ARTICLES

Rethinking Attorney-Client Privilege

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ABSTRACT

Words matter. This is particularly true in the legal profession, where the common-law system dictates that from the opinions of judges, stems the edict of law. With the written word of judicial decisions carrying such weight, courts must take care to ensure their rulings are adequately justified and penned in a manner that provides sufficient notice as to what acts or omissions are legal. Nowhere is this more necessary than in cases where government and corporate officials, who often wield vast spheres of influence, attempt to invoke one of the oldest and most frequently discussed topics of legal scholarship—the attorney-client privilege.

In spite of more than four-hundred years of judicial history and countless law-review articles establishing the privilege as part of the very foundation of the practice of law, courts continue to struggle with its application to corporate and government entities. The resulting opinions are inconsistent and often so void of reasoning that corporate executives, government officials, and their attorneys are without sufficient notice as to what communications are protected from disclosure. The current circuit split on this issue, combined with President Donald Trump's recent invocations of the privilege, have only fueled the need for clarity on a law seemingly as well known to the general public as to members of the bar.

This Article is the first to examine the perspectives employed by courts in entity-privilege cases to answer a question more than four-hundred years in the making: based upon the competing perspectives utilized by courts in entity-privilege cases, how should the attorney-client privilege apply to government agencies and corporations? I employ an interdisciplinary approach, using

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illustrative modeling to reveal the analytical perspectives developed by courts in these difficult cases. The result is data that upends a previously accepted legal doctrine characterizing the interactions among attorneys, agents, and entities as being triangular in nature. My analysis uncovers how judicial opinions in entity-privilege cases operate far differently in practice than theory, which has only fueled confusion as to what communications are protected from disclosure. Equipped with a better understanding of how judges arrive at their decisions in these cases, I "rethink" attorney-client privilege by drawing from established principles of agency law to develop a rule that furthers the privilege's goal of fostering candid conversations between clients and their attorneys. Lastly, I apply the proposed rule in a test suite involving two of the most well-known entity-privilege cases to measure the rule's practical applicability. After observing its effectiveness, I conclude by summarizing this rethinking of attorney-client privilege and noting the rule's promise in light of current events and the divide amongst courts on this issue.

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INTRODUCTION

"I did not have sexual relations with that woman . . . ."[1] "Attorney client privilege is now a thing of the past."[2] Speaking before captive worldwide audiences the reaction to such bold statements by two American presidents was clear—words matter.[3] Though estranged in ideology and demeanor, the context

1. James Bennet, *The President Under Fire: The Overview*, N.Y. TIMES, Jan. 27, 1998, at A1.

2. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 15, 2018, 5:56 AM), https://twitter.com/realdonaldtrump/status/985502053345751040?lang=en [https://perma.cc/QZM8-Y7AT]; *see also* Josh Dawsey, *Trump Assails Comey in Tweetstorm, Suggests He Deserves to be Jailed*, WASH. POST, Apr. 16, 2018, at A4.

3. *See, e.g.*, Cameron Stewart, *Read My Lips: No Sex and No Lies*, THE AUSTRALIAN, Jan. 28, 1998, at 1; Mary Dejevsky, *'Listen to Me . . . I Did Not Have Sexual Relations with Her,'* THE INDEPENDENT, Jan. 27, 1998, at 1.

surrounding these declarations by Presidents Bill Clinton and Donald Trump meant the two would remain forever linked by their responses to criminal investigations occurring while in office.[4] For casual observers, the circumstances of both presidential cases seemed ripped from the plot of a Hollywood blockbuster and injected some much-needed pomp into the formal circumstance that usually accompanies public discussion of evidentiary principles.[5] To legal scholars, cases involving such high-profile clients inspired renewed vigor in an already popular topic for scholarship — the attorney-client privilege.[6]

Given its essential function within the practice of law, it is not surprising that attorney-client privilege is a frequent subject of academic discussion.[7] Much has been written about the privilege's history and function in the United States and abroad.[8] Although lacking the command of public attention garnered by presidential clients, scholars have long recognized and researched the essential role attorneys also play in the private sector.[9] In addition, scholarship has delved into the intricate theories of the privilege and discussed its potential for oversight and

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4. *See, e.g.*, Kathleen Kenna, *White House Seeks to Stop Testimony. Attorney-Client Privilege Likely to Be Cited in Appeal*, THE TORONTO STAR, Aug. 4, 1998, at A2; Maya Oppenheim, *Trump Says His Lawyers 'Probably Wondering Whether Their Offices Will Be Raided' after Criminal Investigation into Michael Cohen*, THE INDEPENDENT, Apr. 15, 2018, at 6; Eric Tucker & Chad Day, *Trump: Raid on His Lawyer Abuses Attorney-Client Privilege*, POST & COURIER, Apr. 11, 2018, at A9; Chris Cillizza, *The FBI Just Proved Donald Trump Wrong on Attorney-Client Privilege*, CNN (Apr. 10, 2018), https://www.cnn.com/2018/04/10/politics/trump-cohen-crime-fraud-exception/index.html [https://perma.cc/V3AL-A9TS]; David Martosko, *'A Total Witch Hunt': Trump Tweets Blistering Early Morning Attack on His Own Justice Department and Says 'attorney-client privilege is dead' After the FBI Raids His Lawyer's Office for Stormy Daniels Hush Money Files*, DAILY MAIL (Apr. 10, 2018), https://www.dailymail.co.uk/news/article-5598833/Trump-sputter-tweets-FBI-raid-lawyer-Attorney-client-privilege-dead.html [https://perma.cc/6NAH-CXRD].

5. *See* Michael Isikoff et al., *Clinton and the Intern*, NEWSWEEK, Feb. 2, 1998, at 30; *Embattled President Fights New Allegations; Admits Gennifer Flowers Affair. Former Associates Speak Well of Lewinsky. Tripp a Key Player in Clinton Scandals*, UNION LEADER, Jan. 22, 1998, at A.

6. *See, e.g.*, Benjamin J. Priester et al., *The Independent Counsel Statute: A Legal History*, 62 L. & CONTEMP. PROBS. 5 (1999); Randall K. Miller, *Special Presidential Impeachment Section, Essay: Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647 (1999); Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. L. SCH. ROUNDTABLE 143 (1998); Nelson Lund, Douglas R. Cox, *Executive Power and Governmental Attorney-Client Privilege: The Clinton Legacy*, 17 J.L. & POL. 631 (2001); Ann M. Murphy, *All the President's Privileges*, 27 J.L. POL'Y 1 (2018).

7. *See* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton rev. 1961); 1 MCCORMICK ON EVIDENCE § 87 (4th ed. 1992); PAUL R. RICE, 1 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES ch. 1 (2d ed. 1999).

8. *See, e.g.*, Geoffrey C. Hazard Jr., *An Historical Perspective on the Lawyer-Client Privilege*, 66 CAL. L. REV. 1061 (1978) [hereinafter Hazard, Jr.]; Lance Cole, *Revoking our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003); Robert J. Anello, *2008 Global Legal Practice Symposium: Preserving the Corporate Attorney-Client Privilege: Here and Abroad*, 27 PENN ST. INT'L L. REV. 291 (2008); John Huxley Buzzard et al., PHIPSON ON EVIDENCE (13th ed. 1982); R. Cross & C. Tapper, EVIDENCE (6th ed. 1985); D.F. Partlett, *Attorney-Client Privilege, Professions, and the Common Law Tradition*, 10 J. LEGAL PROF. 9 (1985).

9. *See, e.g.*, Katharina Pistor et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791 (2002); Eric W. Orts, *The Complexity and Legitimacy of Corporate Law*, 50 WASH. & LEE L. REV. 1565 (1993).

misuse.[10] A review of this research reveals two points of broad consensus: (1) that attorney-client privilege exists for government and corporate entities,[11] and (2) that applying the rule in these contexts has proven so difficult that courts are prone to authoring opinions completely void of any underlying justification.[12]

For an area of law that turns upon the rulings and rationales found within judicial opinions,[13] the omission of the latter inspires more questions than answers.[14] For instance, why does the oldest legal privilege in existence, first formulated during the reign of Queen Elizabeth I,[15] remain so difficult to apply more than four centuries after its creation? As a principle forming the very bedrock of legal practice,[16] should courts not be completely comfortable with its application by now? Likewise, as a law so readily familiar to the non-lawyer public that it is commonly referenced in television shows and movies,[17] should not every person

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10. *See, e.g.*, Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59 (2002); Cole, *supra* note 8; Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469 (2002); Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 MARQ. L. REV. 475 (2011).

11. Alexander C. Black, Annotation, *Determination of Whether a Communication is from a Corporate Client for Purposes of the Attorney-Client Privilege—Modern Cases*, 26 A.L.R.5th 628, 2 (2019) ("It is virtually undisputed that corporations are entitled to claim the attorney-client privilege."); *see, e.g.*, *In re* Lindsey, 148 F.3d 1100 (D.C. Cir. 1998) (holding that the attorney-client privilege and its exceptions apply to government entities). *Contra* Leslie, *supra* note 10, at 470 (disagreeing with how "scholars have defended the government attorney-client privilege" and advocating for the privilege being found inapplicable to government entities); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997) (holding that public interest prevents the attorney-client privilege from applying to government entities).

12. RICE, *supra* note 7, § 4:28, at 4-158 n.1 ("Most courts have assumed, without analysis, that governmental entities can assert the attorney-client privilege."); *see also infra* Part III (analyzing a sampling of entity-privilege cases and noting where certain cases present conclusory opinions).

13. *See* FED. R. EVID. 501 (stating that "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege").

14. RICE, *supra* note 7, § 4:28, at 4-158 n.1; STEPHEN A. SALTZBURG et al., 2 FED. R. OF EVIDENCE MANUAL § 501.02 (2018).

> One of the great ironies of the Evidence Rules is that privileges, many of which find their justification in the reliance of the public upon them, are left in the confused state they were in prior to the enactment of the rules. Arguably, the certainty of codification is more necessary with privileges than with any other rule of evidence.

Id.

15. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing 8 WIGMORE, *supra* note 7, § 2290) (noting the historic origins of the attorney-client privilege).

16. Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that attorney-client privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

17. *See, e.g.*, THE FIRM (Davis Entertainment, Mirage Enterprises, Paramount Pictures, and Scott Rudin Productions 1993); THE LINCOLN LAWYER (Lionsgate, Lakeshore Entertainment, Sidney Kimmel Entertainment & Stone Village Pictures 2011); *The West Wing: Bad Moon Rising* (NBC television broadcast Apr. 25, 2001), http://www.westwingtranscripts.com/wwscripts/2-19.txt [https://perma.cc/72YM-8XYT] ("He's a government lawyer. The privilege doesn't exist."); *The Good Wife: Death of a Client* (CBS television broadcast Mar. 24, 2013), https://www.imdb.com/title/tt2698008/ [https://perma.cc/L8ZV-4S5U]; *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 4, 2016), https://breakingbad.fandom.com/wiki/Better_Call_Saul_(episode)

who has successfully gone through law school be able to apply the privilege confidently and logically no matter the client type? The answer is that application of the attorney-client privilege to entities has proven so difficult because courts have been viewing it from the wrong perspective.[18]

The process leading to the modern understanding of attorney-client privilege is the result of centuries of legal percolation involving public-policy debates, scholarly analysis, and courtroom applications.[19] The consequence of this evolutionary process is a concept of confidentiality so fundamental to legal practice that it has transcended its origin within the confines of the laws of evidence to exist as an equally engrained component of legal ethics.[20] No other evidentiary principle has been deemed so virtuous or vital to the practice of law.[21] In fact, it is difficult to imagine serious debate over the validity or value of a rule so integral to our legal system that it is frequently referenced in the media.[22] To review this history is to understand that the attorney-client privilege may well be settled in idea, but continues to be refined in practice as courts map the final phase of its unsettled application—to entities.[23]

This Article is the first to examine the perspectives employed by courts in entity-privilege cases to answer a question more than four-hundred years in the making: based upon the perspectives employed by courts, how should the attorney-client privilege apply to government and corporate clients? For decades, courts have fashioned a variety of tests for entity privilege by analyzing cases through the traditional legal principle that characterizes the interactions between entities and their attorneys as part of a triangular relationship.[24] The response has been confusion and disagreement amongst courts.[25] In fact, my research shows

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[https://perma.cc/75VT-RVKF]; *see also* Armen Adzhemyan & Susan M. Marcella, *"Better Call Saul" if you want Discoverable Communications: The Misrepresentation of the Attorney-Client Privilege on Breaking Bad*, 45 N.M. L. REV. 477 (2015).

18. *See infra* Part III.

19. *See infra* Part III.

20. "The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics." MODEL RULES OF PROF'L CONDUCT R. 1.6 (AM. BAR ASS'N 1983) (comment) [hereinafter 1983 MODEL RULES]. However, it should be noted that there are key differences between the applicability and strength of the two rules. Grace M. Giesel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations*, 48 MERCER L. REV. 1169, 1176 n.25 (1997) (providing a brief but thorough comparison of the attorney-client privilege and duty of confidentiality).

21. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (describing how the attorney-client privilege "promote[s] broader public interests in the observance of law and administration of justice.").

22. Kevin Johnson, *Attorney-Client Privilege: It's All Over the News but How Does it Work?*, USA TODAY (Apr. 17, 2018), https://www.usatoday.com/story/news/politics/2018/04/17/attorney-client-privilege-its-all-over-news-but-what-lay-manlegal-primer/523855002/ [https://perma.cc/YY49-48A3]; *see also supra* note 17. A Google News search of articles that included the phrase "attorney client privilege" from November 1, 2017 to November 1, 2018 returned "about 4,400" results. A Lexis Advance search of U.S. News sources for the same time period revealed 7,970 news articles.

23. *See infra* Part III.

24. *See infra* Part III.

