Powers*, No. 94-56603, 1995 WL 608481 at *2 (9th Cir. Oct. 11, 1995) ("An employee of a corporation that holds an attorney-client privilege may not assert the corporation's privilege for personal protection where there is no express agreement for personal representation or where the employee has not requested such representation."); *see also* *In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. 2005); *United States v. Stein*, 463 F. Supp. 2d 459 (S.D.N.Y. 2006).

67. *Upjohn*, 449 U.S. at 395; *see also* GERGACZ, *supra* note 1, at §§ 3.72-.81 (discussing *Upjohn*'s corporate client privilege doctrine).

68. *Upjohn*, 449 U.S. at 395; *see also* GERGACZ, *supra* note 1, at §§ 3.03-.78, 3.90.

69. *See Upjohn*, 449 U.S. 383.

70. *Leer v. Chi., Milwaukee, St. Paul & Pac. Ry.*, 308 N.W.2d at 309 n.8 ("*Upjohn* is critically different from the instant case in that the communications in *Upjohn* regarded a matter within the scope of the employee's duties. In the instant case the witnessing of an accident was not within the scope of the employees' duties.>").

relationship with corporate counsel.⁷¹ The attorney will thus have two clients: the corporate entity and the executive. Yet, formally creating a dual attorney-client relationship is typically not done. Counsel's sole client is usually the corporation and the executive merely communicates as its employee.⁷² In addition, counsel's dual representation might yield substantial conflict-of-interest issues.⁷³ Thus, counsel could be wary of taking on the executive as an additional client. As the Fourth Circuit noted: "Indeed, the court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees."⁷⁴ This further discourages formal dual relationships.

Nonetheless, a dual attorney-client relationship may be inferred.⁷⁵ Although expressed several ways, the test requires the executive to have reasonable grounds to believe that he was personally represented by corporate counsel.⁷⁶ This standard would not be satisfied from an executive's subjective intuition.⁷⁷ An inferred representation needs to be based on objective evidence. This is a difficult test to meet. For example, if corporate counsel informs the executive that the corporation is his client, no inferred relationship will arise, even if the executive misunderstands the effects.⁷⁸ The advisory suppresses any reasonable belief an executive may have in a personal attorney-client relationship.

71. See, e.g., *In re Beville*, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986); *Stein*, 463 F. Supp. 2d 459.

72. See *In re Powers*, No. 94-56603, 1995 WL 608481 at *2 (9th Cir. Oct. 11, 1995); *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333 (4th Cir. 2005); *Stein*, 463 F. Supp. 2d 459.

73. *In re Grand Jury Subpoena: Under Seal*, 415 F.3d at 340 (noting that the corporate attorneys serving dual clients acknowledged a loyalty to America Online ("AOL") when they stated, "[W]e can represent you as long as no conflict appears").

74. *Id.*

75. *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333.

76. See *id.*; *Stein*, 463 F. Supp. 2d 459; see also GERGACZ, *supra* note 1, at § 2.11.

77. See *Kubin v. Miller*, 801 F. Supp. 1101, 1115 (S.D.N.Y.1992) ("[A]lthough the so-called client's subjective belief can be considered by the court, this belief is not sufficient to establish an attorney-client relationship."); see also *Hansen v. Caffry*, 720 N.Y.S.2d 258, 259 (App. Div. 2001) ("[A] plaintiff's unilateral beliefs and actions do not confer upon it the status of client." (internal citations and quotation marks omitted)).

78. See MODEL RULES OF PROF'L CONDUCT R. 1.13(d), cmts. 7 & 8. (noting that such is counsel's duty under rules of professional conduct).

