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Attorney-Client Privilege In Corporate Administration: A New Approach

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ATTORNEY-CLIENT PRIVILEGE IN CORPORATE ADMINISTRATION: A NEW APPROACH

INTRODUCTION

Attorney-client privilege is heralded as one of the oldest common law privileges for confidential communication.[1] As noted by the United States Supreme Court, attorney-client privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice."[2] However, as shown in instances when attorneys serve legal and non-legal functions within corporations, these privileges lend themselves to abuse.[3] This abuse, in turn, reveals some of the fundamental pitfalls of current legal standards for assessing attorney-client privilege within the corporate sphere.[4]

As modern corporate counsels become evermore involved in business operations, there is a burgeoning concern that lawyers within corporations, performing legal and non-legal functions (as "hybrid counsel"[5]), will use their dual roles as shields against discovery—invoking attorney-client privilege to immunize otherwise unprotected communications.[6] This overlap of responsibility presents serious implications where governmental investigations are impeded by unnecessary roadblocks stemming from the improper invocation of privilege.[7] At root is an amorphous privilege

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1. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

2. *Id.* Similarly, the work product doctrine allows for the protection of "materials obtained or prepared by an adversary's counsel with an eye toward litigation." Hickman v. Taylor, 329 U.S. 495, 511 (1947).

3. *See* Maura I. Stassberg, *Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid Frivolous Claims of Attorney-Client Privilege*, 37 SETON HALL L. REV. 413, 473 (2007) (citing F.D.I.C. v. Hurwitz, 384 F. Supp. 2d 1039 (S.D. Tex. 2005), *rev'd in part, vacated in part sub nom.* F.D.I.C. v. Maxxam, Inc., 523 F.3d 566 (5th Cir. 2008); Cobell v. Norton, 213 F.R.D. 16 (D.D.C. 2003); Am. Med. Sys., Inc. v. Nat'l Union Fire Ins. Co., No. Civ.A. 98-1788, 1999 WL 816300 (E.D. La. Oct. 7, 1999)).

4. Rather than provide a broad survey of attorney-client privilege rules, this Note focuses exclusively on attorney-client privilege standards as applied in federal courts.

5. This Note refers to in-house counsel that performs legal and non-legal functions as "hybrid counsel." One common example is General Counsel serving as Chief Compliance Officer.

6. *See* Letter from Chuck Grassley, Senator, to Trevor Fetter, Chairman, Tenet Healthcare Corporation (Sept. 8, 2003), *available at* http://www.finance.senate.gov/newsroom/chairman/release/?id=25d04c0d-c7ab-4f00-b4ff-292c2fa6d815 ("Apparently, neither Tenet nor Ms. Sulzbach saw any conflict in her wearing two hats as Tenet's general counsel and chief compliance officer . . . . It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement.").

7. This is evident by virtue of the fact that the Department of Justice has consistently encouraged and provided incentives for corporations that waive attorney-client privilege or voluntarily disclose relevant facts and evidence. *See* Memorandum from Eric H. Holder, Deputy Attorney Gen., Dep't of Justice, to All Component Heads and United States Attorneys: Bringing Criminal Charges Against Corporations § 6(B) (Oct. 10, 2014), *available at*

standard that engenders abuse.[8] Indeed, the pitfalls of the current privilege regime has led to the proposal of many solutions, including: the separation of legal and business roles within corporations,[9] enactment of federal legislation to codify privilege rules,[10] and alterations to federal common law.[11] Most recently, the D.C. Circuit of Appeals offered an anomalous interpretation of the current standard, further demonstrating that this area is fraught with conflict and primed for change.[12]

Part I of this Note discusses the problems raised by hybrid counsel's invocation of attorney-client privilege. Part II provides a general overview of the current attorney-client privilege standard used by federal courts. Part III assesses the viability of proposed improvements to the current standard. Part IV delves into the need for a new approach, one that provides for greater certainty and creates a more coherent framework. Part V provides a recent snapshot of the shifting legal landscape. Finally, Part VI proposes action steps for better addressing the problem of attorney-client privilege in corporate settings.

I. STATEMENT OF THE PROBLEM

Hybrid counsel inevitably performs business and legal functions alike making it difficult to determine in which capacity the corporate employee operates.[13] This often blurry line opens the door to abuse,[14] in which hybrid counsel invokes privilege where it otherwise may not apply.[15] Further adding to this danger, the judicial exercise of distinguishing between legal and non-legal functions often leads to confusion, controversy, and tension

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http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF. *See also* Memorandum from Mark R. Filip, Deputy Attorney Gen., Dep't of Justice: Principles of Federal Prosecution of Business Organizations to Heads of Dep't Components and U.S. Attorneys, U.S.A.M. §§ 9-28.700 (Aug. 28, 2008), *available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.

8. *See* Stassberg, *supra* note 3.

9. *See* John B. McNeece IV, *The Ethical Conflicts of the Hybrid General Counsel and Chief Compliance Officer*, 25 GEO. J. LEGAL ETHICS 677 (2012).

10. *See* Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 63–64 (2002).

11. *See* Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853 (1998).

12. *See In re* Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014) (discussed *infra*).

13. Communications made by attorneys rendering legal advice are entitled to privilege, while communications serving predominantly non-legal purposes are generally not protected. *See* Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) (holding privilege attaches where corporate counsel is sought to render legal advice). *See also In re* Cnty. of Erie, 473 F.3d 413, 419 (2d Cir. 2007) ("[T]he question usually is whether the communication was generated for the purpose of obtaining or providing legal advice as opposed to business advice.").

14. *See* Stassberg, *supra* note 3.