25. *See infra* Part III.

that even when entity-privilege cases are decided "correctly," the frequent lack of justification in judicial opinions undermines the opinion's usefulness.[26] Practitioners and entity agents suffer in the current state of judicial inconsistency as each tries to determine the requirements for ensuring legal conversations will remain confidential.[27] The significance of the problem is only amplified when considering the powerful positions of many litigants in these cases and the privilege's role in the daily operations of attorneys.[28] Using an interdisciplinary approach that draws upon the practice of illustrative modeling, it becomes clear that the perspectives of courts applying the privilege to entities is far more complex than originally thought and often results in an illustration that is anything but triangular.[29] The result is a circuit split on the issue of how best to apply the privilege to entities and decisions that fail to provide adequate guidance to attorneys and their entity clients.[30]

In order to rethink the attorney-client privilege, we must first define it. Given the popularity of scholarship and litigation on the topic, a number of different phrasings for the rule exist.[31] After reviewing the most popular variations of the rule, Part I settles upon a succinct definition of the privilege.[32] Part II then explains the principle of illustrative modeling and its untapped potential within the study of law by discussing its use in other academic disciplines. Part III continues by using illustrative modeling to better trace the historical development of the privilege in practice and perspective. This enables us to see how courts have taken such varied approaches throughout the privilege's evolution. Having identified the different methodologies used by courts, Part IV sets upon the task of applying the "reason and experience" required by the Federal Rules of Evidence to formulate an improved law.[33] In Part V, I test my proposal by constructing a test suite comprised of a representative sampling of two high-profile cases discussed in Part III in order to measure the test's potential in real-world scenarios. In my conclusion, I reaffirm the timeliness of this proposal, which occurs amidst the backdrop of investigations into the Trump Administration and statements by President Trump concerning attorney-client privilege. I also weigh the strength of

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26. RICE, *supra* note 7, § 4:28 n.82; *see infra* Part III (discussing the thought process and shortcomings of entity-privilege cases).

27. *See infra* Part III.

28. *See, e.g.*, *In re* Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005); *In re* Lindsey, 158 F.3d 1263, 1273 (D.C. Cir. 1998); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920 (8th Cir. 1997). Each of these cases involve a president or governor and are discussed in more detail in Part III below.

29. *See infra* Part III.

30. *See In re Lindsey*, 158 F.3d at 1273; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920.

31. *See infra* Part I.

32. Having multiple formulations of the same rule is part of the problem contributing to the confusion surrounding entity-privilege cases. In Part I, I address this issue by deciding on an articulation of the rule for attorney-client privilege that combines the well-established elements of the privilege with the intricacies of some modern scenarios.

33. FED. R. EVID. 501; *see also* Upjohn Co. v. United States, 449 U.S. 383, 397 (1981) (quoting FED. R. EVID. 501).

the most likely counterargument—the role of "the public" in government-privilege cases—before arguing that the privilege's underlying purpose of promoting candid conversations supports this logical "rethinking" of an age-old legal principle.

I. DEFINING THE ATTORNEY-CLIENT PRIVILEGE

Courts and scholars alike have offered different formulas for determining whether attorney-client communications are privileged.[34] Reviewing the number of phrasings for the rule is more than merely academic, as its many variations have only contributed to the confusion and uncertainty of its application.[35] My research on the definition of attorney-client privilege most frequently cited by judges and legal scholars reveals two primary candidates for a universal definition.[36] The first is the rule put forth by John Henry Wigmore, a former law professor and dean who authored the seminal work, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* ("*Wigmore on Evidence*").[37] The second phrasing is the version put forth by Charles Edward Wyzanski Jr., a former chief federal district court judge,[38] in *United States v. United Shoe Machinery Corporation*.[39] Although citing to either's definition would place the

34. *Compare* Estate of Paterno v. Nat'l Collegiate Athletic Ass'n, 168 A.3d 187, 193–94 (Pa. Super. Ct. 2017), *with* ContraVest Inc. v. Mt. Hawley Ins. Co., 273 F. Supp. 3d 607, 613 (D.S.C. 2017); *see* Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS 201, 217 (2010) (comparing "the traditional formulation" of the privilege to modern interpretations of the rule); James N. Willi, *Proposal for a Uniform Federal Common Law of Attorney-Client Privilege for Communications with U.S. and Foreign Patent Practitioners*, 13 TEX. INTELL. PROP. L.J. 279, 283 (2005) (discussing the number of variations for the rule of attorney-client privilege within the context of patent law).

35. *Compare* 8 WIGMORE, *supra* note 7, § 2290, *with* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000). It is difficult to focus on consistent operation of a rule across the number of state and federal jurisdictions when so many variations of the actual rule itself exist. For example, even if a particular jurisdiction put forth a clear opinion with logical analysis leading to a fitting resolution that seemed primed for adoption in other venues, it could be unsettling to a court considering such a move if the rule in the adopting court for the privilege is worded completely different. Certainly, such a situation would provide an attorney opposing such implementation the opportunity to argue against adoption on the basis the jurisdictions apply wholly different rules—even if only in language and not substance.

36. By conducting research into the number of authorities that have put forth a definition of the attorney-client privilege, two sources emerged as the primary contenders. My deduction was based upon the popularity of the source as reflected by the number of citations to its definition and how well the rule fit the nuances of the practice of law. I attempted to guard against the second factor being arbitrary by reviewing case scenarios involving the privilege and comparing those fact patterns to the stated rule to determine which rule (if any) most expressly addressed the scenario. My research revealed more than 10,000 sources citing to "wigmore 'attorney client privilege'" and approximately 6,270 sources citing to "'united shoe' 'attorney client privilege.'"

37. *John Henry Wigmore*, We'll See Them Through, https://sites.northwestern.edu/plrcwwi/john-henry-wigmore/ [https://perma.cc/C5CF-2U4D] (last visited Oct. 8, 2019).

38. Eric Pace, *Charles E. Wyzanski, 80 is Dead; Judge on U.S. Court for 45 Years*, N.Y. TIMES, Sept. 5, 1986, at A20.

39. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 361 (D. Mass. 1950); Alexander C. Black, Annotation, *Determination of Whether a Communication is from a Corporate Client for Purposes of the Attorney-Client Privilege—Modern Cases*, 26 A.L.R.5th 628, § 2 (2019) (describing the test articulated in *United Shoe Machinery Corp*. as "[a] classic and widely cited statement of the privilege").

author in sound legal company, the competing descriptions have done nothing to further the goal of creating a more predictable rule for entity actors to follow.[40] Therefore, deciding on one version of the rule is the first step in removing some of the uncertainty encountered by courts and entity actors.[41]

Comparing the two versions, Dean Wigmore's rule is broadly stated and encompasses the spirit of the attorney-client privilege by breaking the law down into eight parts,[42] while Judge Wyzanski's version is more nuanced and specific, identifying fifteen narrower divisions that are stated below.[43] Given the complexity of the privilege's application in today's cases, "there is some question as to whether [Dean Wigmore's definition] completely states the modern privilege."[44] In contrast, the rule penned by Judge Wyzanski includes specific references to the privilege's exceptions that are frequently at issue in modern cases.[45] In sum, the more detailed phrasing proffered by Judge Wyzanski makes it easier to apply and more applicable to contemporary cases regarding the privilege.[46] Thus, to help eliminate confusion among courts, practitioners, and entity actors, the attorney-client privilege should apply when:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[47]

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40. Implementing an agreed-upon rule would ensure attorneys are able to judge client behavior against the verbatim requirements a court will apply if the communication becomes an issue in litigation.

41. The number of different variations of the rules for the attorney-client privilege have drawn attention from other scholars as well. *See* Saltzburg et al., *supra* note 14, § 501.02.

42. Wigmore defined the rule on the attorney-client privilege as:

> (1) Where legal advice of any kind is sought (2) from a professional legal advis[e]r in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advis[e]r, (8) except the protection can be waived.

8 WIGMORE, *supra* note 7, § 2292.

43. *United Shoe Mach. Corp.*, 89 F. Supp. at 358–59; *see also* Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 319 (7th Cir. 1963) (describing Wigmore's version of the rule as a "summation 'of the general principle'").

44. 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE § 5473, at 103–04 (1986) (quoting 8 WIGMORE, *supra* note 7, § 2292) [hereinafter WRIGHT & GRAHAM].

45. *Id.*; *see also* Black, *supra* note 39.

46. 24 WRIGHT & GRAHAM, *supra* note 44.

47. *United Shoe Mach. Corp.*, 89 F. Supp. at 358–59 (D. Mass. 1950). In this case, the defendant argued that the attorney-client privilege applied to documents from its patent department and were therefore exempt from discovery. *Id.* at 358. Judge Wyzanski put forth the aforementioned rule for the privilege in his decision, which protected communications with the defendant's corporate counsel. *Id.* at 358–59, 360–61.

Relying on Judge Wyzanski's definition of attorney-client privilege is noteworthy for two reasons. First, settling on a rule eliminates the confusion encountered by entity actors and attorneys when trying to assess how to protect communications. While scholars, practitioners, and courts agree the privilege is a fundamental component of the law,[48] reaching a consensus on its definition has proven more problematic.[49] Second, comparing and contrasting the definitions offered by Judge Wyzanski and Dean Wigmore highlights the critical importance of language within the law. By analyzing the language of courts in these difficult cases more thoroughly, we are able to uncover a deeper understanding of how judges approach entity-privilege issues.

II. THE PURPOSE AND POTENTIAL OF ILLUSTRATIVE MODELING

What we say, and *how* we say it, matters. This is especially true in the legal field, where principles of common law dictate that the written opinions of judges serve as binding precedent in lower courts and the authority on whether a law itself is permitted.[50] The importance of language in the law is not limited to judicial opinions, however. Arguments put forth by attorneys advocating for their clients can just as easily turn on the nuanced use of a word.[51] So too is the language employed by legal scholars, which can impact public policy and the rule of law by influencing judicial opinions and legislative proposals.[52] Even more frequently considered by the general public and scholars alike is how the word choice of

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48. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (holding that the privilege's purpose "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"); Trammel v. United States, 445 U.S. 40, 51 (1980) (noting the attorney-client privilege's underlying purpose of facilitating candid conversations); United States v. Edwards, 303 F.3d 606, 618 (5th Cir. 2002) (describing the privilege as "the oldest and most venerated of the common law privileges"); United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997) (stating the privilege is "perhaps the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system").

49. *See supra* Part I.

50. *See* Finley v. United States, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."); Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 248 (3d Cir. 2013) (quoting Adams v. Lever Bros. Co., 874 F.2d 393, 395 (7th Cir. 1989)); Lewis v. Harris, 908 A.2d 196, 226 (N.J. 2006) ("What we 'name' things matters, language matters. We must not underestimate the power of language."); *see generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

51. *See, e.g.*, *In re* Lindsey, 148 F.3d 1100, 1107–08 (D.C. Cir. 1998) (discussing the different word choices of opposing counsels, "extension" versus "exception," and the significance of the varying approaches); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915 (8th Cir. 1997) (noting the "strikingly different rhetorical approaches" taken by the parties in their arguments and analyzing the impact of each).

52. *See, e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (cited by 417 cases and 2,754 law reviews and scholarly works); William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (cited by 262 cases and 1,251 law reviews and scholarly works); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (cited by 18 cases and 227 academic works).

legislators impacts the interpretation of laws by courts.[53] The consequences of language are only amplified for common law doctrines such as attorney-client privilege, which turn upon judicial opinions.[54]

Given the weight attorneys, scholars, and judges place on court decisions, studying judicial perspectives in attorney-client privilege cases can have dramatic benefits.[55] Armed with a better understanding of *how* and *why* a judge arrived at a particular decision would provide better predictability to the entity attorneys and agents who depend upon the common-law to guide their reliance upon the privilege.[56] One way to advance understanding of judicial perspectives in this complex intersection of ethics and evidence is with the use of illustrative modeling.

Illustrative modeling is the practice of using images to better convey an idea or thought process.[57] Although rarely utilized within the study of law, the practice of using images to improve understanding of complex topics is a centuries-old tool commonly employed in other academic disciplines under various names.[58]

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53. Research of news sources on Lexis Advance for "activist judges" returned more than 10,000 sources. The topic of judicial interpretation is also a frequent area of scholarship. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018); Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015); William N. Eskridge, Jr., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION (2016); *see also* Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017) (citing President Donald Trump's language in overturning the federal travel ban); Alexander Burns, *Federal Judge Blocks New Ban on Travel to U.S.*, N.Y. TIMES (Mar. 16, 2017), (noting how a federal court "repeatedly invoked Mr. Trump's public comments") https://www.nytimes.com/2017/03/15/us/politics/trump-travel-ban.html [https://perma.cc/D4AG-GSK7].

54. FED. R. EVID. 501; Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998); People v. Knuckles, 650 N.E.2d 974, 977 (Ill. 1995). Some states, however, have codified a version of the attorney-client privilege. *See, e.g.*, Colo. Rev. Stat. § 13-90-107(1)(b) (2018). Still, the common law may still be incorporated in state statutes. State *ex rel.* Leslie v. Ohio Hous. Fin. Agency, 824 N.E.2d 990, 994 (Ohio 2005) ("In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law.").

55. The evolution of the attorney-client privilege for corporate entities stalled after the Supreme Court's decision in *Upjohn Co. v. United States*. As discussed in Part III below, this decision fails to provide clear guidance to entity actors and entity clients, which is reflective of a common theme in entity-privilege cases. Therefore, it is necessary to study these problematic cases to promote advancements in understanding of how entity-privilege operates. This is in accord with the Federal Rules of Evidence, which mandate that the rules are to be interpreted in a manner that "promote[s] the development of evidence law." FED. R. EVID. 102; *see also* 5 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE § 102.02 (Mark S. Brodin & Matthew Bender eds., 2018) ("It is now recognized that the law of evidence must respond to fundamental changes in our society and judicial procedures if parties are to retain confidence in the courts rather than turn to nonjudicial resolution of disputes. As changes occur in society they have an impact on the courtroom.").

56. *See* RICE, *supra* note 7, § 4:28 n.82.

57. *See, e.g.*, text accompanying notes 55–59.