Consider *In re Grand Jury Subpoena: Under Seal* from the Fourth Circuit.⁷⁹ AOL's attorneys informed the communicating executives that their client was the corporation only, and that any privilege belonged solely to AOL.⁸⁰ Even though the executives were also told that the corporation's attorneys could provide personal representation, there was no indication that they agreed to do so.⁸¹ The court held that, based on this disclosure, there was no objectively reasonable evidence that the executives could believe they had any personal attorney-client relationship.⁸² Consequently, the executives' motion to quash a subpoena that sought access to their communications with AOL's counsel was denied.⁸³

Even in absence of a pre-communication disclosure, executives would be hard-pressed to establish that their relationship with corporate counsel was a personal one, rather than within their corporate roles.⁸⁴ Although other factors might point to a possible personal attorney-client relationship, the difficulty is to show that these factors, at the time of the communication, underpinned the executive's belief that corporate counsel was his attorney, too.⁸⁵ The mere existence of those factors would not be sufficient to support the inference. *United States v. Stein* demonstrates the sufficiency requirements.⁸⁶

KPMG counsel interviewed one of its partners, Carol Warley, during an internal investigation of problem tax shelters.⁸⁷ No pre-communication advisory was given.⁸⁸ Thus, unlike the investigation in

79. *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333.

80. *Id.* at 336 ("We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it.").

81. *Id.* ("We represent AOL, and can represent [you] too if there is not a conflict . . . the attorney-client privilege is AOL's and AOL can choose to waive it.").

82. *Id.* at 339-40.

83. *Id.* at 341.

84. *United States v. Stein*, 463 F. Supp. 2d 459 (S.D.N.Y. 2006).

85. *See generally, id.* at 462-63 (discussing the different standards applied by district courts to determine when personal privilege attaches).

86. *Id.*

87. *Id.* at 461 n.11 (noting that Warley's status as a partner in the KPMG partnership did not change the court's analysis of her role as an "employee" communicating on behalf of her "employer").

88. *Id.* at 460.

This problem could be avoided if counsel in these situations routinely made clear to employees that they represent the employer alone and that the employee has no attorney-client privilege with respect to his or her communications with employer-retained counsel. Indeed, the Second Circuit advised that they do so years before the

In re Grand Jury Subpoena: Under Seal,⁸⁹ there was no record that Warley was told that counsel's only client was KPMG and that any privilege belonged solely to the firm. Nonetheless, Warley had the burden of establishing the inferred relationship.⁹⁰

Warley argued that two factors supported the inferred relationship. In past cases, company counsel jointly represented her and KPMG.⁹¹ In addition, a provision in KPMG's partnership agreement stated that "[t]he General Counsel shall act on behalf of all Members, except where a dispute arises between an individual Member and the Firm."⁹² Even so, this showing was not sufficient and, thus, no personal attorney-client relationship was found.⁹³ The court advanced several rationales.⁹⁴ First, KPMG's counsel had not misrepresented that they were acting as Warley's personal counsel.⁹⁵ Further, Warley never requested that she be personally represented.⁹⁶ Consequently, no justifiable inference could have arisen from any words spoken between the parties. In addition, the mere existence of the partnership agreement clause did not establish a dual representation.⁹⁷ Warley needed to show that she relied on that clause as the basis for inferring a personal attorney-client relationship.⁹⁸ Since that connection was not made, no representation was found.⁹⁹ As for the previous joint representations, the court determined that Warley was a witness in those proceedings, not a co-party with KPMG.¹⁰⁰ She had no personal stake in those cases.¹⁰¹ Thus, no reasonable expectation could arise that all communications thereafter occurred under a dual attorney-client relationship.¹⁰² Since Warley

communications here in question. [original footnote omitted] But there is no evidence that the attorneys who spoke to Ms. Warley followed that course.

Id.

89. *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333 (4th Cir. 2005).

90. *Stein*, 463 F. Supp. 2d 459.

91. *Id.* at 461.

92. *Id.* (citing DeVita Decl., Ex. E, ¶ 3.6).

93. *Id.* at 466.

94. *Id.* at 464-65.

95. *See id.* at 465.

96. *See id.* at 462-63, 465.