15. *See* McNeece, *supra* note 9, at 686 ("[C]ourts have hinted at the difficulty of determining its application, noting that 'the day-to-day involvement of corporate counsel in the business of the company 'may blur the line between legal and non-legal communications.'") (citing Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 EMORY L.J. 1023, 1028 (1997)).

amongst parties—hampering the efficiency of litigation and related investigations.[16]

Moreover, as commentators appropriately recognize, hybrid counsels face considerable ethical dilemmas over their conflicting positions.[17] One commentator has described this tension in situations where general counsel also serves as a compliance officer:

> General Counsel must maintain the client's confidentiality; in this case the Counsel's clients are the corporation and its agents. Meanwhile, the [Compliance Officer], in following his fiduciary duty, must report compliance violations, and . . . the *potential* for compliance violations. There is thus a conflict between proper fiduciary conduct and required confidentiality. Further, the Compliance Officer's focus and attention goes to what has already been done and makes corrections. In contrast, the modern General Counsel has a legal and management role that creates the very programs the Compliance Officer will review.[18]

Given the, at times, conflicted interests of legal counsel and corporate officers, the specter of improper invocation of privilege is especially salient in business administration.[19]

In light of this, clearer standards are necessary for determining which communications deserve privilege and which do not.[20] Rather than receiving broad discretion to invoke privilege, hybrid counsel should not be entitled to attorney-client privilege in *investigative fact-finding*, where legal advice is neither rendered nor expected. Factual findings arising from these communications should remain open to discovery without the specter of attorney-client privilege looming large. This is not to say that such communications must always lose privilege. Rather, privilege may remain where, for example, outside counsel is retained—thereby sanitizing the problematic involvement of hybrid counsel.[21]

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16. JENNIFER POPPE ET AL., PROTECTING THE IN-HOUSE ATTORNEY CLIENT PRIVILEGE (2011), *available at* https://utcle.org/ecourses/OC4950/get-asset-file/asset_id/22343 ("[U]ncertainty arises, in part, because applying the attorney-client privilege and work product doctrine raises intensely fact-specific questions.").

17. *See* Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 EMORY L.J. 1023 (1997).

18. McNeece, *supra* note 9, at 677–78.

19. *In re* Cnty. of Erie, 473 F.3d 413, 419 (2d Cir. 2007) ("The issue usually arises in the context of communications to and from corporate in-house lawyers who also serve as business executives.").

20. Indeed, certainty is one of the most important features for attorney-client privilege. *See* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) ("But if the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.").

21. "Our protection of confidential client communications through privilege is premised on the assumption that this is essential to vigorous representation of clients." Stassberg, *supra* note 3, at 418.

This endeavor requires amending the "predominant purpose" test used by many courts in deciding whether attorney-client privilege attaches.[22] Where hybrid counsel is involved, emphasizing whether legal advice was in-fact rendered or expected is necessary for ensuring that privileges are not abused. The aim is to provide greater guidance for practitioners and depart from the multi-tiered analyses of the predominant purpose test relied upon by courts today.[23] By focusing on whether legal advice was *rendered* and/or *expected*, courts can avoid the troublesome contextual complexities inherent in the current approach.

At the same time, institutional mechanisms should be leveraged to ensure that crucial non-privileged facts reach the light of day and are not immune from discovery. This entails the creation and use of independent arbiters of the law who can make determinations as to underlying facts, much like magistrate judges in federal courts, or arbitrators resolving disputes.[24] This new institutional mechanism serves the interests of attorney-client privilege by preserving confidentiality and satisfying the need for factual findings.[25]

II. CURRENT STANDARD FOR ATTORNEY-CLIENT PRIVILEGE

A. PRIVILEGE & THE PREDOMINANT PURPOSE TEST

In assessing privilege within the corporate context, courts generally look at the predominant purpose of a communication, the context in which legal advice is rendered, and whether documents are obtained and/or created in anticipation of litigation.[26] Specifically, for attorney-client privilege to attach, courts require: "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and

22. *Cnty. of Erie*, 473 F.3d at 419.

23. *Id.*

24. This institutional measure, theoretically, would operate independently of the courts and with the consent of both parties. While the decision would not be binding, it could offer a useful guide in order for parties to ensure the efficiency of litigation proceedings.

25. *See* Dombrowski v. Bell Atl. Corp., 128 F. Supp. 2d 216, 219 (E.D. Pa. 2000) (finding attorney-client privilege should not "insulate underlying facts from the light of day").

26. *See Cnty. of Erie*, 473 F.3d at 413 (applying the predominant purpose test); MSF Holding, Ltd. v. Fiduciary Trust Co. Int'l, No. 03 Civ. 1818PKLJCF, 2005 WL 3338510, at *1 (S.D.N.Y. Dec. 7, 2005) (examining the surrounding context of the communication, including whether the attorney engaged in legal analysis); Geller v. N. Shore Long Island Jewish Health Sys., No. Civ. 10-170 ADS ETB, 2011 WL 5507572, at *3 (E.D.N.Y. Nov. 9, 2011) (examining the surrounding context in order to determine if in-house counsel acted as an agent of outside counsel in preparation for trial); United States *ex rel.* Frazier v. IASIS Healthcare Corp., No. 2:05–cv–766–RCJ, 2012 WL 130332 (D. Ariz. Jan. 10, 2012) (declining to attach privilege where a compliance officer never held himself out as an attorney, nor acted on behalf of the legal department); United States *ex rel.* Parikh v. Premera Blue Cross, No. Civ. 01-476P, 2006 WL 3733783, at *1 (W.D. Wash. Dec. 15, 2006) (no privilege found where corporate employees did not know a compliance officer acted as a "representative of the legal department").

(3) was made for the purpose of obtaining or providing legal advice."[27] Under this standard, a privileged communication must serve the predominant purpose of rendering legal advice.[28]

Under the predominant purpose test, the purpose of a communication becomes the most crucial factor in assessing privilege. If a communication's predominant purpose is to provide legal advice, attorney-client privilege is likely to attach.[29] In making such determinations courts must consider the surrounding context of the communication.[30] This contextual assessment demands inquiry into, among other things: whether counsel's job functions were predominantly legal, whether the focus of counsel's communication was to prepare for trial, and whether there was any expectation of confidentiality.[31] These different ad-hoc considerations create a convoluted framework that not only creates an excruciating need for judicial oversight, but muddles the field for practitioners.[32]

The predominant purpose test has long been a part of attorney-client privilege jurisprudence and much of the current law is owed to *Upjohn v. United States*.[33] As announced by the United States Supreme Court in *Upjohn*, communications made "at the direction of corporate superiors *in order to secure legal advice* from counsel" are privileged.[34] In *Upjohn*, the petitioner, a pharmaceutical company, investigated suspect payments made by a subsidiary for the benefit of foreign officials.[35] Petitioner's attorneys sent questionnaires to foreign managers seeking detailed information concerning the suspect payments.[36] Petitioner's General Counsel subsequently conducted interviews in conjunction with the questionnaire.[37] When these documents were requested by the government, petitioner later refused to reveal the questionnaire answers and interview notes, invoking attorney-client privilege.[38] The Supreme Court ultimately found the questionnaires and interview notes were protected by attorney-client privilege.[39]

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27. *Cnty. of Erie*, 473 F.3d at 419. *Accord* Fed. Hous. Fin. Agency v. UBS Americas Inc., No. 11 CIV. 5201 DLC, 2013 WL 1700923, at *1–2 (S.D.N.Y. Apr. 16, 2013).