58. *See* Allison Meier, *When Art Was the Scientist's Eye: 400 Years of Natural History Illustrations*, HYPERALLERGIC (Dec. 6, 2013), https://hyperallergic.com/97027/when-art-was-the-scientists-eye-400-years-of-natural-history-illustrations/ [https://perma.cc/6PPN-8E88] (describing how science has utilized illustrative modeling for centuries); David L. Streiner, *Finding Our Way: An Introduction to Path Analysis*, 50 CANADIAN J. OF PSYCHIATRY 115, 116 (2005), *available at* http://journals.sagepub.com/doi/pdf/10.1177/070674370505000207 [https://perma.cc/UU2A-B5S] (stating that the name of "path analysis" as it is used in the field of statistics "comes from the pictorial representations of the models themselves").

For example, illustrations referred to as "structural equation models" and "path diagrams" are "widely used in sociology, econometrics, biology, and other sciences" in order to convey the operation of research data.[59] In addition, models consisting of dots and lines—named "Lewis Structures" after their inventor—are frequently used in chemistry to better understand the chemical bonds between atoms.[60] Likewise, researchers and practitioners within the field of engineering use electrical schematics to supplement written descriptions of how electrical and mechanical systems operate.[61] Social scientists have also acknowledged the benefits of illustrative modeling as diagrams are commonly used within these fields to improve understanding of research and studies.[62]

Illustrative modeling's broad appeal across so many academic disciplines stems from its well-documented success at conveying complex matters to diverse audiences.[63] Numerous studies have established the benefits of viewing a concept via an illustration as opposed to through the use of words alone.[64] Additional research proves these benefits are not limited by age, gender, sexuality, or race.[65] Considering its potential impact and the power of illustrative modeling across such varied disciplines, care must be taken to ensure the graphic model is accurate —an *illustration* rather than an *illusion*.[66] However, by carefully applying this tool

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59. Peter Spirtes et al., *Using Path Diagrams as a Structural Equation Modeling Tool*, 27 SOCIOLOG. METHODS & RES. 182, 182 (1998).

60. Frank Weinhold & John E. Carpenter, THE STRUCTURE OF SMALL MOLECULES AND IONS 227–36 (Ron Naaman & Zeev Vager, eds., 1988); Melanie M. Cooper et al., *Lost in Lewis Structures: An Investigation of Student Difficulties in Developing Representational Competence*, 87 J. CHEMICAL EDUC. 869, 869 (2010).

61. *See* R. S. Shekhawat, *Mathematical Modeling of Electrical Machines using Circle Diagram*, 4 INT'L J. ELECTRONICS & COMM. ENGINEERING & TECH. 173 (2013).

62. *See, e.g.*, Elizabeth Moorman Kim et al., *Parent Beliefs and Children's Social-Behavioral Functioning: The Mediating Role of Parent-Teacher Relationships*, 51 J. SCH. PSYCHOL. 175, 178 (2013); ANALYTICAL SOCIOLOGY ACTIONS AND NETWORKS 7–10 (Gianluca Manzo ed., 2014).

63. *See supra* notes 61–62 and accompanying text.

64. *See e.g.*, Francis Dwyer, Jr., *Adapting Visual Illustrations for Effective Learning*, 37 HARV. EDUC. REV. 250 (1967); Krista Wasylenky & Nicole Tapajna, *The Effects of Positive and Negative Illustrations on Text Recall*, 29 U. OTTAWA PAPERS IN LINGUISTICS (2001), *available at* http://artsites.uottawa.ca/clo-opl/doc/The-Effects-of-Positive-and-Negative-Illustrations-On-Text-Recall.pdf [https://perma.cc/PDG8-MKFH]; Seth Spaulding, *Research on Pictorial Illustration*, 3 AUDIO VISUAL COMM. REV. 35 (1955).

65. W. Howard Levie & Richard Lentz, *Effects of Text Illustrations: A Review of Research*, 30 EDUC. COMM. & TECH. J. 195 (1982); J. R. Levin & R. E. Mayer, *Understanding Illustrations in Text*, LEARNING FROM TEXTBOOKS (B. K. Britton, A. Woodward, & M. R. Binkley eds., 1993); S. J. Concannon, *Illustrations in Books for Children: Review of Research*, 29 THE READING TEACHER 254–56 (1975).

66. Just as with the law's well-known "reasonable-person standard," no one is expected to achieve perfection. Thompson v. Jacobs, 314 So. 2d 797 (Fla. Dist. Ct. App. 1975); Wagner v. Wagner, 372 So. 2d 510 (Fla. Dist. Ct. App. 1979); *see also* United States v. Mendenhall, 446 U.S. 544 (1980) (noting the reasonable-person standard within the criminal-law context); Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233 (2010). However, the power of illustrative modeling requires the drafter take special care in preparing a medium to convey an idea in a manner that is likely to be more impactful than if only words were used. For a prime example of an illustration that inspires more confusion than understanding, one should review the schematic prepared to help NATO officials understand the conflicts in the Middle East. Elisabeth Bumiller, *We Have Met the Enemy and He is PowerPoint*, N.Y. TIMES, Apr. 26, 2010, at A1.

to the complex, multi-party fact patterns of entity-privilege cases, scholars can advance the understanding of how such cases operate for the benefit of clients, attorneys, and the judiciary.[67]

III. THE EVOLUTION OF THE ATTORNEY-CLIENT PRIVILEGE IN PRACTICE AND PERCEPTION

Concisely tracing the attorney-client privilege's historical development enables us to better appreciate the parallels between courts of different eras. Early privilege cases focused on the privilege's application to human clients.[68] Modern courts, by comparison, struggle to set boundaries for entity clients.[69] A comparison of the different cases reveals the privilege's dramatic evolution.[70]

A. DEVELOPMENT OF THE ATTORNEY-CLIENT PRIVILEGE FOR HUMAN CLIENTS

1. 1577–1801

The idea of protecting communications between individuals and their legal representatives first appeared in the annals of legal writing during the reign of Queen Elizabeth I.[71] These references, however, were short and

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67. By applying this interdisciplinary approach to the operation of entity-privilege cases, judges and scholars can refine their legal arguments to provide consistent, legally sound opinions that will guide entity attorneys and agents.

68. *See infra* pp. 14–20.

69. *See infra* pp. 20–45.

70. *See, e.g.*, Softview Comput. Prods. Corp. v. Haworth, Inc., 2000 U.S. Dist. LEXIS 4254, at *5–6 (S.D.N.Y. Mar. 31, 2000) (stating that "the elements of the attorney-client privilege are well settled"); Crabb v. KFC Nat'l Mgmt. Co., No. 91-5474, 1992 U.S. App. LEXIS 38268, at *7–8 (6th Cir. Jan. 6, 1992) (stating that "[i]t is well settled that attorney-client privilege is not waived merely because the communications involved extend across corporate structures"); Nesselrotte v. Allegheny Energy, Inc., Civil Action No. 06-01390, 2008 U.S. Dist. LEXIS 55730, at *37 (W.D. Pa. July 22, 2008) (stating that it is "well-settled . . . the privilege belongs to the client, not to the attorney"); EEOC v. BDO USA, 876 F.3d 690, 696 (5th Cir. 2017) (stating that it is "well-settled" that a determination of privilege stems from an analysis of the elements); Brunton v. Kruger, 32 N.E.3d 567, 576 (Ill. 2015) (stating that "[t]he testamentary exception to the attorney-client privilege is well settled law"); CSX Transp., Inc. v. Gilkison, No. 5:05-CV-202, 2009 U.S. Dist. LEXIS 46033, at *16 (N.D.W. Va. May 29, 2009) (stating that "[t]he 'crime-fraud' exception to the attorney-client privilege is well settled law in West Virginia").

71. 8 WIGMORE *supra* note 7, § 2290 (citing 1 Berd v. Lovelace, Cary 88, 21 Eng. Rep. 33 (Ch. 1577); Dennis v. Codrington, Cary 143, 21 Eng. Rep. 53 (Ch. 1580); Kelway v. Kelway, Cary 127, 21 Eng. Rep. 47 (Ch. 1580); Onbie's Case, March N.C. 83, p. 136, 82 Eng. Rep. 422 (K.B. 1642); Roll, C.J., in Waldron v. Ward, Sty. 449, 82 Eng. Rep. 853 (K.B. 1654); Sparke v. Middleton, 1 Kebl. 505, 83 Eng. Rep. 1079 (K.B. 1664); Legard v. Foot, Rep. t. Finch 82, 23 Eng. Rep. 44 (Ch. 1673); Anonymous, Skin, 404, 90 Eng. Rep. 179 (K.B. 1693)). Queen Elizabeth I ruled from 1587–1603. The type of legal representative employed by a client of this era could drastically impact whether communications were privileged. Hazard, Jr., *supra* note 8, at 1070–73 (citing 8 WIGMORE, *supra* note 7, at 2290, 2291). There were several possible actors a client could hire during this era—including barristers, attorneys, solicitors, and scriveners. *Id.* at 1070. Each had a different role, though there may have been instances where one type performed the usual type of work of another. *Id.* Therefore, I use the phrase "legal representative" as a broader term in place of "attorney" when discussing privilege cases of this era.

disjointed, revealing very little about the underlying policies that motivated courts of the era to consider protecting certain communications.[72] Cases offering much in the way of historical analysis did not appear until nearly a half century after the death of Queen Elizabeth I.[73] From 1654 until 1743, "there are fourteen reported decisions on the subject."[74] Collectively, these cases indicate that the judicial perspective for courts at the time stemmed from chivalrous principles governing the moral code of nobility—that "a gentlemen does not give away matters confided to him."[75] In contrast to our modern view of the privilege as client-centered, courts viewed legal representatives as being part of a noble class and therefore honor-bound to refrain from discussing private conversations.[76] With the privilege being a product of a legal representative's social status, clients were helpless to maintain secrecy of conversations if their legal representative decided to reveal them.[77] As summed up by one English jurist resistant to the evolution in perspective that would eventually occur, "I cannot accede to the proposition which has been contended for, that the *privilege of an attorney* is the privilege of the client . . . ."[78]

An illustrative model of this early judicial perspective reflects the legal representative as being in control of the privilege. This is indicated by an arrow symbolizing the privilege flowing from the legal representative to the client. While the position of parties within the illustrative model conflicts with our modern understanding of privilege operation,[79] its linear, two-party design is familiar to the current perspective utilized by courts in cases involving human clients.[80]

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72. Hazard, Jr., *supra* note 8, at 1070–73.

73. *Id*. at 1070.

74. *Id*.

75. *Id*.; *see also* 8 WIGMORE, *supra* note 7, § 2290 (listing sample cases); *see generally* Maurice Hugh Keen, CHIVALRY (1984) (providing background on the origin and operation of chivalrous principles).

76. Hazard, Jr., *supra* note 8, at 1070; 8 WIGMORE, *supra* note 7, § 2290.

77. 8 WIGMORE, *supra* note 7, § 2290.

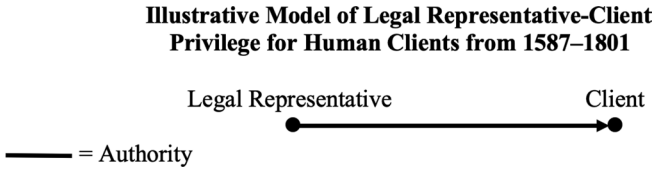
> It followed also, under the original theory, that the privilege could be *waived by the attorney*. Since only the attorney's honor is involved, the court would not always attempt to judge its standards or to enforce them if the attorney himself was willing to risk his conscience and his reputation. 'The Court can't determine what is honor,' said Chief Baron Bowes in 1743.

Id. (citing Annesley v. Earl of Anglesea, 17 How. St. Tr. 1139, 1240 (Ex. 1743)).

78. Alexander, C.B., in Preston v. Carr, 1 Younge & J. 175, 178, 148 Eng. Rep. 634, 635 (Ex. 1826) (emphasis added). As Wigmore explained, although the idea of the privilege being the client's would grow significantly in the early 1800s, the shift in perspective was not without critics. 8 WIGMORE, *supra* note 7, § 2290 n.9 (citing Alexander, C.B., in Preston v. Carr, 1 Younge & J. 175, 178, 148 Eng. Rep. 634, 635 (Ex. 1826)).

79. *See infra* p. 20; *see also* Wachtel v. Health Net, Inc., 482 F.3d 225, 230 (3d Cir. 2007) (comparing the initial justification for the privilege with the modern view).

80. *See infra* p. 20.



2. 1801–PRESENT

The majority of early cases on the issue of the attorney-client privilege culminated to stand for the proposition that any privilege was that of the gentlemen legal representative to control.[81] However, the number of opinions taking the contrary perspective began growing significantly at the start of the nineteenth century.[82] The competing policy rationales that motivated the warring judicial factions of the era were aptly set out in the much-celebrated case of *Annesley v. Anglesea*.[83] The case is worth examination not only as a clear window into the dilemma faced by courts of the era, but also "because [it] anticipate[s] substantially everything that has since been said on the subject."[84]

To say the facts of *Annesley* were gripping would do little justice to the herculean struggles overcome by the story's protagonist, James Annesley. In what seemingly marked the beginning of a comfortable life for James, he was born to a father who held the noble title of "baron."[85] This designation carried with it a large inheritance that passed to James so long as he was alive at his father's passing.[86] Although James was still living when his father died, rather than receiving his inheritance, he

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81. *See supra* pp. 14–15.

82. 8 WIGMORE, *supra* note 7, § 2290. Lea v. Wheatley (C.P. 1679) was "[t]he earliest judicial pronouncement" that the privilege is the client's to control, but the holding did not alter the perspective that would dominate legal practice for more than a century after. *Id*. at n.6 (citing Duchess of Kingston's Trial, 20 How. St. Tr. 355, 574N (H.L. 1776)). *But see id*. at n.9 ("The persistence of the older notion is seen as late as 1826: Alexander, C.B., in Preston v. Carr, 1 Younge & J. 175, 178, 148 Eng. Rep. 634, 635 (Ex. 1826) . . . .").