97. *See id.* at 466.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

asserted attorney-client privilege, she had the burden of establishing all of its elements.¹⁰³ Because she could not, her communications were discoverable following KPMG's waiver.¹⁰⁴

Even if an executive does establish a personal relationship with corporate counsel, all communications would not automatically be protected. Only those that occurred for the purpose of seeking personal legal advice would qualify.¹⁰⁵ This requirement, too, is difficult for an executive to satisfy. Ordinarily, as *Upjohn* suggests, communicating about company matters makes the communication that of the corporate client.¹⁰⁶ To overcome this, the executive must change the focus of the communication. The focus must become a personal one rather than one related to corporate affairs, so that the executive is not personifying the entity when communicating with counsel. Somehow, the executive must signal that discussing, for example, reorganizing the corporation's West Coast operations, is not being done on the corporation's behalf. Instead, the information is being provided so personal legal advice may be obtained. The Tenth Circuit provided an illustration: "For example, a corporate officer's discussion with his corporation's counsel can still be protected by a personal, individual attorney-client privilege when the conversation specifically concerns the officer's personal liability for jail time based on conduct interrelated with corporate affairs."¹⁰⁷

The court in *United States v. Stein* examined this requirement, too, and found that even if Warley was a client of KPMG's counsel, no personal attorney-client privilege would have attached.¹⁰⁸ Although her communications about the tax shelters implicated both KPMG and her individually, she would have needed to show that they occurred for a personal purpose.¹⁰⁹ She could not. Questions about personal liability did not trigger the communications.¹¹⁰ Instead, her liability concerns arose out of what she told counsel in furthering KPMG's internal investigation.¹¹¹ Thus, only KPMG could be protected by the privilege.

103. *Id.* at 465.

104. *Id.* at 466.

105. *In re Grand Jury Proceedings*, 156 F.3d 1038 (10th Cir. 1998); *see also* GERGACZ, *supra* note 1, at § 2.11.

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

107. *In re Grand Jury Proceedings*, 156 F.3d at 1041.

108. *United States v. Stein*, 463 F. Supp. 2d 459, 465 (S.D.N.Y. 2006).

109. *Id.*

110. *See id.* at 465-66.

111. *See id.* at 465.

Corporate privilege law provides little protection for executives unless they take steps to limit their exposure before even speaking with corporate counsel. But, executives are not lawyers steeped in the intricacies of attorney-client relationships and privileged communications. They are experts in business with an important role to play when corporations seek legal advice. The following section will propose a change in law that protects executives who are steadfast in their duties, candidly communicate, and thus, enable corporate counsel to acquire the information needed to provide sound legal advice.

IV. LIMITING THE SCOPE OF CORPORATE PRIVILEGE WAIVER TO PROTECT EXECUTIVE COMMUNICATIONS

A corporation's privilege waiver should be limited by a communicating executive's veto right. This veto right should only arise if the privileged information is sought to be used against the executive, personally. The executive may then exercise the veto and exclude those communications from evidence. Under this proposed rule, the executive has neither personal privilege, nor a say in the corporation's waiver decision. A waiver will still make privileged corporate information fully available in discovery. The discovering party may continue to use the information against the corporation or a third party or put it to any other use. The veto power merely narrows the range of a corporate privilege waiver.

The veto will not protect every communicating executive, however. It will be restricted to those who did so without receiving an advisory beforehand. Such an advisory will notify the executive that counsel's client is the corporation and that it controls any privilege. Providing this information removes misapprehensions about lawyer-client relationships. Further, there is no personal expectation of privacy or confidentiality. Once the advisory is given, the executive will understand that he is merely imparting company information to corporate counsel and that he has no control over its use.

Consider how this proposed rule would apply in *In re Grand Jury Subpoena: Under Seal*¹¹² and then in *United States v. Stein*.¹¹³ In *In re Grand Jury Subpoena: Under Seal*,¹¹⁴ the AOL executives received a

112. 415 F.3d 333, 339 (4th Cir. 2005).

113. 463 F. Supp. 2d 459 (S.D.N.Y. 2006).