28. *Cnty. of Erie*, 473 F.3d at 419.

29. *Id.*

30. *See generally* Prince v. Madison Square Garden L.P., 240 F.R.D. 126, 126–28 (S.D.N.Y. 2007) (noting the shift from ordinary internal investigation to investigation for the purposes of preparing for litigation); *Geller*, 2011 WL 5507572, at *3 (noting that documents prepared in routine business operations are not entitled to privilege).

31. *IASIS*, 2012 WL 130332, at *1–3 (examining contextual factors); *Parikh*, 2006 WL 3733783, at *6–8 (analyzing facts surrounding communications made by an attorney).

32. *See* Stassberg, *supra* note 3.

33. *See generally* Upjohn Co. v. United States, 449 U.S. 383, 394 (1981).

34. *Id.* (emphasis added).

35. *Id.*

36. *Id.* at 386–87.

37. *Id.* at 387.

38. *Id.* at 388.

39. *Id.* at 394 (suggesting that counsel acted in their legal capacity).

As set forth in *Upjohn*, persuasive factors in determining privilege include: (i) counsel acting as a lawyer; (ii) involvement of counsel at the direction of corporate superiors; and (iii) communications for the purposes of rendering legal advice.[40] Although these factors provide some guidance, *Upjohn* did "not undertake to draft a set of rules," but rather decided that privilege, "should be determined on a case-by-case basis."[41] This has left the law somewhat unsettled,[42] particularly in instances where it is unclear whether counsel performs legal or non-legal functions.[43]

B. ATTORNEY-CLIENT PRIVILEGE POST-UPJOHN

In the wake of *Upjohn*, courts refined their standards for assessing attorney-client privilege, giving rise to the predominant purpose test as it is used today.[44] Courts, such as the Second Circuit, strictly *require* that claimants show privileged communications bear the predominant purpose of rendering legal advice.[45] For example, in *In re County of Erie*, a class of arrested persons alleged they were subjected to unconstitutional strip searches and motioned to compel the discovery of e-mails between county attorneys and various officials.[46] At issue was "whether the communications were made for the purpose of obtaining or providing legal advice as opposed to advice on policy."[47] The court determined that the e-mails in question were sent for the predominant purpose of providing legal advice because they included "a lawyer's assessment of Fourth Amendment requirements . . . ."[48]

Although *County of Erie* involved government officials, its analysis in distinguishing between legal and non-legal advice is particularly relevant when considering the dual roles served by hybrid counsel.[49] The Second

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40. *Id.* ("The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel.").

41. *Id.* at 396.

42. John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 464 n.91 (1982) ("Such critics note that corporate clients consulted with their attorneys frequently in recent years in spite of the fact that the definition of the corporate privilege was unsettled.").

43. Particularly when hybrid counsel is involved. The difficulty in discerning where privilege attaches arises because of the complexity of drawing a line between business and legal advice. *See In re* Cnty. of Erie, 473 F.3d 413, 421 (2d Cir. 2007) ("In short, an attorney's dual legal and non-legal responsibilities may bear on whether a particular communication was generated for the purpose of soliciting or rendering legal advice . . . .").

44. *See id.* at 413; *In re* John Doe Corp., 675 F.2d 482, 487–488 (2d Cir. 1982); United States *ex rel.* Parikh v. Premera Blue Cross, No. Civ. 01-476P, 2006 WL 3733783, at *6–7 (W.D. Wash. Dec. 15, 2006); Raba v. Suozzi, No. Civ. 06-1109(DRH)(AKT), 2007 WL 128817, at *4 (E.D.N.Y. Jan. 11, 2007).

45. *Cnty. of Erie*, 473 F.3d at 419.

46. *Id.* at 415.

47. *Id.* at 419.

48. *Id.* at 422.

49. *See* Sexton, *supra* note 42.

Circuit even recognized the importance of this distinction where in-house counsel is involved.[50] As set forth in *County of Erie*, when in-house counsel renders advice that is not predominantly legal, these communications are unlikely to be privileged.[51] However, the actual application of this standard is easier in theory than practice.[52]

When a communication involves an attorney who serves both as legal counsel and non-legal corporate officer, there are often two purposes: (i) the collection of factual information for business purposes, and (ii) the collection of factual information for rendering legal advice.[53] Here, the predominant purpose test is frustrated; there will always be two purposes to the communication, both to provide business advice *and* to render legal advice. This problematic dual purpose brings to light the challenging applications of the predominant purpose test. Determining the predominant purpose of a communication requires ad-hoc contextual analyses that render determinations of privilege unpredictable and dramatically fact-specific.

Further adding to the confusion is an ambiguous and contested definition of what qualifies as legal advice. Under the predominant purpose test, determining the purpose of a given communication naturally turns on the meaning of legal advice.[54] As defined by one court, legal advice "involves the interpretation and application of legal principles to guide future conduct or to assess past conduct. It requires a lawyer to rely on legal education and experience to inform judgment."[55] Where in-house counsel serves dual functions, privileged communications must involve interpreting and applying legal principles.[56] Stated another way, in order for a communication to be protected by privilege, an attorney's advice depends "principally on knowledge of or application of legal requirements or principles, rather than expertise in matters of commercial practice."[57] In the corporate context, a lawyer's "recommendation of a policy that complies (or better complies) with [a] legal obligation—or that advocates and promotes compliance, or oversees implementation of compliance

50. *Cnty. of Erie*, 473 F.3d at 419 ("The issue usually arises in the context of communications to and from corporate in-house lawyers who also serve as business executives. So the question usually is whether the communication was generated for the purpose of obtaining or providing legal advice as opposed to business advice.").

51. *Id.* at 421.

52. *Id.* at 420–21 ("The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer.").

53. MSF Holding, Ltd. v. Fiduciary Trust Co. Int'l, No. 03 Civ. 1818PKLJCF, 2005 WL 3338510, at *1 (S.D.N.Y. Dec. 7, 2005) ("In-house counsel often fulfill the dual role of legal advisor and business consultant.").

54. *Id.*

55. *Cnty. of Erie*, 473 F.3d at 419–20.