83. Annesley v. Anglesea, 17 How. St. Tr. 1139 (1743). So incredible were the facts of *Annesley* that the case has inspired numerous adaptations. *See* Jon Henley, *Stranger than Fiction: The True Story Behind Kidnapped*, THE GUARDIAN (Feb. 18, 2019, 3:00 PM), https://www.theguardian.com/books/2010/feb/18/kidnapped-stevenson-true-story-annesley [https://perma.cc/GZ65-6V6T] ("The extraordinary story of James Annesley has inspired at least five novels, including Sir Walter Scott's Guy Mannering and, most famously, Robert Louis Stevenson's Kidnapped, one of the best-loved adventure books of all time."). In addition, scholars and courts have cited the case for its impact on the law. *See, e.g.*, *In re* Sawyer, 229 F.2d 805, 808 (7th Cir. 1956); Hazard, Jr., *supra* note 8, at 1073–80. As Professor Norman W. Spaulding notes, Wigmore references the case so frequently that one could gain "the impression that it is the single most significant authority on the subject" of attorney-client privilege. Norman W. Spaulding, *The Privilege of Probity: Forgotten Foundations of the Attorney-Client Privilege*, 26 GEO. J. LEGAL ETHICS 301, 318 (2013). "The caption of the case is properly Craig v. Anglesea, but it has not usually been so styled in subsequent citation . . . ." Hazard, Jr., *supra* note 8, at 1073 n.53. In keeping with the case's popular designation, I will refer to it throughout this Article as Annesley v. Anglesea (or *Annesley*, for short reference).

84. Hazard, Jr., *supra* note 8, at 1075.

85. *Annesley*, 17 How. St. Tr. at 1144 (describing the proof offered at trial of the birth of James Annesley).

86. Spaulding, *supra* note 83, at 318.

was placed onto the streets by his stepmother and sent away to a "remote colony" as a slave.[87] After thirteen grueling years, James managed to escape and return to England only to be falsely accused of murder by his uncle after announcing his return.[88] After James proved his innocence at the murder trial, he filed suit against his uncle to establish himself as the rightful heir to his father's fortunes.[89] James's success hinged on whether he could convince the court to hear testimony from his uncle's attorney that would reveal the details of his uncle's murderous plot and, in doing so, prove James's identity.[90]

James made three primary arguments as to why communications between his uncle and his attorney should be discoverable at trial. First, James argued the privilege should only apply to those communications that occurred "in furtherance of pending litigation."[91] Second, James claimed the communications were discoverable because they concerned matters unrelated to the reason his uncle hired an attorney.[92] This argument mirrors the modern requirement that communications be "in the course" of the attorney-client relationship in order to receive protection.[93] Third, foreshadowing the firmly established crime-fraud exception of contemporary times,[94] James argued that communications about committing a crime should not be shielded from discovery.[95]

In contrast, James's uncle argued that the legal representative and the client controlled the privilege.[96] According to his uncle, a chilling effect would result if a client is not encouraged to "fully and candidly disclose everything that is in his mind."[97] The formulation of the rule James presented to the court, his uncle stated, "would make the rule a great deal too narrow . . . ."[98] Furthermore, he argued that in order to facilitate the candid conversations necessary for a proper attorney-client relationship, there "must be presumed" a confidential relationship from the very moment a client speaks with an attorney about legal matters.[99]

Ultimately, the court ruled in James's favor by narrowing the privilege's scope of protection to encompass only those communications necessary for the original litigation.[100] While this differs from our modern understanding of the privilege, *Annesley* stands as far more than a compelling story. The detailed decision helps

87. *Id.*
88. *Id.*
89. Hazard, Jr., *supra* note 8, at 1074.
90. *Id.*
91. *Id.* at 1075; *Annesley*, 17 How. St. Tr. at 1229, 1232.
92. *Annesley*, 17 How. St. Tr. at 1230.
93. Hazard, Jr., *supra* note 8, at 1076.
94. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2016) [hereinafter MODEL RULES].
95. *Annesley*, 17 How. St. Tr. at 1231.
96. *Id.* at 1235–36.
97. *Id.* at 1237.
98. *Id.*
99. *Id.*
100. *Id.* at 1241–42.

compare policy arguments that continue to this day.[101] In addition, the court foreshadowed the case-by-case approach required by modern rules of evidence with its holding that "the proper way . . . to determine this and every like case [will be] upon their own circumstances."[102] Lastly, the case highlights the potential notoriety of trials involving questions of attorney-client privilege.[103] Centuries before worldwide fascination with investigations into Presidents Richard Nixon, Bill Clinton, and Donald Trump, *Annesley*'s popularity was an early indicator of how riveting the seemingly mundane legal rule of attorney-client privilege could be at trial.[104]

The arguments discussed in *Annesley* influenced future cases that would continue the evolutionary progression towards the modern, universal perspective that recognizes the client as controlling the privilege.[105] The cases of *Wright v. Mayer* and *Grenough v. Gaskell* served as catalysts for a further shift in perspective.[106] The judge in *Mayer* dispensed with the need for in-depth discussion and proclaimed the attorney-client privilege to be "the privilege of the client."[107] Providing further fuel to the movement were the words of Judge L. C. Brougham in *Gaskell*, who in applying the privilege described it as born out of "the interests of justice" and therefore necessary to adequately represent clients.[108] By focusing their opinion on the privilege's value to the client, the judges took a critical step towards shifting ownership of the privilege away from legal representatives.[109]

Tracing the attorney-client privilege's evolutionary development in England helps illustrate the difficulty of its application as well as the privilege's value to the practice of law.[110] The varying approaches adopted by early English courts

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101. *See, e.g.*, *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915, 919–20 (8th Cir. 1997) (discussing the competing arguments by the parties that the privilege should be "absolute" versus that it should yield when the communications relate to criminal activity).

102. *Annesley*, 17 How. St. Tr. at 1239; *see* FED. R. EVID. 501; Trammel v. United States, 445 U.S. 40, 47 (1980); United States v. Gillock, 445 U.S. 360, 367 (1980); Upjohn Co. v. United States, 449 U.S. 383, 396–97 (1981).

103. *See* A. ROGER EKIRCH, BIRTHRIGHT: THE TRUE STORY THAT INSPIRED KIDNAPPED (2011) (discussing the immense popularity of the trial). Numerous transcripts of the trial were created and the proceeding inspired investigations by the English and Irish legislatures. *Id.* at 208–10.

104. *Id.*; *see supra* notes 1–5 and accompanying text.

105. *See, e.g.*, Pomeroy v. Benton, 77 Mo. 64 (1882); People v. Jung Hing, 106 N.E. 105 (N.Y. 1914); Simpson v. Miller, 110 P. 485 (Or. 1910); State *ex rel.* Great Am. Ins. v. Smith, 574 S.W.2d 379 (Mo. 1978); Renihan v. Dennin, 9 N.E. 320 (N.Y. 1886); Houser v. Austin, 10 P. 37 (Idaho 1886); Young v. Johnson, 25 N. E. 363 (N.Y. 1890); Bishop v. Webster, 153 S.E. 832 (Va. 1930).

106. 8 WIGMORE, *supra* note 7, § 2290.

107. Wright v. Mayer (1801) 31 Eng. Rep. 1051; 6 Ves. Jr. 281.

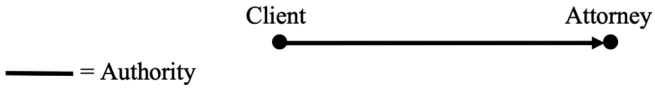
108. Greenough v. Gaskell (1833) 39 Eng. Rep. 618, 620; 1 Myl & K. 98, 103.

109. 8 WIGMORE, *supra* note 7, § 2290, n.5 (describing the language in Greenough v. Gaskell as completely reflective of the modern operation of the privilege).

110. It is well-settled today that the privilege is an essential component to the practice of law. Upjohn Co. v. United States, 449 U.S. 383, 389–90 (1981). So strong is the attorney-client privilege that it even prevents attorneys from divulging client communications that would prove one innocent who was convicted of murder. State v. Macumber, 544 P.2d 1084, 1086–87 (Ariz. 1976) (en banc). For an excellent overview of the general confidentiality requirements for attorneys see Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998).

foreshadowed the case-by-case methodology mandated by the Federal Rules of Evidence.[111] This flexible approach appealed to American courts during the late 1700s, as the fledgling judicial system across the Atlantic began compiling its own case law on the privilege's operation.[112] Both jurisdictions moved toward the current understanding of the privilege, which is reflected in the illustrative model utilized by courts and attorneys since *Mayer* and *Gaskell*. An arrow representing the authority to control the privilege flows from the client to the attorney symbolizing the client as being firmly in control.

Illustrative Model of Attorney-Client Privilege for Human Clients Since 1801



B. DEVELOPMENT OF THE ATTORNEY-CLIENT PRIVILEGE FOR ENTITY CLIENTS

Considering the difficulty encountered by early courts applying the attorney-client privilege to human clients, it should come as little surprise that the task has proven even more burdensome when the client in question is an entity.[113] Courts have struggled to give consistent legal reasoning as to how the privilege coherently applies to clients that by their very nature act through replaceable representatives who are beholden to another group.[114]

1. ENTITY-PRIVILEGE PERSPECTIVE IN THEORY

As illustrated below, the relationship among entity attorneys, entity clients, and entity agents has traditionally been thought of as being triangular in nature.[115]

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111. *Upjohn*, 449 U.S. at 396–97.

112. *See* Morris's Lessee v. Vanderen, 1 Dall. 64, 66 (Pa. 1782) (the first published case on attorney-client privilege in the United States).

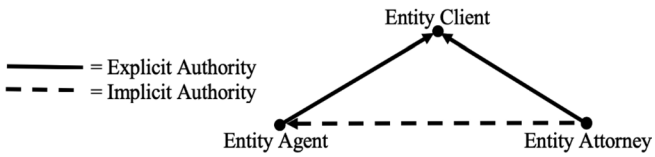
113. *See supra* pp. 18–24.

114. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819); Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 766 (2012); RICE, *supra* note 7, § 4:28.

115. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 15 (1987). Professor Hazard's article is generally considered the leading source on such triangular operations within the law. *See* Susan M. Freeman, *Are DIP and Committee Counsel Fiduciaries for their Clients' Constituents or the Bankruptcy Estate? What is a Fiduciary, Anyway?*, 17 AM. BANKR. INST. L. REV. 291, 332 (2009); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 891 (1994); Michael Stokes Paulson, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 487 (1998).

This theory results from the recognition that every person who interacts with an attorney is either a client, a judge, or a third party.[116] In each type of relationship, the attorney owes a different duty to the other party.[117] As to clients, an attorney generally owes a duty of loyalty that requires confidentiality and a zealous promotion of the client's interests.[118] By comparison, as "an officer of the court," an attorney owes a duty of candor in all oral and written communications with a judge.[119] Interaction with third parties—anyone other than a judge, fellow attorney, or the attorney's client—is limited only by prohibitions against committing crimes or fraud.[120] With these obligations in mind, courts and scholars have accepted a triangular model as the accurate representation of entity-privilege cases without question.[121]

Illustrative Model of the Traditional View of Entity Attorney-Client Privilege[122]



By identifying the three classes an attorney could potentially interact with during the course of legal practice, configuring a triangular relationship seems logical at first glance.[123] After all, an attorney involved with such actors maintains some level of connection with each type of person.[124] However, the traditional model fails to account for the added level of complexity inherent within entity operations—that they can only act through certain authorized agents.[125] Omitted from the calculus are the non-agents who are not third-party strangers nor authorized agents of the client entity, yet maintain a connection to the entity and its attorney.[126] Closer examination of the perspectives courts utilize in entity privilege

116. Hazard, Jr., *supra* note 8, at 21–26.

117. *Id*. at 21–23.

118. MODEL RULES R. 1.6 & 1.7; MODEL CODE OF PROF'L RESPONSIBILITY EC 7 (1980); *see also* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976).

119. MODEL RULES R. 1.6 & 3.3; FED. R. CIV. P. 11.

120. Hazard, Jr., *supra* note 8, at 26.

121. *Id*.; Michael Stokes Paulson, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 487 (1998).

122. Hazard, Jr., *supra* note 8, at 16.

123. *Id*. at 15.

124. *Id*.

125. *See id*. at 16; *supra* p. 19.

126. *See supra* Part III.

cases reveals a far more nuanced operation than reflected by the traditional model.

2. CORPORATE-PRIVILEGE PERSPECTIVE IN PRACTICE

The decision to afford entities with the same protection as individuals did not happen immediately nor without some divergence of opinion.[127] As early as 1915,[128] the Supreme Court considered the possibility that corporate entities might possess the right to protect certain communications using the attorney-client privilege.[129] By 1950, the seminal case of *United States v. United Shoe Machinery Corp.* established a secure foothold of the privilege for corporations.[130] Today, there is widespread agreement that corporate actors are entitled to the privilege.[131] The primary area of debate centers instead on the precise

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127. In Radiant Burners v. American Gas Ass'n, the court held that the privilege could "be claimed only by natural individuals and not by mere corporate entities." 207 F. Supp. 771, 773 (N.D. Ill. 1962). Writing his opinion, Judge Campbell acknowledged the number of sources created prior to his decision that stated a corporation could claim the privilege, while also noting that such sources did so with little legal reasoning. *Id.* at 772–73. Judge Campbell viewed this as an opportunity to correct the previous errors, as he recommended that a new rule was now in order. *Id.* at 773. The court rested its conclusion on the historical foundations of the privilege as well as the lack of privacy necessarily inherent in the operation of corporations. *Id.* at 773–75. As a creature of common-law background, the court stated that since the 1700s attorney-client privilege was personal in nature to the client; therefore, it was consistent that only a person should benefit from it. *Id.* at 775. In addition, the nature of corporations prevented the essential element of confidentiality from existing in this realm. *Id.* Judge Campbell also noted the possibility that some members of a corporation's board of directors might serve on other boards that have a vested interest in the success of both entities. *Id.* at 774. Finally, by filing their corporate records with various governmental bodies, corporate agents relinquished the privacy rights enjoyed by people consulting with their attorneys. *Id.* at 774–75. Based on these determinations, the court struck down attorney-client privilege for corporations.