114. 415 F.3d at 339.

pre-communication advisory.¹¹⁵ Although the advisory was not a model of clarity, it was, nonetheless, found to be satisfactory.¹¹⁶ The advisory identified AOL as counsel's only client although the executives were given an option to seek the advisory's counsel.¹¹⁷ The executives did not subsequently exercise such an option explicitly.¹¹⁸ The advisory further alerted the executives that AOL controlled any privilege and could choose to waive it.¹¹⁹ Thus, the AOL executives knew that their only role was to further their employer's aims.¹²⁰ Any misapprehension was eliminated. In addition, since the advisory noted that AOL could later unilaterally disclose the communications, no expectation of privacy, even a mistaken one, could reasonably occur.¹²¹ Thus, there was no unfairness and the proposed rule's narrowing of the effect of the corporate client's waiver would not apply.

United States v. Stein, on the other hand, is exactly the type of situation for which the proposed rule is meant to address.¹²² KPMG's counsel did not give Warley a pre-communication advisory.¹²³ Nor did it inform Warley about her position as communicator, its role as KPMG's counsel, or, the discretion that KPMG retained as sole holder of the privilege.¹²⁴ Further, a teamwork ethos existed, too; exemplified by a provision in the partnership agreement and Warley's past relationships with KPMG counsel.¹²⁵ Consequently, one could readily see how she was lulled into excusable ignorance about the nature and consequences of candidly communicating with KPMG's counsel. Fairness demands a different approach than the one that current law accommodates. Under the proposed rule, Warley could block those communications from being used as evidence against her. They could, however, still be used as evidence against KPMG or any other party.

115. *Id.*

116. *Id.* at 340 ("We note, however, that our opinion should not be read as an implicit acceptance of the watered-down 'Upjohn warnings' the investigating attorneys gave the appellants."); see GERGACZ, *supra* note 1, at § 2.16.

117. *See id.* at 339-40.

118. *Id.* at 339.

119. *Id.* at 339-40.

120. *Id.* at 340.

121. *Id.*

122. 463 F. Supp. 2d 459 (S.D.N.Y. 2006).

123. *Id.* at 460.

124. *Id.*

125. *Id.* at 461.

V. JUSTIFICATION FOR PROPOSED RULE

Three justifications may be offered for this Article's proposal: First, the rule is in accordance with how attorney-client privilege principles have been applied to corporations; Second, the rule provides an incentive (or, at least, removes a disincentive) for executives most closely connected to a matter to candidly provide information to corporate counsel; Third, the rule is consistent with other principles of law that were created specifically to ameliorate otherwise occurring unfair or unjust results.

*A. Consistent with the Nature of a Corporation's
Attorney-Client Privilege*

The artificial corporate entity, as distinguished from an individual, must act through others. This fact was taken into account when privilege principles were applied to corporate clients. Consider the following three leading corporate privilege cases. First, *Upjohn Co. v. United States* molded the concept of communication to the reality of how corporations impart information.¹²⁶ *Upjohn* set forth a number of factors for identifying which employee communications with counsel qualified as privileged corporate communications.¹²⁷ Similarly, *CFTC v. Weintraub* focused on a corporation's decision-making structure as it analyzed the source of an entity's control over its privilege.¹²⁸ *Weintraub* identified management as the place within the corporate

126. 449 U.S. 383 (1981).

127. *Id.* at 394-95. In his concurring opinion, Chief Justice Burger summarizes the factors the Court considered:

Because of the great importance of the issue, in my view the Court should make clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.

Id. at 402-03 (Burger, C.J., concurring) (citations omitted).