56. *Id.*

57. *MSF Holding*, 2005 WL 3338510, at *1.

measures—is legal advice."[58] While this appears clear enough on its own, when business advice is included in a communication, the ability to discern legal advice becomes increasingly difficult.[59]

C. PREDOMINANT PURPOSE & CONTEXTUAL ANALYSES

In instances where the distinction between legal and non-legal advice is unclear, such as transactional due diligence investigations, courts will scrutinize the communication's surrounding context.[60] Context factors into the analysis because the purpose of a particular communication is "informed by the overall needs and objectives that animate the client's request for advice." [61] Examining context allows courts to determine whether "an attorney is consulted in a capacity other than as a lawyer."[62] This is especially significant when hybrid counsel acts as a compliance officer. Despite formal legal training, a compliance officer may never be tasked with rendering legal advice. Instead, he may only be asked to conduct routine investigations and/or internal audits devoid of legal advice. [63] This is distinct from instances where a lawyer must directly "assess compliance with a legal obligation." [64] Consequently, courts evaluate the context of communications in order to better understand their underlying purpose. [65] Thus, determining privilege in communications involving hybrid counsel is largely a contextual endeavor.

Context is particularly important when hybrid counsel, acting as a compliance officer, conducts an internal investigation.[66] In these instances, the surrounding circumstances of the investigation largely dictate whether privilege applies.[67] For example, the purpose of an investigation may shift: from preliminary fact finding to rendering legal advice. [68] In *Prince v. Madison Square Garden L.P.*, defendant's attorney, acting as a compliance officer, conducted an internal investigation after an employee filed various complaints.[69] While the court ordered discovery of the initial investigation, investigative materials following the initiation of the lawsuit were

58. *Cnty. of Erie*, 473 F.3d at 422.
59. *Id.*
60. *Id.* at 421.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 422.
65. *See generally* United States *ex rel.* Frazier v. IASIS Healthcare Corp., No. 2:05–cv–766–RCJ, 2012 WL 130332, at *5–9 (D. Ariz. Jan. 10, 2012) (discussing a lawyer's conduct in order to determine privilege).
66. *See* Prince v. Madison Square Garden L.P., 240 F.R.D. 126, 126 (S.D.N.Y. 2007) (discussing counsel's role in an internal investigation).
67. *Id.*
68. *Id.*
69. *Id.* at 127.

privileged.[70] As the court noted, "at some point, the purpose and focus of the investigation had to have shifted from an internal investigation . . . to an investigation for the purposes of mounting a legal defense."[71] *Prince* shows that internal investigations are not automatically privileged and courts will assess the surrounding circumstances, such as the timing and purpose of the investigation.[72] When litigation becomes imminent, communications in internal investigations are likely privileged.[73] As is evident, context largely informs determinations of attorney-client privilege. This suggests the importance of emphasizing the *expectation* of legal advice as a factor within the predominant purpose test.

In facts analogous to *Prince*, *Geller v. North Shore Long Island Jewish Health System* held that investigative communications were privileged because the defendant's Chief Compliance Officer acted as an agent of defense counsel that was retained for the purposes of conducting the investigation.[74] *Prince* and *Geller* reveal that internal investigations conducted by compliance officers (or their agents) are not entitled to privilege by default. Rather, courts must consider the circumstances surrounding the investigation.[75] This supports the contention that factual investigations conducted by counsel serving dual roles should not automatically be entitled privilege unless legal advice is actually rendered or expected.

Courts also examine the surrounding circumstances of a communication when business advice is involved and the predominant purpose of the communication.[76] In *United States v. Ackert*, an investment firm proposed a transaction that would reduce the defendant's federal income tax liability. The defendant's Senior Vice President and Tax Counsel conducted research and advised the company regarding the tax implications of the proposed investment. In light of the business investment and financial nature of the tax advice, the defendant "failed to demonstrate a basis for asserting its attorney-client privilege."[77] Accordingly, the communications were predominantly business related and not entitled to privilege.[78]

Similar to *Ackert*, *United States v. Adlman* found persuasive the fact that a tax consultant conducting due diligence was predominantly

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70. *Id.* at 128.

71. *Id.*

72. *Id.* ("Whether or not there were two completely separate investigations, at some point, the purpose and focus of the investigation had to have shifted from an internal investigation in response to Prince's claims to an investigation for the purposes of mounting a legal defense against any such claims.").

73. Geller v. N. Shore Long Island Jewish Health Sys., No. Civ. 10-170 ADS ETB, 2011 WL 5507572, at *3 (E.D.N.Y. Nov. 9, 2011).

74. *Id.*

75. *Id.*

76. *See* United States v. Ackert, 169 F.3d 136 (2d Cir. 1999).

77. *Id.* at 140.

78. *Id.* at 139–40.

responsible for "auditing, accounting, and advisory services," as opposed to providing legal services.[79] The consultant's "billing statements lump[ed] the work done in [his] consultation together with other accounting and advisory services," giving rise to the presumption that his advice was predominantly financial.[80] Contextual considerations like those found in *Ackert* and *Adlman* weigh heavy in determining the purpose of a communication and whether privilege applies. Such ad-hoc factual considerations reveal the grey areas of the current regime and its unpredictable outcomes.

Further adding to the contextual analyses of the predominant purpose test, scrutiny is also given to the nature of the employment position held by counsel.[81] In *United States ex rel. Frazier v. IASIS Healthcare Corp.*, plaintiff alleged violations of the False Claims Act against his former employer, IASIS, where he served as a compliance officer.[82] Although plaintiff was a trained attorney and the corporation paid for his "bar fees and paid for [his] continuing legal education courses," communications between IASIS employees and the plaintiff were not privileged.[83] As the court found, plaintiff was never a "member of, nor reported to, the legal department."[84] Furthermore, plaintiff and his subordinate personnel at the corporation "were autonomous from the general counsel's office."[85] Plaintiff did not in fact operate as counsel; when he learned of a legal issue "he referred the employee to the Legal Department."[86] *IASIS* shows surrounding circumstances may indicate hybrid counsel did not operate in a legal capacity, giving rise to no attorney-client privilege.[87]

Other courts have examined whether allegedly privileged communications were "undertaken by non-attorneys," or employees, "with no legal background."[88] In *Fitzpatrick v. American International Group*, plaintiffs challenged the privileged status of all documents described in defendants' privilege logs.[89] At issue was the fact "defendants' in-house counsel held business as well as legal titles 'and performed significant business functions.'"[90] *Fitzpatrick* found that companies may not insulate communications from discovery merely because they involve attorneys.

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79. United States v. Adlman, 68 F.3d 1495, 1500 (2d Cir. 1995).

80. *Id.*

81. *See generally* United States *ex rel.* Frazier v. IASIS Healthcare Corp., No. 2:05–cv–766–RCJ, 2012 WL 130332, at *1 (D. Ariz. Jan. 10, 2012).