While the decision in Radiant Burners was a pivotal ruling, it would last only a short time. Commending the district court judge for his "ingenuity and judicial courage," the Seventh Circuit nevertheless overturned the decision. Radiant Burners, Inc. v. Am. Gas Ass'n., 320 F.2d 314, 318 (7th Cir. 1963). In doing so, the court held that "history, principle, precedent and public policy" has given rise to the corporate attorney-client privilege. *Id.* at 323.

128. *See* United States v. Louisville & Nashville R.R. Co., 236 U.S. 318 (1915) (citing Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457 (1877)); Blackburn v. Crawford's Lessee, 3 Wall. 175 (1865).

129. *See* Louisville & Nashville R.R. Co., 236 U.S. at 318 (citing Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457 (1877)).

130. United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950).

131. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383 (1981); Liesa L. Richter, *The Power of Privilege and the Attorney-Client Privilege Protection Act: How Corporate America Has Everyone Excited About the Emperor's New Clothes*, 43 WAKE FOREST L. REV. 979, 987 (2008); Alexander C. Black, Annotation, *Determination of Whether a Communication is from a Corporate Client for Purposes of the Attorney-Client Privilege—Modern Cases*, 26 A.L.R.5th Art. 628 (2018) ("It is virtually undisputed that corporations are entitled to claim the attorney-client privilege . . . ."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (2000); Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157 (1993). *But see* Radiant Burners, Inc. v. Am. Gas Ass'n, 207 F. Supp. 771 (N.D. Ill. 1962); Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 876–77 (1998) (noting the inability of many corporate communications to satisfy the requirements of attorney-client privilege due to the inherent lack of confidentiality present in their day-to-day operations).

operation of that privilege.[132] A review of the key cases involved in the evolution of corporate attorney-client privilege provides a better understanding of the difficulty courts face when using the traditional, triangular model.

a. United States v. United Shoe Machinery Corporation

In *United Shoe Machinery Corp*., Judge Wyzanski put forth a test that allowed any corporate employee to invoke attorney-client privilege for confidential communications with attorneys who spent most of their time performing legal work for the corporation.[133] Although the breadth of the decision drew criticism, an illustrative model of the court's perspective reveals a decision that was merely a logical evolutionary step from the perspective already in use for human clients.[134]

In his opinion, Judge Wyzanski defined the client and its authorized agents in the broadest of terms.[135] The client in corporate-entity cases would include the corporation and "all its subsidiaries and affiliates collectively."[136] Agents for the corporate client included all "officers and employees."[137] Examining the corporate makeup, Judge Wyzanski held that entities and sub-entities shared the role of client since the only differences among them were minor variances in invoices and bookkeeping.[138] In what would become a common theme in entity privilege cases, Judge Wyzanski's opinion fluctuates between wording that suggests employees and their corporate employer operate independently and language that correctly refers to employees as being part of the corporation.[139]

Having broadly defined a corporate client and its pool of authorized agents, the court then considered the status of the attorneys.[140] The decision notes that

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132. *See* 24 Wright & Graham, Jr., *supra* note 44, § 5476 (describing the questions of entity-privilege operation as "one of the most perplexing issues in the law of privilege"); *In re* Fujiyama, 83 B.R. 739, 741 (Bankr. D. Haw. 1988) ("However, the question as to who personifies the corporation is one that has caused federal courts great difficulties."); Richter, *supra* note 131; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (2000) (describing how the majority of authorities agree the privilege applies to corporations but "[c]ourts and commentators have not agreed, however, on the question of the precise scope of the privilege for organizational clients").

133. *United Shoe Mach. Corp*., 89 F. Supp. at 361.

134. Comparing the Illustrative Model of Attorney-Client Privilege for Human Clients Since 1801 appearing on page 16 to the Illustrative Model of *United States v. United Shoe Mach. Corp*. that appears on page 20, it is easy to see how the client in both circumstances maintains a direct connection with the attorney. Agents of client-entity, according to the logic employed in *United Shoe Machinery Corp*., include all employees—no analysis of authority, position, or job description is required. *See id*. at 359.

135. *Id*. at 359, 361.

136. *Id*. at 359.

137. *Id*. The court references *employees and/or officers* three times in its opinion when discussing how the corporate client communicates. *Id*. at 359, 360. In addition, as the opinion's conclusion indicates, the type of employee involved was irrelevant to the court's test for corporate privilege. *Id*. at 361.

138. *Id*.

139. *Id*. (using the phrases "[n]one of these corporations *or* their offices or employees consulted counsel" versus "an officer or employee *of* the defendant") (emphasis added).

140. *Id*.

corporate counsel can exist externally or within a corporation,[141] and referred to outside counsel as "independent."[142] The court frames in-house attorneys as "resident" counsel,[143] reflecting their position within the corporate client. The court explains this positioning by noting, "the apparent factual differences between these house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation's buildings, and are employees rather than independent contractors."[144]

An illustrative model of *United Shoe Machinery Corp*. parallels the evolutionary progression of the perspective employed for human clients. Outside counsel appear in the same position as attorneys in the conventional post-*Annesley* position with respect to the client, while in-house counsel are part of the corporate client.[145] A lateral position in the illustrative model indicates that outside counsel are connected to the clients (the corporation and subsidiaries) but are not part of the vertical corporate structure.[146] This helps convey the court's position that outside counsel are "not acting as business advisers or officers of [the clients]."[147] As with *Annesley*, there is a direct connection between the client and the attorney.[148] The illustration only diverges at the recognition that corporations act via agents.[149] The court viewed the corporation as the client to outside and in-house counsel.[150] Employees act on behalf of the corporate client, with the privilege flowing from the employees, through the corporation, to each counsel.[151] Arrows from the corporation to each counsel type reflect the entity's status as the client controlling the privilege.[152] The court places in-house counsel and other employees within the corporation, only drawing a distinction between the two groups based upon the extent to which their job involves legal work.[153] Were the court to view the privilege as flowing directly from the employees to the outside counsel,

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141. *Id*.

142. *Id*.

143. *Id*. at 360.

144. *Id*.

145. This is true despite the court's statement that there "are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege." *Id*. While this statement may be held as reflective of the inconsistent logic commonplace in opinions regarding difficult, multiparty entity cases, read in context the court is referring to the operation of each contrasting type of attorney as opposed to them being the exact same. *See id*. Otherwise, the court would not have provided each type of attorney with the additional descriptive labels of "resident" and "independent." *Id*.

146. *Id*. at 359–60.

147. *Id*.

148. *See supra* pp. 15–18.

149. *Compare supra* p. 15 (illustrating the perspective of cases involving human clients by showing a direct connection between human client and counsel), *with infra* p. 21 (illustrating *United Shoe Machinery Corp*. by showing a direct connection between entity client and counsel).

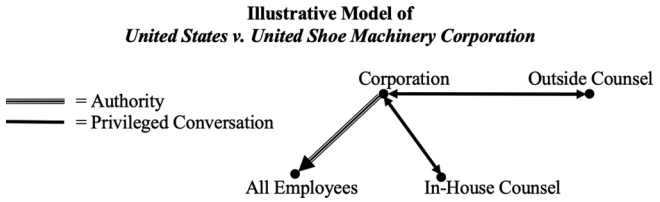
150. *United Shoe Mach. Corp*., 89 F. Supp. at 359–60.

151. *See id*. at 24.

152. *See infra* p. 23.

153. *United Shoe Mach. Corp*., 89 F. Supp at 359–61. A notable omission from the court's analysis is any consideration of the in-house counsel's role as an agent of the entity.

there would be emphasis on the employees as human clients instead of the employee as an agent of the corporation.[154] Conversely, an arrow from the in-house counsel to the corporation shows their status as employees since they too could serve as agents of the corporation, according to Judge Wyzanski.[155]



b. City of Philadelphia v. Westinghouse Electric Corporation

Similar to the evolution of the attorney-client privilege for human clients, the initial rule for corporate clients articulated in *United Shoe Machinery Corp.* was destined for revision.[156] Heeding the case-by-case approach dictated by the Federal Rules of Evidence,[157] *City of Philadelphia v. Westinghouse Electric Corp.* ("*Westinghouse*") narrowed the scope of corporate privilege to include only those communications made by agents within the corporation's control group.[158] The court recognized that corporate entities operate via agents, but limited the realm of qualifying agents to those employees who were in a position to act upon any legal advice they received.[159] *Westinghouse* shifted the focus in entity-privilege cases from an employee's status to the employee's authority.[160]

The court begins by analyzing the role of the corporation's employees.[161] Westinghouse Electric Corporation argued that conversations between employees and its corporate counsel should be privileged based upon an employee's dual status as a person seeking legal advice from an attorney and as an employee doing the same on behalf of the corporation.[162] However, Judge Kirkpatrick rejected

154. *See supra* p. 15.
155. *See id.*
156. *See supra* pp. 21–22.
157. Upjohn Co. v. United States, 449 U.S. 383, 396–97 (1981).
158. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).
159. *Id.* at 485–86.
160. *Compare United Shoe Mach. Corp.*, 89 F. Supp. at 359–60 (holding that all employees are authorized to speak to an attorney on behalf of a corporate entity), *with Westinghouse Elec. Corp.*, 210 F. Supp. at 485–87 (ruling that only employees that are part of a corporation's control group possess sufficient power to speak to an attorney on behalf of a corporation).
161. *Westinghouse Elec. Corp.*, 210 F. Supp. at 484–85.
162. *Id.* at 484.

this argument by noting the degree to which a person's interests as an individual and an employee could differ.[163] In addition, corporate counsel had warned employees during conversations that they would refer any violation of "company policy" to corporate supervisors, which destroyed the confidentiality requirement for human clients.[164] For these reasons, the court held that a person consulting an attorney could only do so individually or on behalf of the entity.[165]

After briefly and without analysis deeming the corporation the client, the court sets upon the task of determining which employees are permitted to assert the attorney-client privilege on its behalf.[166] The court distinguished between two types of agents that exist within a corporation—employees seeking legal advice on behalf of the corporate client and employees providing information to the corporate counsel.[167] The court's perspective views employees who meet with an attorney on behalf of the corporation as the personification of the corporate client.[168] In contrast, the court classifies other employees meeting with a corporate attorney as "merely a witness" providing information for the attorney to use in representing the corporate client.[169] To distinguish between the two, the court implemented what became known as the "control-group test," which protects a communication between a corporate attorney and an employee if the employee has authority "to control or . . . take a substantial part in" implementing changes within the corporation based upon the information received from the attorney.[170]

In the wake of *Westinghouse*, use of the control-group test grew as courts began utilizing a perspective based upon the authority of corporate employees.[171] An illustrative model of the decision reflects the operation of this new perspective. The court's acknowledgement that corporations act through agents places the corporation and employees in positions that are unchanged from *United Shoe Machinery Corp*.[172] However, the arrows indicate the movement of authority among the actors, rather than movement of information.[173] The corporation sends

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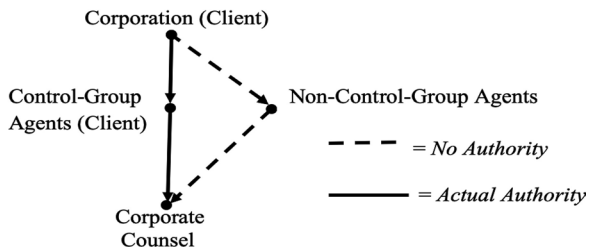
163. *Id*.
164. *Id*.
165. *Id*. at 485.
166. *Id*.
167. *Id*.
168. *Id*. at 484–85.
169. *Id*. at 485.
170. *Id*. If the employee making the communication is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then the employee personifies the corporation and the privilege would apply. *Id*.
171. *See, e.g*., Congoleum Indus., Inc. v. GAF Corp., 14 Fed. R. Serv. 2d 128 (E.D. Pa. 1969); Hogan v. Zletz, 11 Fed. R. Serv. 2d 933 (N.D. Okla. 1967); Natta v. Hogan, 11 Fed. R. Serv. 2d 905 (10th Cir. 1968); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963).
172. The court in both cases classifies the employees into varying sub-groups based upon the operation of the test employed by each court. However, the employees remain properly represented below the corporate client as an indication of the employees working through the corporation and as subservient to the entity client.
173. *See Westinghouse Elec. Corp*., 210 F. Supp. at 484–86.

actual authority to the employees within the control group, which is indicated by a bold, solid line.[174] The presence of non-control-group agents serving as employees within the corporation places them in a subservient position to the corporate client, but without actual authority to act upon any legal advice received.[175] This status is indicated by a broken line.[176] In addition, the court's perspective views the control-group employees as a personification of the client.[177] Therefore, the control-group agents appear directly below the corporation, while the non-control-group employees are angled to the side helping to symbolize those in the non-control-group as outside the direct, vertical structure of the client corporation.[178] The court does not distinguish between in-house and outside counsel in its opinion.[179] Whether the corporate attorney is an employee or an independent contractor of the corporate client is not relevant to the court's focus on the type of authority delegated to the employees.[180] Thus, an illustrative model of the court's perspective places the corporate counsel in a single position regardless of type.[181]

Illustrative Model of
Philadelphia v. Westinghouse Electric Corporation



This model shows the court's shift in perspective away from an employee's apparent authority and toward the employee's actual authority to act upon any

174. *See infra* p. 28.
175. *See id.*
176. *See id.*
177. *Westinghouse Elec. Corp.*, 210 F. Supp. at 485.
178. *See infra* p. 28.
179. *Westinghouse Elec. Corp.*, 210 F. Supp. at 485.
180. *Id.*
181. The court did not indicate that in-house counsel receiving advice from outside counsel would differ from any other corporate agent. Therefore, as the *Westinghouse* illustrative model indicates, should the in-house counsel in such a situation be found to also exist as part of the control-group, such communications would be privileged if the other elements for the privilege existed as well. This could occur in a scenario where in-house counsel recommended to corporate decision-makers that outside counsel be retained for a particular matter. The in-house counsel would likely be in frequent conversation with the outside counsel and could therefore be deemed a member of the control-group if the in-house counsel could act upon any advice received from the outside counsel.

legal advice received from a corporation's attorney.[182] Unlike the test for privilege applied to individuals, it would no longer be enough that a confidential communication occurred between an attorney and a person for the purpose of obtaining legal advice.[183] Instead, a corporate employee would need to prove they possessed sufficient authority to act on the corporation's behalf to protect the conversations.[184]

c. Harper & Row Publishers, Inc. v. Decker

In *Harper & Row Publishers, Inc. v. Decker* ("*Decker*"), the perspectives utilized in entity-privilege cases continued to evolve as the United States Court of Appeals for the Seventh Circuit implemented a new test for determining whether communications made by corporate employees are privileged.[185] The court held that corporate communications are privileged if an employee sought the information from an attorney, at the instruction of a higher-ranking employee, and on a "subject matter" that is related to the responsibilities of the employee.[186] The court's focus on the subject the employee discusses led courts adopting the test later on to refer to it simply as the "subject-matter test."[187]

An illustrative model of the *Decker* perspective reveals how the panel's decision further pared back the broad holding articulated in *United Shoe Machinery Corp*., while avoiding the perceived shortcomings of the control-group test formulated in *Westinghouse*.[188] The three-judge panel unanimously held that the corporation is the client.[189] This proved greater part decree than conclusion, as

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182. *United Shoe Machinery Corporation* held that every employee possessed apparent authority to speak on behalf of their corporate employer by virtue of their employment. *See supra* pp. 21–22. In contrast, the court in *Westinghouse* examined an employee's actual authority to assess whether the employee could speak on corporate client's behalf. *Westinghouse Elec. Corp*., 210 F. Supp. at 485–86.