128. 471 U.S. 343, 351 (1986).

hierarchy where the power to waive the privilege resided.¹²⁹ Finally, *Garner v. Wolfenbarger* focused on intra-corporate disputes where shareholders sought access to corporate materials over which the directors had asserted the corporation's privilege.¹³⁰ *Garner's* "good cause" test sought to balance the interests of these key corporate actors with those of the entity.¹³¹

This Article's proposed rule follows this model. Its modification of the effects of a corporate privilege waiver brings to the fore the organizational role of the employee-communicator. By doing so, the proposed rule is built upon two of *Upjohn's* factors for identifying corporate privilege: First, that the employee must communicate within the scope of his job; Second, that the employee must know that the purpose of the communication is for the corporation to obtain legal advice.¹³²

These factors distinguish an executive acting as an individual (when no corporate privilege arises) from one who personifies the entity. In the latter situation, the executive's self is swallowed up by his organizational role; thus, the executive's communications with counsel are deemed to be the corporation's. The proposed rule retains this disappearance of executive-communicator personhood, not only at the time the corporation's privilege is created, but also through its waiver. Current law, after a corporate privilege waiver, imparts a personal element to the executive's communications.¹³³ The proposed veto provides a means to remove it, thereby maintaining the purely corporate character of the communication.

Further, modifying the effects of a corporate waiver makes it consistent with the consequences faced when individuals waive their privileges. When an individual waives the privilege, only his words

129. *Id.*

130. 430 F.2d 1093, 1095 (5th Cir. 1970); see GERGACZ, *supra* note 1, at §§ 6.01-.50 (discussing *Garner's* influence on corporate privilege law).

131. See *Garner*, 430 F.2d at 1103-04.

132. *Upjohn v. United States*, 449 U.S. 383, 394 (1981); see GERGACZ, *supra* note 1, at §§ 3.78, 3.79, 3.84, 3.86A, 3.90 (discussing these *Upjohn* factors).

133. *E.g.*, *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 n. 5 ("Ordinarily, the privilege belongs to the corporation and an employee cannot himself claim the attorney-client privilege and prevent disclosure of communications between himself and the corporation's counsel if the corporation has waived the privilege." (citing *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D. Mich. 1977))); see generally, GERGACZ, *supra* note 1, at §§ 2.04-.09.

become discoverable because only his words were protected.¹³⁴ Under current law, however, when a corporation waives its privilege, the words of others become discoverable.¹³⁵ Even though those words belong to the corporation, for privilege purposes, they were communicated by an employee. Following the waiver, that employee, as well as the corporation, can face consequences. By limiting the consequences for the communicating employee, the proposed rule more closely aligns a corporate waiver's effects with those of an individual client's.

B. Encourages Candid Communication with a Corporation's Attorney

Under current law, executives who candidly communicate with corporate counsel can face liability arising from those communications, if the corporation waives its privilege.¹³⁶ Although this waiver scenario is not a common event, high-profile cases, such as *In re Grand Jury Subpoena: Under Seal*¹³⁷ and *United States v. Stein*,¹³⁸ might ultimately affect executive candor.

Loyalty to one's employer, of course, remains an incentive. Such loyalties are called into question when corporations waive privileges to suit their own ends, however, irrespective of the effect on their executives. Self-preservation rather than fidelity to one's organizational role might assert itself and affect the extent of future executives' candor. Although the risk of adverse job consequences remains a spur, such a concern will be mitigated by the prospect of one's own words later being used as evidence of personal wrongdoing. Executives closely connected to the subject matter, those who possess top-flight, important information, will be most affected.

The proposed veto empowers such executives. If an advisory is provided, the executive knows the implications of communicating with

134. Cf. *Upjohn*, 449 U.S. at 391 (noting that privilege is different for individuals and for corporations because for individuals, "the provider of information and the person who acts on the lawyer's advice are one and the same," but for corporations, information must come from multiple individuals).

135. E.g., *Diversified Indus., Inc.*, 572 F.2d at 611 n. 5; see also *United States v. Stein*, 463 F. Supp. 2d 459, 462 (S.D.N.Y. 2006); *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 335 (4th Cir. 2005); see generally GERGACZ, *supra* note 1, at § 2.09.

136. See, e.g., *In re Grand Jury Subpoena: Under Seal*, 415 F.3d at 333; *Stein*, 463 F. Supp. 2d at 459.

137. 415 F.3d at 333.