82. *Id.*

83. *Id.* at *2–3.

84. *Id.* at *2.

85. *Id.* at *3.

86. *Id.*

87. *See id.*

88. U.S. Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 160 (E.D.N.Y. 1994) (individuals who are not attorneys may serve as agents of an attorney).

89. Fitzpatrick v. Am. Int'l Grp., No.10 Civ. 142 (MHD), 2011 WL 350287, at *2 (S.D.N.Y. Feb. 1, 2011).

90. *Id.* (internal citation omitted).

Rather, a court inquires into the position held by an employee when assessing whether they acted in a business or legal capacity. Much like *Fitzpatrick*, other courts look at whether an attorney *authored* an allegedly privileged communication.[91] In *Louisiana Municipal Police Employees Retirement System v. Sealed Air Corp*., the District Court of New Jersey distinguished a separate case based on the fact that "the document in dispute was not authored by an attorney," and "the document was the result of an investigation into the business purposes behind the termination of a contractual relationship."[92] Accordingly, counsel's level of legal training, job description, and employment history are all relevant to determining the predominant purpose of a communication.[93] This creates layer upon layer of different analytical tiers that, in the end, form a complex and convoluted picture—neither providing a clear rule nor serving the interests of justice.

D. EXPECTATIONS OF CONFIDENTIALITY

A court's consideration of a communication's predominant purpose does not end with assessing the employment position of the attorney invoking privilege. Courts also look to whether there is an expectation of confidentiality. Under this prong, it is clear that if "confidentiality [is] not intended . . . privilege [does] not attach."[94] Expectations of confidentiality are central concerns when hybrid counsel provides legal and non-legal advice.[95] In *IASIS*, the company's compliance officer never indicated his interactions with employees "were privileged, nor did [he] ever form any impression that persons [he] interacted with believed [their] conversations were privileged."[96] Thus, despite being a professionally trained attorney, the compliance officer's communications were not privileged.[97] In accord with *IASIS*, the Western District Court of Washington found in *Premera* that no privilege existed where employees interviewed by its Chief Compliance Officer were neither informed that the officer acted on behalf of the legal department, nor told that the interview was conducted for the purposes of rendering legal advice.[98] *Premera* held that unless employees were instructed that their interviews were "part of a *legal* investigation" and that

91. La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 308 (D.N.J. 2008) ("[T]he document in dispute was not authored by an attorney nor did it provide legal advice.").

92. *Id.*

93. United States *ex rel.* Frazier v. IASIS Healthcare Corp., No. 2:05–cv–766–RCJ, 2012 WL 130332, at *3 (D. Ariz. Jan. 10, 2012) ("Pursuant to the discussions at oral argument, the Court finds that Frazier did not have an attorney-client relationship with IASIS. Frazier was a compliance officer for IASIS and was not IASIS's attorney.").

94. *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1037 (2d Cir. 1984).

95. *IASIS*, 2012 WL 130332, at *2–3.

96. *Id.* at *3.

97. *Id.*

98. United States *ex rel.* Parikh v. Premera Blue Cross, No. Civ. 01-476P, 2006 WL 3733783, at *1 (W.D. Wash. Dec. 15, 2006).

the compliance officer was "a representative of the legal department," privilege would not attach.[99] *IASIS* and *Premera* show that courts examining the context of a communication look to whether there was an expectation of attorney-client confidentiality.

One additional consideration is whether confidentiality is diminished when multiple personnel are copied on what is alleged to be a privileged communication—destroying confidentiality and/or any expectation of confidentiality.[100] Indeed, among communications where non-attorneys and third parties are copied, there is a presumption that confidentiality does not exist.[101] Courts recognize that a communication "sent to a third party ordinarily removes the cloak of confidentiality necessary for protection under the attorney-client privilege."[102] In *U.S. Postal Service v. Phelps Dodge Refining Corp.*, plaintiff brought action against a corporate vendor alleging breach of contract.[103] In discovery, the magistrate judge determined attorney-client privilege applied only if the communications were "intended to be confidential."[104] If "a document [is] prepared for purposes of simultaneous review by legal and non-legal personnel, it cannot be said that the primary purpose of the document is to secure legal advice."[105] Just as allowing third party access to confidential communications bars privilege, a corporation cannot secure privilege merely by copying counsel to the communication.[106] The mere fact an attorney is included in a communication does not necessarily confer privilege protection. *Phelps* reveals the narrow construction of attorney-client privilege, a crucial consideration in assessing how to better address findings of privilege where hybrid counsel is involved.

As reflected by extensive case law, a court's analysis of privilege is a fact intensive inquiry conducted on an ad-hoc, case-by-case basis.[107] Whether attorney-client privilege applies to a communication largely depends upon the purpose of a given communication, and is informed by the circumstances in which that communication arises. These factors confirm the highly contextual nature of attorney-client privilege analyses. Where counsel serves both legal and non-legal functions, the layered analyses of the predominant purpose test prove to be a strenuous exercise of judicial oversight—further suggesting the predominant purpose test is ready for amendment.

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99. *Id.* at *8.
100. *See* U.S. Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 160 (E.D.N.Y. 1994).
101. *Id.*
102. *Id.* at 162 (internal citations omitted).
103. *Id.* at 158.
104. *Id.* at 163.
105. United States v. Int'l Bus. Machs. Corp., 66 F.R.D. 206, 213 (S.D.N.Y. 1974).
106. U.S. Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 163–64 (E.D.N.Y. 1994).
107. Upjohn Co. v. United States, 449 U.S. 383, 396 (1981).

III. ALTERNATIVE APPROACHES TO ATTORNEY-CLIENT PRIVILEGE

There are several proposed alternative approaches to attorney-client privilege where hybrid counsel is involved. Perhaps the most powerful, and realistic, is the proposal that the conflicting roles of hybrid counsel be divided amongst different individuals within the corporation.[108] For example, where counsel serves as both in-house attorney and compliance officer, the "compliance and legal functions should be separated. Conflicts between required maintenance of confidentiality and required disclosures, different groups to which fiduciary duties are owed, and practical considerations demonstrate the ethical problems with a hybrid position."[109] While this is a laudable solution that has taken effect in practice,[110] it does not wholly address the continuing *legal* issue facing judges who must rule on questions of privilege, or litigants that face insurmountable difficulties in obtaining necessary facts. Furthermore, it may still benefit organizational interests to employ hybrid counsel in order to maintain attorney-client benefits that are otherwise unavailable. By reshaping the predominant purpose test, focusing the analysis on whether legal advice is rendered or expected, organizations have further incentive to separate the legal from non-legal roles—as privilege will less often apply to hybrid counsel..