183. *See supra* p. 18.

184. *Westinghouse Elec. Corp*., 210 F. Supp. at 485–86.

185. Harper & Row Publishers v. Decker, 423 F.2d 487 (7th Cir. 1970).

186. *Id*. at 491–92. The precise enunciation of the rule stated by the court is that:

> [A]n employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment . . . .

Id.

187. *See, e.g*., *In re* Grand Jury Investigation, 599 F.2d 1224, 1234 (3d Cir. 1979); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1165 (D.S.C. 1974); *In re* Avantel, S.A., 343 F.3d 311, 315 (5th Cir. 2003); United States v. Upjohn Co., 600 F.2d 1223, 1224 (6th Cir. 1979); Barton v. Zimmer Inc., No. 1: 06-CV-208, 2008 U.S. Dist. LEXIS 1296, at *12–13 (N.D. Ind. Jan. 7, 2008). The title is deceiving because one could interpret the name as meaning that communications are protected if the "subject matter" discussed is related to legal advice. Any deception that occurs, however, is not the fault of the Seventh Circuit Court of Appeals, which did not name the test it utilized in *Decker*.

188. *See Decker*, 423 F.2d at 491 (stating the shortcoming of the control-group test is its failure to take into consideration the lower-ranking employees who can sometimes play a part in corporate legal decision making).

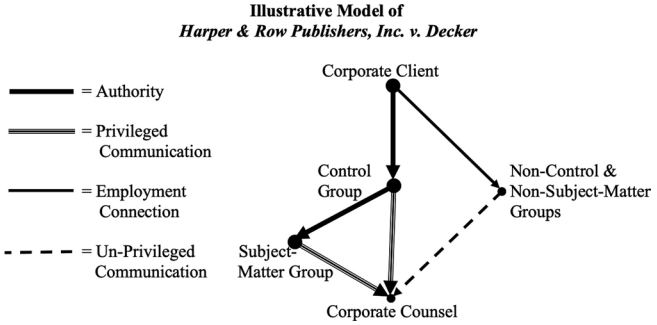
189. *See id*. at 490–91.

the opinion is void of any breakdown describing why the court believed the corporation operated in this capacity.[190] The task of personifying the corporation proved just as conclusory.[191] Still familiar in the decision was the concept that a corporation acts through its agents.[192] In language that could cause observers to view the subject-matter test as an addition to the control-group test rather than a separate test altogether, the court acknowledged the potential for lower-ranking employees and managers to act on behalf of the corporation.[193] The court found the control-group test "not wholly adequate" and focused its limited analysis on the subject matter being discussed by employees rather than their position within the company.[194] The court refrained from analyzing the attorneys' roles or statuses as in-house or outside counsel.[195] With the subject-matter test's focus being on the employee's conversation, the attorney's position proved inconsequential.[196]

An illustrative model of the court's perspective in *Decker* shows the subject-matter test in operation. The client remains the corporation, which is comprised of three factions: (1) the subject-matter group, (2) the control group, and (3) the non-control and non-subject-matter group.[197] Authority to act as part of the corporation flows from the corporate client to each of the three factions.[198] Supervisors instruct members of the subject-matter group who communicate on the corporation's behalf to corporate counsel.[199] Likewise, authority flows from the corporation to members of the control group, which are authorized to speak to corporate counsel.[200] However, authority does not transfer from the corporate client to the non-control and non-subject matter groups.[201] Instead, members of this group are merely associated with the entity by virtue of their employment.[202] A broken line symbolizing their ability to speak to corporate counsel without authority to represent the corporate client connects them to the client and

190. *See id.*
191. *See id.* at 491–92.
192. *See id.* at 491.
193. *Id.* The panel in *Decker* did not expressly overrule the control-group test but added to the pool of potential people who could speak on a corporation's behalf.
194. *Id.* Any employee within the control group would almost certainly be discussing a subject matter the employee had authority to impact. *Id.* An exception could exist to be sure, but such cases would be rare. However, the court did overturn the lower-court's ruling to the extent it "rest[ed] entirely upon the control group test." *Id.* at 491. This just adds to the confusion as to the status of the control group test in the Seventh Circuit after *Decker*.
195. *Id.* at 491–92.
196. *Id.*
197. *See id.* at 490–91.
198. *See infra* p. 28.
199. *See id.*
200. *See id.*
201. *Decker*, 423 F.2d at 491–92.
202. *See id.*

attorney. As with *Westinghouse*, the court did not distinguish between the location of counsel for the corporation, which is reflected in the illustration.[203]



d. Upjohn Co. v. United States

With the competing perspectives of *United Shoe Machinery Corp.*, *Westinghouse*, and *Decker*, a split emerged that spurred the growth of each formula in other jurisdictions.[204] A number of courts even combined elements of each test to create their own hybrid versions.[205] The growing number of variations only added to the confusion of how best to determine whether corporate communications were privileged.[206] While the case-by-case approach required by the Federal Rules of Evidence seemed adequately represented by so many different approaches, the lack of uniformity for applying a rule as important as the attorney-client privilege was primed for resolution by the Supreme Court.[207] This opportunity for clarity presented itself in the case of *Upjohn Co. v. United States* ("*Upjohn*").[208]

Upjohn involved a pharmaceutical company's internal investigation to determine whether a subsidiary of the corporation had made illegal payments to foreign governments in exchange for contracts.[209] The issue before the Supreme

203. *See id.*; *supra* pp. 23–26.

204. *See* Upjohn Co. v. United States, 449 U.S. 383, 386 (1981); *Control Group Test Adopted as Standard for Assertion of Attorney-Client Privilege by Corporate Client, United States v. Upjohn Company, 600 F.2d 1223 (6th Cir. 1979), cert. granted, 445 U.S. 925 (1980)*, 58 WASH. U. L. REV. 1041 (1980) [hereinafter *Control Group Test*].

205. *See* Perrigon v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D. Cal. 1978); Dunn Chem. Co. v. Syborn Corp., 1975-2 Trade Cas. (CCH) para. 60,561 (S.D.N.Y. 1975); Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 40 (E.D.N.Y. 1973); Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1163 (D.S.C. 1974); Diversified Industries, Inc. v. Meredith, 572 F.2d 606, 608–10 (8th Cir. 1978) (en banc), *rev'g on rehearing*, 572 F.2d 596 (8th Cir. 1977); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 385 (D.D.C. 1978).

206. *See Control Group Test*, *supra* note 204 (describing the varied approaches and adoptions by different jurisdictions).

207. *Id.*

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

209. *Id.* at 386.

Court was whether or not communications made between in-house counsel and corporate employees during the internal investigation were protected by the attorney-client privilege.[210] The Court dispensed with few words in its opinion before dispelling the notion that it would set forth a bright-line rule as advocated by many observers.[211] Noting the government's lack of argument on the issue, the Court acquiesced that Upjohn was the client.[212] Just as easily dispensed with was the Court's assessment of the attorneys involved in the case, which the justices simply stated were "counsel for Upjohn acting as such."[213] From here, the Court's opinion broadens to set forth five factors to determine whether a communication is privileged: (1) whether high-ranking executives did not have the information in question, (2) whether the communication was necessary for legal compliance, (3) whether the information given by the employee involved subjects within his or her job description, (4) whether the employees were "sufficiently aware" the corporation was seeking the information for the corporation, and (5) whether the information has been treated as confidential since it was received.[214] The Court balanced these factors and held that communications between Upjohn employees and corporate counsel were privileged.[215] In doing so, the Court explicitly eliminated the control-group test.[216] Less clear from its opinion, however, is whether the *Upjohn* factors applied to other cases as well or were case-specific as required by the Federal Rules of Evidence.[217] By declining to offer any definitive rule for future cases, the Court provided little guidance to entity actors, attorneys, and judges as to what communications are privileged in the entity context.[218]

An illustrative model of the perspective employed by the justices in *Upjohn* reflects the very lack of clarity the Court cautioned against in its criticism of the control-group test.[219] Recognizable is the Court's focus on the level of authority possessed by the employee and the requirement that information remain confidential.[220] Less familiar is the Court's emphasis on the communication and information passing between corporate actors and entity attorneys.[221] An illustrative model of *Upjohn* reflects the scattered approach employed by the Court. The

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210. *Id*.

211. *Id*.

212. *Id*. at 389–90. Here, the Court and the government missed an opportunity to clear up another area of uncertainty in cases of entity privilege by providing guidance as to how best to determine the client's identity. *Id*.

213. *Id*. at 394.

214. *Id*. at 394–95.

215. *Id*. at 395–97.

216. *Id*. at 397 (quoting FED. R. EVID. 501).

217. *Id*. at 396–97 (stating the Court is "decid[ing] only the case before us" because of the "case-by-case" approach advocated for by the Federal Rules of Evidence).

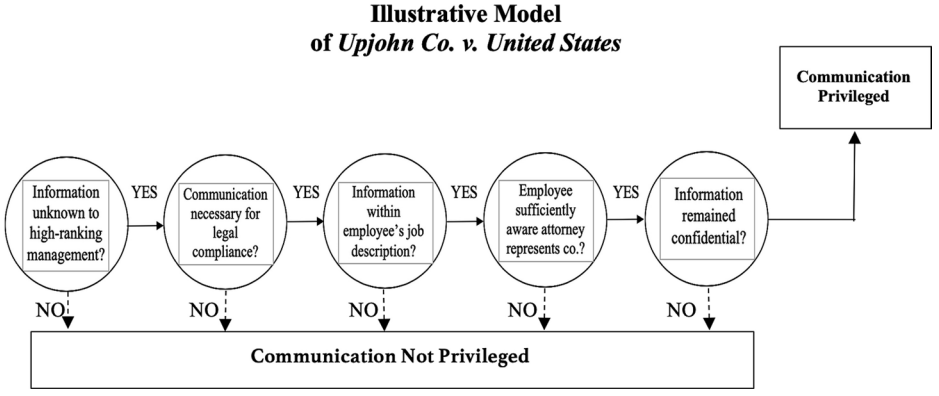
218. *Id*. at 403–04 (Burger, J., concurring).

219. *Id*.

220. *See supra* pp. 23–28.

221. *See Upjohn Co*., 449 U.S. at 394–95.

factors appear in order from left to right.[222] The *Upjohn* illustrative model is also noteworthy because it stands in contrast to the more linear-based models that represent the perspectives employed in *United Shoe Machinery Corp.*,[223] *Westinghouse*,[224] and *Decker*.[225]



3. GOVERNMENT-PRIVILEGE PERSPECTIVE IN PRACTICE

In spite of the similarities between corporate and government entities, a comparison of the cases involving either as a client highlights the unique perspectives courts employ to analyze each entity type.[226] Unlike in the corporate context, courts applying the privilege to government entities have not created a multitude of tests to determine who speaks on the government entity's behalf.[227] In addition, the Supreme Court has not yet confronted the question of how best to apply the privilege to a government entity, as it did in *Upjohn Co.* for corporations.[228] Most significantly, courts include "the public" as a critical part in its decision-making process when the client in question is a government entity.[229] Including the public as part of the court's perspective creates an additional layer of consideration,

222. *Id.*; *see supra* notes 214–22 and accompanying text.

223. United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950); *see supra* pp. 21–23.

224. Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962); *see supra* pp. 23–26.

225. Harper & Row Publishers v. Decker, 423 F.2d 487 (7th Cir. 1970); *see supra* pp. 26–28.

226. *See* Jason Batts, *The Weintraub Principle: Attorney-Client Privilege and Government Entities*, 92 S. CAL. L. REV. POSTSCRIPT 1, 11–14 (2018) (discussing the similarities between corporate and government entities).

227. *See supra* pp. 33–41.

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

229. *See, e.g.*, *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997); *In re* Lindsey, 148 F.3d 1100, 1103 (D.C. Cir. 1998); United States v. Doe (*In re* Grand Jury Investigation), 399 F.3d 527 (2d Cir. 2005).

compared to their corporate counterparts.[230] To add to even more complexity, courts and scholars are able to agree on neither what the public's interests are nor whether they operate differently in civil versus criminal cases.[231] As in the corporate context, the resulting confusion has created a circuit split with courts disagreeing on how best to apply an age-old legal principle to these complex, modern fact patterns.[232] However, by applying illustrative modeling to public-entity cases, an insightful pattern emerges—a court's decision turns on where "the public" appears in its perspective.[233]

a. In re Grand Jury Subpoena Duces Tecum

The case of *In re Grand Jury Subpoena Duces Tecum* ("*Clinton Case I*")[234] was far more dramatic than its tedious title suggests.[235] Hidden in plain sight were the gripping facts surrounding an investigation by the Office of Independent Counsel ("OIC") into potential criminal wrongdoing by President Bill Clinton and First Lady Hillary Clinton.[236] The case stemmed from the White House's refusal to produce certain documents in response to a grand jury subpoena, based in the claim that any records of conversations involving White House attorneys were protected by the attorney-client privilege.[237] To enforce the subpoena, the OIC filed a motion to compel their production in federal court.[238] After losing the initial hearing at the district court level, the OIC appealed to the United States Court of Appeals for the Eighth Circuit to determine "whether an entity of the federal government may use the attorney-client privilege to avoid complying with a subpoena by a federal grand jury."[239]

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230. *Compare* Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962) (not referencing the public when the case involves a corporate entity), *with In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997) (drawing heavily on perceived public implications in deciding the case involving a government entity).