138. 463 F. Supp. 2d at 459.

corporate counsel. For example, concerns about a possible corporate privilege waiver disclosing what was said may lead the executive to seek guidance from a personally-retained attorney before communicating. The key is that the executive knows the personal consequences and that his employer made sure he did. Trustworthy employers take care of their employees. On the other hand, in absence of an advisory, the executive is not jeopardized by misapprehensions regarding the intricacies of corporate privilege law. Either way, organizational loyalty is not undermined and candor should be enhanced.

Furthermore, the proposed rule should have a positive effect on executive-corporate counsel relations. Counsel must retain trust when dealing with executives. Corporate privilege waivers that put communicating executives in jeopardy and risk creating an impression that cooperating with counsel is beset with perils. By removing such confidence barriers, the proposed rule fosters a healthy relationship between corporate counsel and executives.

C. Promotes Fairness Considerations

The logic of corporate privilege law has unanticipated fairness concerns that arise from its nature—specifically, that the entity controls the privilege and the communicator does not. This is a distinguishing characteristic between privilege for corporate and individual clients. Individual clients are not affected by waiver decisions made by others. Their communications with counsel must be personally waived, either expressly or implicitly. No unfairness arises because the individual client controls the waiver.

This is not so for communicating executives. Their involvement is limited to providing information and they face the effects of a waiver without any ability to control it. The disconnect between communication and waiver disenfranchises the executive. Under current law, the executive is treated as merely a means to an end, the creation of a corporation's privilege. His worth and legitimate interests as a human being are ignored. Instead, the executive is subsumed into the logic of privilege law that places great weight on the identity of the client. Consequently, when the corporate client waives the privilege, the executive is cut adrift. This is unfair. Justice requires that the executive's interests be acknowledged.

Furthermore, this Article's veto proposal is consistent with the law being shaped by justice concerns. Other bodies of law have changed

logical rule-based outcomes when unanticipated injustices result. Corporate privilege law should follow suit. Consider partnership by estoppel, for example.¹³⁹ No organizational form is created when third parties rely on false representations that a partnership exists. Instead, liability is imposed, as if a partnership exists, to ameliorate the unfairness arising from the relying party's otherwise unsatisfied claims.¹⁴⁰ Without partnership by estoppel, the logic of partnership law has it that ersatz partners would not face liability. They were not parties by contract, personally, nor were they operating a business as a partnership. For justice reasons, the third party's interests needed to be accommodated. Similarly, in the law of wills, a named beneficiary will not inherit, if the beneficiary had murdered his benefactor, even though the will itself was flawless.¹⁴¹ Although the logic of wills law and its focus on proving up a valid document suggests that the murderer will inherit, the fairness principle interposes itself.

Criminal law also provides an example. Generally, defendants are competent to testify and their incriminating statements or confessions may be used as evidence against them. However, the logic of this proposition is leavened by fairness, specifically, in how those incriminating statements came about.¹⁴² Thus, in criminal law, to ameliorate unfairness, courts may exclude certain defendant statements from evidence.

Conceptually, this evidence exclusion is somewhat similar to this Article's proposed rule. Although corporate privilege law does not have Constitutional underpinnings, the unfairness upon which the evidence exclusion is based is remarkably similar; a person should not have his statements used as evidence, if they were induced without a sufficient advisory or understanding of the personal ramifications of making them.

139. *See generally* JUDSON CRANE & ALAN BROMBERG, LAW OF PARTNERSHIP, 196-200 (1968).

140. *See, e.g.*, *Boone v. Gen. Shoe Corp.*, 242 S.W.2d 138, 142-43 (Ark. 1951).

141. *Riggs v. Palmer*, 22 N.E. 188, 191 (N.Y. 1889).

142. The Supreme Court has considered a number of fairness challenges to statements defendants made to the police. *See Blackburn v. United States*, 361 U.S. 199, 206-07 (1959) (coerced confessions); *Escobedo v. Ill.*, 378 U.S. 478 (1964) (confession made without honoring defendant's request for counsel beforehand); *Miranda v. Ariz.*, 384 U.S. 486 (1966) (no advisory provided prior to making statements to police).