Another proposal is the federal codification of privilege rules through legislation.[111] As posited by Professor Timothy P. Glynn, "[f]ederalizing privilege is the answer. To achieve reasonable certainty, we must abandon our multi-jurisdictional, common-law approach in favor of a national, codified solution. That leads inevitably to Congress. Congress has the capacity and power to enact legislation that provides clear, unqualified, and generally applicable privilege protections."[112] Although Professor Glynn's thesis is aimed at privilege *en masse*, his proposition extends into the realm of hybrid counsel. Federalizing privilege is indeed a step toward improving the disparate common law rules governing attorney-client privilege.[113] As Professor Glynn's approach suggests, federalizing privilege could best

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108. McNeece, *supra* note 9, at 694 ("The separation of compliance and legal functions is developing into industry best practice.").

109. *Id.*

110. Michael Volkov, *An Independent CCO Is A Compliance Program Requirement*, CORRUPTION, CRIME & COMPLIANCE (Apr. 8, 2013), http://corruptioncrimecompliance.com/2013/04/an-independent-cco-is-a-compliance-program-requirement/ ("The trend of an independent CCO has now been embraced by scores of leading companies, including more recently some major players in the finance industry such as Barclays, HSBC, and J.P. Morgan, which empowered their CCOs by separating them from their respective legal departments. These innovative solutions to real governance problems only increase the trend across all industries—an empowered chief compliance officer creates a significant check and balance against misconduct.").

111. Glynn, *supra* note 10, at 63–64.

112. *Id.*

113. *Id.* at 59.

address discrepancies among common law applications of privilege by promoting uniformity, clarity, and efficiency.[114] However, federalizing privilege does not expel the internal tensions of invoking privilege where hybrid counsel is involved. And, as recent history shows, reliance upon Congress is a bold, if not hopeless, leap of faith.[115] Amendments to the common law of attorney-client privilege are just as effectively addressed through both corporate best practices—i.e., separating the roles of counsel and officers—and judicial rulemaking.[116]

Other, more extreme, commentators have even called for the abolition of the confidentiality requirement of attorney-client privilege.[117] As suggested by one commentator, confidentiality "should be abandoned as a requirement for the attorney-client privilege because compliance with it generates significant unnecessary costs in the preservation of the secrecy, the proof of that preservation, and the resolution of disputes surrounding it."[118] This proposal is simply too far-fetched, ill advised, and does not prove helpful within the corporate context. Of particular concern is the prospect that abolishing the confidentiality requirement would lead to unfettered third-party disclosures, rendering the invocation of attorney-client privilege frivolous.[119] While Rice is correct that abolishing the confidentiality requirement could cut costs incurred in preserving "secrecy," his solution does not address the fundamental issue where hybrid counsel is involved: that important factual findings will remain concealed under a veil of undeserving privilege.[120]

Foreign jurisdictions may also provide further guidance. Notably, the European Union does not attach attorney-client privilege to in-house counsel, regardless of the legal or non-legal functions they serve.[121] While abolishing attorney-client privilege for in-house counsel is an extreme change from the current privilege regime, it at least suggests the possibility of a normative change in social attitudes regarding the roles and privileges of hybrid counsel.[122] If we recognize the inherent tensions and conflicted

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114. *Id.* at 134–35.

115. *See* Kia Makarechi, *Congress on Track to Be the Worst Ever at Passing Laws*, VANITY FAIR (Sept. 2, 2014, 10:32 AM), http://www.vanityfair.com/online/daily/2014/09/worst-congress-ever.

116. For example, augmenting the predominant purpose test as suggested here.

117. Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853 (1998).

118. *Id.* at 861, 897–98.

119. *See* Westinghouse Elec. Corp. v. Republic of Phil., 951 F.2d 1414, 1428 (3d Cir. 1991) ("A disclosure to a third party waives the attorney-client privilege unless the disclosure is necessary to further the goal of enabling the client to seek informed legal assistance.").

120. Rice, *supra* note 117, at 861.

121. *See* Joined Cases T-125 & T-253/03, Akzo Nobel Chems. Ltd. v. Comm'n of the Eur. Cmtys., 2007 E.C.R. II-3532. *See also* John Gergacz, *In-House Counsel and Corporate Client Communications: Can EU Law After Akzo Nobel and U.S. Law After Gucci Be Harmonized? Critiques and A Proposal*, 45 INT'L L. 817 (2011).

122. *See Akzo Nobel Chems. Ltd*., 2007 E.C.R. II-3532.

nature of hybrid counsel, normative assumptions of attorney-client privilege could shift closer towards the view espoused by European law.[123] This would have the effect of rendering all communications involving hybrid counsel unprivileged. Through this shift, privilege would not apply and no multi-tiered test would be necessary. But, as is evident, the severity of this shift is unwarranted at this time.

To better address attorney-client privilege where hybrid counsel is involved, one could adopt a test akin to the work product doctrine.[124] The work product doctrine is relatively straightforward: if a document is created in *anticipation* of litigation, privilege is likely to attach.[125] Adding a requirement that attorney-client privileges arise in *anticipation* of litigation presents one way of safeguarding against abusive and manipulative uses of privilege.[126] Analyzing whether a communication arose in anticipation of litigation could clarify the current attorney-client privilege framework.[127] At the same time, this would depart from precedent established in cases like *Upjohn* and *County of Erie*, where anticipation of litigation was not required. Adopting the work product doctrine would not extend privilege to instances where litigation is not anticipated. Adopting the work product doctrine would have the effect of excessively narrowing attorney-client privilege.

IV. A NEW APPROACH

Where hybrid corporate counsel is involved, courts should avoid the multi-tiered analyses of the predominant purpose test. As shown through extensive case law, the test itself is imprecise, unpredictable, and lends itself to abuse where attorney-client privilege can be used as a shield against discovery.[128] Given that cases often turn on one or two minute facts,[129] attorney-client privilege should be construed narrowly, particularly in light of its power to render "relevant information undiscoverable."[130] This is further supported by the general disapproval of manipulative uses of privilege.[131] Indeed, "selective assertion of privilege should not be merely

123. *Id.*

124. *See* United States v. Adlman, 68 F.3d 1495, 1495 (2d Cir. 1995).

125. *Id.* at 1501 ("The work-product rule shields from disclosure materials prepared 'in anticipation of litigation' by a party, or the party's representative, absent a showing of substantial need.").