231. *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 917–18 (stating that a criminal case involving a government agent "presents a rather different issue" than a civil case with the same party); Leslie, *supra* note 10, at 483 (discussing the different justifications for the privilege's application in the government civil versus criminal contexts).

232. *See supra* Part III.B.3.a–b.

233. *Id*.

234. 112 F.3d 910 (8th Cir. 1997).

235. *See generally* Dick Polman, *A Prosecutor, or a Persecutor?*, AUSTIN AMERICAN-STATESMAN, Feb. 8, 1998, at H1; David Zeman, *Headed for a Showdown Protagonists: President Bill Clinton, Prosecutor Kenneth Starr*, DETROIT FREE PRESS, Mar. 12, 1998, at 1A; Michael Winerip, *Judge Dread: He was a Preacher's Son who Dreamed of Becoming America's Top Judge. Instead He Brought a President to His Knees. What Got Into Kenneth Starr?*, THE GUARDIAN, Sept. 9, 1998, at 2.

236. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 913–14.

237. *Id*. The White House initially claimed the subpoenaed records were also protected from disclosure pursuant to the rule on executive privilege and the work-product doctrine. *Id*. However, on appeal the White House dropped its claim of executive privilege. *Id*. at 914.

238. *Id*. at 914.

239. *Id*. at 915.

The parties' arguments in *Clinton Case I* focused on the privilege's purpose and impact.[240] The White House asserted that the well-established intent of the privilege to promote candor between attorney and client should render its protections "absolute."[241] The OIC countered with the assertion that any government privilege that exists should yield to the greater public interest in uncovering criminal activity by a presidential administration.[242] Studying the competing rationales, the Eighth Circuit widened the scope of its inquiry by stating that the more pertinent question concerned whether the privilege applied at all in the context of a criminal investigation into government officials.[243]

The court quickly dispensed with the notion that communications between a government official and their private attorneys were of any controversy.[244] There is no question an employee, whether of the public or private sector, could hire his own attorney to represent them and safeguard conversations between the two.[245] The rest of the court's opinion focuses on the interactions between government attorneys and their clients.[246] The decision clearly identified "the White House [as] the real party in interest in this case."[247] Accordingly, the White House occupied the client position within the illustrative model. Less clear is identification of the principle that the White House must act through agents.[248] Citing *Upjohn Co*., the court referenced the "officers and agents" in a corporation's structure, but fails to offer any helpful commentary on this principle or explicitly state the rule for public entities.[249] The agents therefore appeared below the government entity to symbolize their being part of the overarching entity.

Lastly, the court succinctly notes the existence of the government attorneys in the case before proceeding with a more thorough discussion of their interplay within the government context.[250] Drawing upon a variety of sources, the opinion begins to veer away from the prospect of finding a broad protection for attorney communications in the government context.[251] The court sides with the *Restatement* that "[m]ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by

240. *See id*. at 916, 919–20.
241. *Id*. at 916.
242. *See id*. at 919–20.
243. *Id*. at 915.
244. *See id*.
245. *See In re* Lindsey, 148 F.3d 1100, 1103 (D.C. Cir. 1998).
246. *Id*.; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 915.
247. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 915. In identifying the "client" in the action, the court relied on Proposed Federal Rule of Evidence 503. *Id*. at 915–16. As the court stated, this rule "defined 'client' to include 'a person, public officer, or corporation, association, or other organization or entity, either public or private.'" *Id*. at 915. This inclusion as part of the analysis bolsters the court's willingness to accept a government entity as the client. *Id*.
248. *Id*. at 915–16.
249. *Id*. at 920 (quoting Upjohn Co. v. United States, 449 U.S. 383, 391 (1981)).
250. *Id*. at 915.
251. *Id*. at 915–16.

another."[252] The court first searched through case law to determine if there are any sources that provide more detailed guidance without success.[253] Unable to find prior guidance, the court turned to the more "general principle" that the government's interest in criminal prosecutions is greater than its interest in confidentiality.[254] While the opinion included a comparison of the liability and reporting requirements for private versus public entities, far more instrumental to the court's perspective was "the strong public interest in honest government and . . . exposing wrongdoing by public officials."[255] The public's influence in the decision proved too powerful a force to allow the court to shield communications that might assist a criminal investigation into government officials.[256] This is reflected in the illustrative model of the court's perspective, where the public encompasses the government entity, government agent, and government attorneys. This breaks the line of communication between government attorneys and the client's agent. The court ruled the government agent's communications to the government attorneys were not on behalf of the government client.[257] The illustration reflects the court's holding. An arrow between the government client and the government agent reflects the connection between the two parties. The arrow from the government-client/government-agents line towards the government attorneys represents the communication. The communication starts out resembling a privileged communication, as in the corporate context, which is reflected by the solid line. Likewise, the communication from the government attorneys starts out as privileged as reflected by the solid line. As the court held, however, the public's role in government operations causes the character of the communications to change from privileged to un-privileged.[258] The government client, government agents, and government attorneys owe a duty to the public.[259] This is represented by the circles encompassing each as "the public." As the protections pass through the public circle, they are transformed from protected to un-privileged.

252. *Id.* at 916 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 cmt. b) (2000)).

253. *Id.* at 919.

254. *Id.*

255. *Id.* at 920–21.

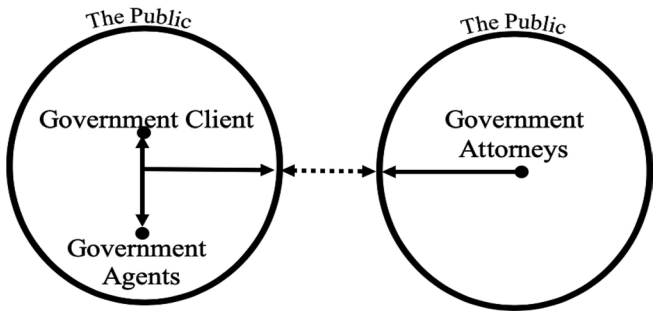
256. *Id.* at 915, 921. The difference between a rule that is inapplicable versus a rule that applies absent an exception is not completely without significance. So great is the public's impact that the court would not permit the privilege to apply before testing for exceptions, as in the latter operation. Instead, the mere existence of government's public function renders the privilege unfit for consideration, at least according to the rationale set forth by the Eighth Circuit Court of Appeals. *See id.*

257. *Id.* at 924.

258. *Id.* at 918–19.

259. *Id.* at 920–21.

Illustrative Model of
In re Grand Jury Subpoena Duces Tecum



b. In re Lindsey

For a case whose facts mirrored so clearly those in *Clinton Case I*, the rationale articulated by the court in *In re Lindsey* ("*Clinton Case II*") resulted in a perspective that differed significantly.[260] *Clinton Case II* continued the Clinton Administration's legal saga, which played out in the court of public opinion as much as it was did in the court of legal decision.[261] The controversy seemed unavoidable from the moment an order was issued to the Investigating Officer (IO), Kenneth Starr, expanding the scope of his investigation to include the question of whether President Clinton "suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law."[262] In furtherance of Starr's investigation, a federal grand jury subpoenaed Bruce R. Lindsey, who served as "Deputy White House Counsel and Assistant to the President."[263] Lindsey, in turn, refused to answer several of the grand jury's questions on the basis that his conversations with President Clinton were protected by the attorney-client privilege.[264] The independent counsel was successful in seeking judicial relief in federal district court compelling Lindsey's testimony and the President appealed.[265]

Drawing upon a variety of sources, the United States Court of Appeals for the D.C. Circuit concluded that the government can be a client for purposes of the attorney-client privilege, which in this case "would be the Office of the

260. 148 F.3d 1100, 1103 (D.C. Cir. 1998).

261. *Id.* at 1102–04; *see supra* notes 1, 3–5.

262. *In re Lindsey*, 148 F.3d at 1103 (quoting *In re* Motions of Dow Jones & Co., 142 F.3d 496, 497–98 (D.C. Cir. 1998)). The total scope of Independent Counsel Starr's mandate of investigation was actually broader than this, as it included a responsibility to examine the conduct of "Monica Lewinsky or others." *Id.* However, *Clinton Case II* only concerned a subpoena of President Clinton's attorney, Mr. Bruce R. Lindsey. *Id.*

263. *Id.*

264. *Id.* Lindsey also refused to testify as to certain matters on the basis of the work product doctrine and executive privilege. *Id.*

265. *Id.* The Office of the President did not appeal the district court's ruling on executive privilege. *Id.* at 1106.

President."[266] The court notes without discussion that in cases involving a government-client "the attorney may be an agency lawyer" and that this is Lindsey's role.[267] While the court devoted a thorough discussion to determining that government entities can serve as a client for purposes of the attorney-client privilege, the opinion is practically void of any reference or analysis as to the requirement that entities must necessarily act through agents.[268] In passing, the court does note that any conversations that might be protected must have occurred "between President Clinton and Lindsey or between others in the White House and Lindsey while Lindsey was 'acting in his professional capacity' as an attorney."[269] This brief mention indicates the court placed the President as the agent speaking on the government-entity's behalf to its government attorney. In the opinion's illustrative model, this is indicated by an arrow symbolizing the communications from the entity agent to the government attorney, as well as an arrow of authority delegated by the government entity to its agent. The government entity is the client, as stated in the court's opinion.[270] An arrow flows from the government entity to the government attorney.

After reviewing the parties involved in the case, the court turns its focus to the communications.[271] The court held that at first glance the communications between Lindsey and President Clinton that concerned legal matters were privileged.[272] However, the opinion then reconsiders the circumstances by including the public in its analysis.[273] Echoing *Clinton Case I*, the court's perspective of the privilege's operation is critically impacted by the public.[274] As the illustrative model of *Clinton Case II* indicates, the court's opinion was far more nuanced than its preceding companion case—focusing not on the government entity or government actor, but rather on the government attorney's duty to the public.[275] The court held that unlike attorneys representing private clients, principles of open and honest government require that "the loyalties of a government lawyer . . . cannot and must not lie solely with his or her client agency."[276] The court determined that a government attorney "is responsible to the people in our democracy with its representative form of government,"[277] and so great is this charge that

266. *Id*. at 1104–05 (citing numerous cases and secondary sources in reaching its conclusion about the government being a client).

267. *Id*. at 1104.

268. *Id*. at 1104–05.

269. *Id*. at 1106 (quoting FTC v. Shaffner, 626 F.2d 32, 37 (7th Cir. 1980)).

270. *Id*. at 1104–05.

271. *Id*. at 1106–07.

272. *Id*. at 1107.

273. *Id*. ("We therefore turn to the question whether an attorney-client privilege permits a government lawyer to withhold from a grand jury information relating to the commission of possible crimes by government officials and others.").

274. *Id*. at 1108–10.

275. *Id*. at 1108–09.

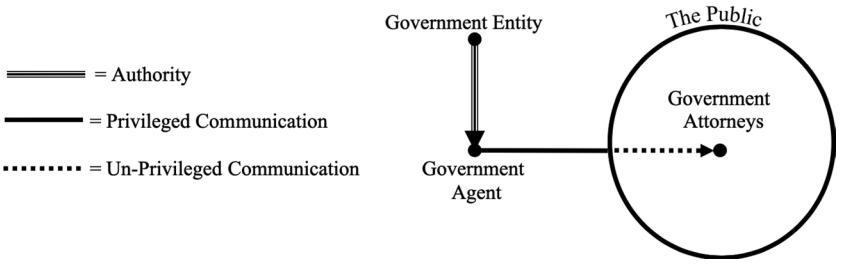
276. *Id*. at 1108.

277. *Id*. at 1109 (quoting Federal Bar Association Ethics Committee, *The Government Client and*

the privilege must yield in the face of an investigation into criminal wrongdoing by a government official.[278] The potential of such a position to chill communications between government agents and their government attorneys was enough for the court to admit it could safely "assume" such would occur.[279] However, this failure of the very purpose of the privilege did not overcome the power of the public, as the court simply suggested government officials should hire private counsel to engage in privileged communications.[280]

In the illustrative model below, the client is the Office of the President (the government entity), with the agent being President Clinton. The arrow from the entity to the agent symbolizes the flow of authority and reflects the subservient nature of the relationship. The agent then communicates with the government lawyer. However, the public obligation enveloping the government attorney changes the nature of this communication from privileged to un-privileged. The court does not indicate, expressly or implicitly, the public's impact on the government entity or its agent.[281] Rather, the court ignores it altogether, choosing instead to focus its attention on the government attorney's public duty.[282] For this reason, the illustrative model accurately avoids including the public in the operation of the government entity or government agent.

Illustrative Model of
In re Lindsey



Through illustrative modeling, the evolutionary significance of *Clinton Case II* stands out. Prior to the turn of the nineteenth century, the attorney's status as a gentleman dictated the operation of the privilege.[283] Likewise, in *Clinton Case II*, the attorney's status as a government attorney dictates the privilege's operation.[284] In both instances, courts focused on the attorneys' status to decide

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Confidentiality: Opinion 73-1, 32 FED. B.J. 71, 72 (1973)).

278. *Id*. at 1110–12.

279. *Id*. at 1112.

280. *Id*.

281. *Id*. at 1108–09.

282. *Id*. at 1107–09.

283. *See* discussion *supra* Part III.A.2.