126. *Id.*

127. The work-product standard would shift the focus from the predominant purpose of a communication to the context in which that communication arose, namely, whether such a communication arose in anticipation of litigation.

128. One only needs to look at the highly contextual analyses applied by courts like the Second Circuit in *County of Erie*, or the Supreme Court in *Upjohn*.

129. *See Adlman*, 68 F.3d at 1495.

130. *In re* Cnty. of Erie, 473 F.3d 413, 418 (2d Cir. 2007).

131. Gruss v. Zwirn, No. 09 CIV. 6441 PGG MHD, 2013 WL 3481350, at *11 (S.D.N.Y. July 10, 2013) ("The reasons to reject selective, manipulative and strategic use of evidentiary

another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage."[132]

The broad application of the ad-hoc and fact-intensive predominant purpose test brings with it the pressing concern that non-privileged relevant information will never see the light of day.[133] This consequence thereby conflicts with the underlying purpose of attorney-client privilege, which aims to serve "public interests in the observance of law and administration of justice."[134] While attorney-client privilege should be preserved at all costs, it should not come at the expense of full factual disclosure where privilege otherwise does not apply. Accordingly, hybrid counsel should relay factual investigative communications in which legal advice is neither rendered nor expected. This is in keeping with the privilege's historically narrow construction, as seen in cases following *Upjohn*.[135]

One fundamental pitfall of the predominant purpose test is the often-blurry line between legal and non-legal functions. Although several courts have addressed this distinction, the distinction itself remains ambiguous.[136] "In limiting the protective capacity of the privilege, courts have hinted at the difficulty of determining its application, noting that 'the day-to-day involvement of corporate counsel in the business of the company may blur the line between legal and non-legal communications.'"[137] Considering this difficulty, a more workable standard must be fashioned.

Regardless of its shortcomings, the predominant purpose test should not be discarded in its entirety. Rather, by amplifying the analytical force of whether legal advice is actually rendered and/or expected, this common law rule would better conform with attorney-client privilege's limited use and narrow construction.[138] As the predominant purpose test focuses upon the nature of a given communication, greater emphasis should be placed on whether legal advice is actually rendered and/or expected.

Some commentators have already noted the issues with privilege begin with the nature of corporate administration, where "the close working relationship between management and corporate counsel may create confusion and uncertainty about the role of corporate counsel in the

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privileges are numerous. As an initial matter, because all evidentiary privileges impede the truth-finding process, they must be narrowly construed.").

132. *Id.* at *7.

133. *See* Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) ("[P]rivilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . .").

134. *Id.* at 389.

135. *Cnty. of Erie*, 473 F.3d at 418 ("[W]e construe the privilege narrowly because it renders relevant information undiscoverable; we apply it 'only where necessary to achieve its purpose.'") (quoting Fisher v. United States, 425 U.S. 391, 403 (1976))).

136. McNeece, *supra* note 9, at 686.

137. *Id.* (internal citation omitted).

138. *Id.*

representation of the organization."[139] The first difficulty is understanding precisely who counsel serves. As one observer finds, "there is evidence that the executives and management of many corporations do not understand this distinction, and believe the representation extends to personal representation of corporate constituents."[140] Where hybrid counsel is involved, the attorney-client relationship becomes evermore convoluted and is inherently riddled with ethical implications. This, of course, has a powerful effect when it comes to invoking privilege. The close working relationship between management and corporate counsel not only creates confusion, but also serves as a basis for understanding why privilege must be narrowly construed.

The close working relationship between hybrid counsel and corporate management provides every incentive for counsel to insulate harmful documents under a veil of undeserving privilege.[141] This naturally reflects the precarious position of hybrid counsel within corporations.[142] Where in-house counsel serves as a compliance officer, counsel "must perform internal investigations and maintain oversight over the corporation. This creates a no-win scenario, as the lawyer needs all the facts in order to provide the best representation possible, while simultaneously being required to not divulge information and break privilege."[143] These situations strike at the very heart of why the current predominant purpose test is inadequate where hybrid counsel is involved. If legal counsel must choose between either obtaining all necessary facts or simultaneously not divulging information (and breaking privilege), the natural consequence is that attorneys will obtain the necessary facts, invoke privilege, and shield relevant factual findings. This scenario should be addressed by amending the predominant purpose test, to construe privilege narrowly and limit its application to instances where legal advice is either rendered or expected.

Further supporting the adoption of changes to the predominant purpose test is that "[a]n attorney who breaks privilege runs the risk of disbarment."[144] Attorneys acting as compliance officers, for example, "must become involved when there is noncompliance with an applicable regulation. But [] General Counsel providing legal advice on a future project is bound by privilege."[145] The same conflicted interests come into

139. *Id.* at 685.

140. *Id.* (citing Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 EMORY L.J. 1023, 1028 (1997)).

141. Such as the circumstances at issue in United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).

142. McNeece, *supra* note 915, at 686.

143. *Id.*

144. *Id.*

145. *Id.*

play: hybrid counsel is "placed in a position where privilege precludes any disclosures, and compliance officer duty mandates them."[146]

One plausible rebuke against amending the predominant purpose test is the risk that hybrid counsel will continue to use privilege as a shield against discovery by merely providing some modicum of evidence showing legal advice was rendered. In these instances, the standard's relevant contextual analyses should remain in effect, i.e., expectations of confidentiality will still be considered in determining whether privilege attaches. This amendment, then, is in keeping with cases like *Upjohn* and *County of Erie* that narrowly construe privilege.[147] Additionally, this offers further incentives to corporations to separate legal and non-legal functions.[148]

Another remaining question is what happens to the rest of the factors within the predominant purpose test. Under the proposal here, certain contextual factors remain relevant, such as client expectations and the nature of counsel's employment position. However, the most important prong of the analysis is whether legal advice was rendered and/or expected, which is also likely to be clearer than determining the overall purpose of the entire communication. Leaving discretion to courts, albeit with particular focus on whether legal advice is rendered or expected, the amended test agrees with *Upjohn's* conception of attorney-client privilege as a case-by-case consideration.[149] Indeed, this proposal aims for a feasible and practical step toward better instructing litigants and courts traversing the murky terrain of attorney-client privilege.

Skeptics may question whether such changes to the predominant purpose test implicate constitutional rights, such as the right against self-incrimination under the Fifth Amendment.[150] While constitutional concerns are always paramount, no constitutional rights are implicated in the proposed change.[151] To be clear, the amendment is limited to the corporate context where counsel serves legal and non-legal functions as hybrid counsel. The very aim of the amended rule only bars privilege in instances where legal advice is neither rendered nor expected during factual investigations by hybrid counsel. The amendment does not extend so far as to capture a criminal suspect's admissions while speaking with counsel. These communications would still receive the utmost privilege protection,

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146. *Id.*

147. *See* Upjohn Co. v. United States, 449 U.S. 383, 392 (1981); *In re* Cnty. of Erie, 473 F.3d 413, 418 (2d Cir. 2007).

148. United States *ex rel.* Frazier v. IASIS Healthcare Corp., No. 2:05–cv–766–RCJ, 2012 WL 130332, at *3 (D. Ariz. Jan. 10, 2012).

149. *Upjohn*, 449 U.S. at 396–97.

150. For extensive discussion on the interplay between constitutional rights and attorney-client privilege, see *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485 (1977).

151. The proposed change will neither compel self-incrimination nor reveal the testimonial confessions of clients.

particularly when considering that legal advice will almost always be expected and sought when consulting with defense counsel. It is also crucial to note that corporate counsels serve the corporation and its agents, not the individual employees personally. Accordingly, this rule change would not even reach personal representation in criminal matters.[152] As such, no constitutional rights are implicated by revealing investigative fact-findings that are discovered in the course of an internal investigation where legal advice is neither rendered nor expected.[153]

The final important element of this proposal is to reinforce institutional mechanisms that provide somewhat of a fast track to privilege determinations. This mechanism would function much like a magistrate judge in federal court or an independent arbitrator. The individual reviewing *contested* documents, as a quasi-magistrate, quasi-arbitrator, could determine which documents are privileged as litigation proceeds in real time. To be clear, this would not usurp the courts. This solution would only be available when both parties consent to have a particular document, or series of documents, reviewed. There are benefits for both sides in this institutional mechanism. Not only does it offer a fast track—perhaps more expeditious than submitting all documents for review by a magistrate—it also offers an independent, impartial third party that guides the process of litigation in its early stages. Having these privilege rulings at the beginning of litigation should reduce costs and remove uncertainties from the process. This institutional mechanism, coupled with the amended predominant purpose test, would better address the complex privilege issues of hybrid counsel.

V. FUTURE CONSIDERATIONS

An issue for further consideration revolves around a recent D.C. Circuit of Appeals case that has the potential to shake attorney-client privilege at its core.[154] In *In re Kellogg Brown & Root, Inc.*, the D.C. Circuit considered claims of privilege in a case involving contractors that allegedly defrauded the United States government.[155] The plaintiff, Harry Barko, "worked for [Kellogg Brown & Root], a defense contractor."[156] "Barko alleged that [Kellogg Brown & Root] and certain subcontractors defrauded the U.S. Government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq."[157] Barko sought discovery of an internal investigation conducted by Kellogg Brown & Root's Law department.[158]

152. McNeece, *supra* note 9, at 685.
153. *Id.*
154. *In re* Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).
155. *Id.*
156. *Id.* at 756.
157. *Id.*
158. *Id.*

On appeal, the D.C. Circuit considered whether the documents sought in discovery were entitled to attorney-client privilege.[159] In discussing the predominant purpose test, the D.C. Circuit decided it was important to "underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other."[160] The court rejected a "but for" reading of the predominant purpose test,[161] instead finding that courts should not strive to find only *one* "primary purpose in cases where a given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication."[162] *Kellogg Brown* expands the predominant purpose test beyond its current scope and departs from the readings of other federal appellate courts.[163] This does not comport with precedent such as *Upjohn* and opens the door to liberal applications of privilege—extending to documents with any legal purpose.

Kellogg Brown introduces a new test in attorney-client privilege jurisprudence: whether seeking legal advice was "*one of* the [communication's] significant purposes."[164] While this test may encourage clarity in the law, it unreasonably broadens attorney-client privilege. The test announced in *Kellogg Brown* is one that can easily lead to abuse in the corporate context, far beyond what the current predominant purpose test permits. Adhering to the "one of" test, parties may easily invoke privilege in undeserving instances. Even when a communication objectively does not involve the rendering of legal advice, the "one of" test, as proposed in *Kellogg Brown* allows for hybrid counsel to assert privilege so long as some modicum of legal advice is given.[165] Thus, the *Kellogg Brown* decision errs in construing privilege far too broadly.

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159. *Id.*

160. *Id.* at 759 ("Under the District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law . . . . The District Court's novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege. And the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry. In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would 'limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.' . . . We reject the District Court's but-for test as inconsistent with the principle of *Upjohn* . . . .") (internal citation omitted).

161. *Id.*

162. *Id.*

163. *See In re* Cnty. of Erie, 473 F.3d 413 (2d Cir. 2007).

164. *Kellogg Brown*, 756 F.3d at 760.

165. In many ways, the original decision by the district court represents one solution at one end of the spectrum (the "but-for" test), and the broader "one of the significant purposes" test, adopted

Despite its flawed holding, the *Kellogg Brown* court rightly acknowledged the need for factual disclosure even where privilege is properly invoked.[166] The court noted that *Upjohn* "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[167] The plaintiff in *Kellogg Brown* "was able to pursue the facts underlying [Kellogg Brown & Root]'s investigation. But he was not entitled to [it]'s own investigation files."[168] This suggests a final consideration: that attorney-client privilege may protect communications so long as the underlying facts within those communications are divulged during the process of litigation—i.e., the facts are teased out of the communication.

VI. CONCLUSION

The conflicting interests of hybrid counsel means that courts should be wary of extending privilege to communications where factual findings remain concealed and no legal advice is rendered. When in-house counsel serves non-legal functions and conducts investigative fact-finding, where no legal advice is rendered or expected, facts arising from these communications should be left open to discovery, without the potential shield of attorney-client privilege. In this sense, the predominant purpose test and its ad-hoc contextual inquiries are not helpful in protecting party interests or preserving efficiency. To improve privilege within the corporate context, institutional mechanisms should be strengthened, such as allowing independent arbiters to review documents in real time. These proposals better conform to fundamental purpose of attorney-client privilege, namely, the promotion of "public interests in the observance of law and administration of justice."[169]

Dylan L. Ruffi[*]

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by the D.C. Circuit, at the other. *See* United States *ex rel.* Barko v. Halliburton Co., 1:05-CV-1276, 2014 WL 1016784 (D.D.C. Mar. 6, 2014), *vacated sub nom. In re* Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).

166. *Kellogg Brown*, 756 F.3d at 764 (quoting Upjohn Co. v. United States, 449 U.S. 383, 395 (1981)).

167. *Id.*

168. *Id.*

169. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

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