284. *See supra* notes 15–19.

whether the privilege applied.[285] This stands in direct contrast to the privilege's modern view of being client-centered.[286]

c. United States v. Doe (In re Grand Jury Investigation)

With two high-profile, circuit-level cases holding that the privilege fails to protect communications between government agents and their attorneys in criminal cases, the rule seemed primed for broader adoption.[287] However, as with the development of the privilege for corporate entities, differing perspectives soon emerged and a circuit split resulted as courts disagreed on the perspective that best furthers the public's interest.[288]

Such was the case in *United States v. Doe (In re Grand Jury Investigation)* ("*Rowland*"),[289] where the United States Court of Appeals for the Second Circuit considered whether to compel disclosure as part of a criminal investigation of conversations between the Governor of Connecticut, John Rowland, and his government attorney, Anne George.[290] The controversy originated from allegations that "Governor Rowland and members of his staff had received gifts from private individuals and entities in return for public favors, including the favorable negotiation and awarding of state contracts."[291] Upon receipt of a subpoena from a federal grand jury, George testified that she had numerous conversations with executive-branch officials on the ethics of receiving gifts, but was unable to testify further because the conversations were protected by the attorney-client privilege.[292] The United States Attorney's Office overseeing the investigation filed suit in federal court, and, following a district court decision compelling George's testimony, Governor Rowland and his office appealed.[293]

An illustrative model of the decision in *Rowland* reveals how the court's perspective turns on the position of the public in their analysis.[294] The court begins its opinion by identifying the Office of the Governor as the client before engaging

285. *Id*.

286. *Id*. The status of the attorney in *Clinton Case II* was the controlling aspect in the court's determination. *In re Lindsey*, 148 F.3d at 1107–09. This logic, however, proves problematic as the court admits a different result occurs if the government agent hires a private attorney. *Id*. at 1112. If the government agent has any public duty, as well, then according to the court's logic in *In re Lindsey* there should be no privilege in either context since the public's interests in solving a criminal investigation remains. *See id*.

287. *See id*.; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

288. Courts in government-entity cases consider the public's interest as pivotal to the ruling. *See supra* Part III. While inclusion of the public is not above debate—given the similarities with corporate shareholders, who are not included in private-entity cases—the persistent inclusion must warrant the public as a part of any solution as it is certainly a part of the reason and experience considered by courts. *See* FED. R. EVID. 501.

289. 399 F.3d 527 (2d Cir. 2005). This case concerned Governor John Rowland of Connecticut, so I will refer to it as *Rowland* to assist with ease of reading and comparing cases in Part III.

290. *Id*. at 528–30.

291. *Id*. at 528–29.

292. *Id*. at 528–30.

293. *Id*.

294. *Id*. at 533–34.

in a thorough discussion that draws upon case law and Proposed Federal Rule 503 to bolster this conclusion.[295] Less clear in the court's opinion is the recognition that entities operate through agents.[296] Instead, the decision alludes to the principle by noting how the district waited to consider the matter for "Rowland's successor, Governor M. Jodi Rell, to consider waiving the privilege insofar as the privilege was held by the Office of the Governor."[297] This is reflected in the decision's illustrative model by identifying Governor Rowland as an agent subservient to the government entity with an arrow indicating the flow of authority from the Office of the Governor to Governor Rowland.

The decision notes various times that George is a government attorney, which is reflected in the illustrative model by showing how communication flows from the government agent.[298] The court then examined what impact the public should have upon this operation by acknowledging the competing interests of investigating a crime versus receiving candid legal advice.[299] While the public has a strong interest in the collection of evidence sought as part of a criminal investigation, the court determined that the public's interest in ensuring their elected officials receive candid legal advice was superior.[300] The rationale of the attorney-client privilege, according to the court, is to "promote the free flow of information to the attorney (and thereby to the client entity) as well as to the individual with whom he communicates."[301] Therefore, an attorney for the government needs open and honest communications from his or her fellow government employees "so that he may better discharge his duty *to that office*."[302] The court takes care to note that the duties of government agents and government attorneys are impacted by the same public interest that informs all government actions.[303] The result is an illustrative model that shows the public enveloping the government operation as a sphere that permits communications between the government agent and a government attorney to continue unimpeded. The court found the mere existence of a government client is not sufficient to pierce the sphere of public interest encompassing government communications.[304]

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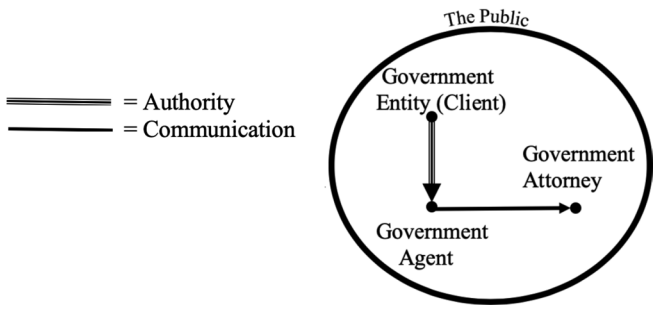
295. *Id.* at 529–33.
296. *Id.* at 533.
297. *Id.* at 530.
298. *Id.* at 533–34.
299. *Id.* at 534–35.
300. *Id.* at 535.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.* at 535–36.

Illustrative Model of
United States v. Doe (In re Grand Jury Investigation)



d. Brinckerhoff v. Town of Paradise

Consideration of the attorney-client privilege's application in the government context is not limited to the appellate level nor criminal cases. For example, in *Brinckerhoff v. Town of Paradise*,[305] a California district court considered several issues related to discovery in a case involving allegations of employment discrimination.[306] The Town of Paradise, a California municipality and the defendant in the case, refused to produce certain communications with outside counsel during discovery, claiming they were protected by the attorney-client privilege.[307] As the illustrative model of the court's decision indicates, the perspective employed by the court focused on the status of those communicating with the town's attorney and the impact of the public.[308]

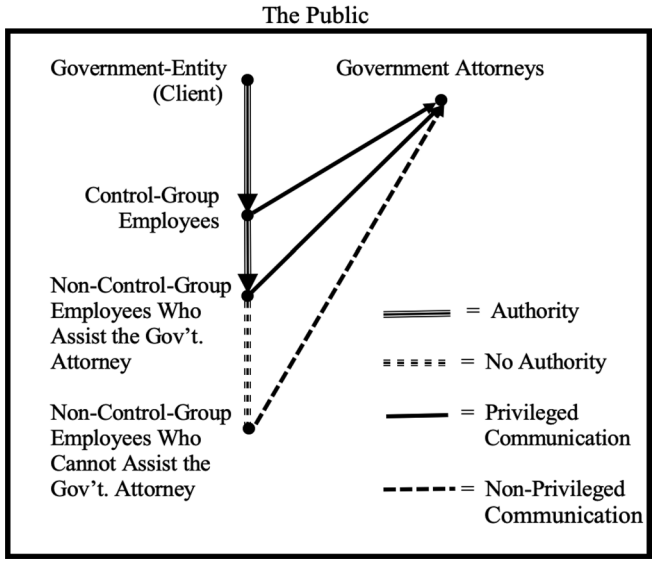
The court's opinion begins with the recognition that "[t]he sole client is the entity," which places the Town of Paradise in the client position for the illustrative model.[309] From the court's discussion, it also becomes evident that the attorneys involved represent the government municipality through agents that are authorized to speak on behalf of the entity client.[310] In order to determine who can speak on the government entity's behalf, the court examined decisions involving corporate entities.[311] From this entity comparison, the court determined that individuals may speak on behalf of their government employer if they are within the "control group," or are able "to provide information to the lawyer to assist him in properly

305. 2010 U.S. Dist. LEXIS 126895 (E.D. Cal. Nov. 18, 2010).
306. *Id.* at *1–2, *9–10.
307. *Id.*
308. *Id.* at *10–19.
309. *Id.* at *11.
310. *Id.* at *16–17.
311. *Id.* at *14–16.

giving sound legal advice."[312] This could potentially include "communications between counsel and lower-level employees."[313]

The court also found that the public's interest in permitting qualifying government employees to have candid conversations with government attorneys outweighed the conflicting interests served by placing a limit on "open and honest government."[314] The illustrative model of *Town of Paradise* shows the public encapsulating the government operation. The flow of authority from the government entity extends to the control-group employees and non-control-group employees who can assist the government attorney. The authority does not extend to non-control-group employees who cannot assist the government.[315]

Illustrative Model of
Brinckerhoff v. Town of Paradise



IV. REFINING THE TEST FOR ENTITIES THROUGH REASON AND EXPERIENCE

As Part III indicates, the perspectives employed by courts in entity-privilege cases have evolved over time and resulted in numerous approaches for corporate and government entities.[316] In corporate-entity cases, judicial perspectives focus

312. *Id*. at *14.
313. *Id*. at *11 (quoting Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1986)).
314. *Id*. at *12.
315. *Id*. at *13–15.
316. *See supra* pp. 13–39.

on determining which individuals within an entity are able to speak on the entity's behalf.[317] The decisions in government-entity cases, by comparison, turn on the position of the public in a court's perspective.[318] The illustrative models of both approaches reflect operations that are far different in practice than the conventional, triangular model for entity cases that courts have long accepted.[319]

In addition, studying the illustrative models furthers the case for creating a consistent approach to entity-privilege cases that is in line with the "reason and experience" mandated by state and federal rules of evidence.[320] A uniform rule that is grounded in sound policy would further the widely accepted purpose of the privilege to foster candid communication between attorneys and clients. A consistent, well-reasoned approach would also provide better notice to entity actors as to what communications will be protected from discovery.[321]

Although a useful starting point, the Federal Rules of Evidence do not define the "reason and experience" courts are to consider when confronted with questions concerning the attorney-client privilege.[322] Lacking any statutory guidance, in practice the phrase has served as a broad declaration codifying the common-law rulings on the privilege.[323] In order to formulate an improved rule based on this direction, we must search for universal principles that would make the privilege easier for courts and entity attorneys to justify and follow.

A. THE THREE PRINCIPLES OF ENTITY ATTORNEY-CLIENT PRIVILEGE

By distilling the various perspectives employed by courts in cases where an entity client invokes the attorney-client privilege, three principles emerge as universal: (1) that entities are restricted to operating through agents,[324] (2) that the underlying purpose of the attorney-client privilege is to promote candid

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317. *See, e.g.*, United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 361 (D. Mass. 1950); City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962); Harper & Row Publishers v. Delaware, 423 F.2d 487, 490–91 (7th Cir. 1970). *But see* Upjohn Co. v. United States, 449 U.S. 383, 389–90, 394–95 (1981) (stating without analysis that Upjohn Co. is the client and then focusing more on the communications involved to determine whether the privilege applied).

318. *See, e.g.*, *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920–21 (8th Cir. 1997); *In re* Lindsey, 148 F.3d 1100, 1107–09 (D.C. Cir. 1998); *In re* Grand Jury Investigation, 399 F.3d 527, 534–35 (2d Cir. 2005); Brinckeroff v. Town of Paradise, 2010 U.S. Dist. LEXIS 126895, at *11–14 (E.D. Cal. Nov. 18, 2010).

319. *Brinckeroff*, 2010 U.S. Dist. at *11–14.

320. *See* FED. R. EVID. 501; Trammel v. United States, 445 U.S. 40, 47 (1980); United States v. Gillock, 445 U.S. 360, 367 (1980); Upjohn Co. v. United States, 449 U.S. 383, 396–97 (1981).

321. *See* RICE, *supra* note 7, § 4:28 n.1 ("Most courts have assumed, without analysis, that governmental entities can assert the attorney-client privilege.").

322. FED. R. EVID. 501.

323. *See, e.g.*, *In re* Grand Jury Investigation, 399 F.3d 527, 532 (2d Cir. 2005).

324. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985); PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:28 (2d ed. 1999); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819); Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 766 (2012).

conversations between attorneys and client,[325] and (3) that the public should be included in the perspective when the client is a government entity.[326] As agreed-upon principles in an otherwise unsettled area of law, each of these doctrines stands firmly in the realm of reason and experience that supports a three-pronged test for entity-privilege application. A court should find communications between an entity actor and an entity attorney privileged if: (1) the attorney represents the entity, (2) the entity actor was an agent of the entity at the time of the communication, and (3) the communication would qualify as being privileged if made between a human client and their attorney.[327] The impact of the public in government-entity cases is considered when looking closer at the rule's illustrative model.[328]

1. STEP 1: IS THE ATTORNEY REPRESENTING THE ENTITY?

The initial task in the three-step process requires a court to determine whether the attorney represents the entity itself or a person associated with the entity. An attorney-client relationship forms when: (1) an individual and a lawyer expressly agree that the lawyer will represent the individual, (2) an individual requests a lawyer to represent them and the lawyer fails to respond in spite of knowledge (actual or presumed) that the individual would "reasonably rel[y] on the lawyer to provide the services," or (3) a court validly appoints the lawyer to represent an individual.[329] When the client is an entity, courts must examine the circumstances to determine whether the person hiring the attorney intended for the entity to be the client.[330] In such an inquiry, any written agreement of representation could be key to determining the client.[331] In addition, if the attorney was serving as in-house counsel at the time of the communication, there should be a presumption that the client was the entity rather than the individual.[332] If the lawyer represents the person in their individual capacity, then no further entity analysis is needed

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

326. *See, e.g.*, *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920–21 (8th Cir. 1997); *In re* Lindsey, 148 F.3d 1100, 1107–09 (D.C. Cir. 1998); *In re* Grand Jury Investigation, 399 F.3d 527, 534–35 (2d Cir. 2005); Brinckeroff v. Town of Paradise, 2010 U.S. Dist. LEXIS 126895, at *11–12 (E.D. Cal. Nov. 18, 2010).

327. *See infra* pp. 43–45.

328. *See supra* p. 39.

329. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

330. *See id.* § 14(f). "Whether the lawyer is to represent the organization, a person or entity associated with it, or more than one such persons and entities is a question of fact to be determined based on reasonable expectations in the circumstances (see Subsection (1))." *Id.*

331. *Id.*

332. Representing both would be a conflict of interest, as the interests of the entity and an individual are likely to collide during litigation. An exception would exist, however, if the entity waives any potential conflicts of interest being fully informed of the scope of the in-house counsel's representation of the individual personally. Given the practical difficulties with such a scenario, it would be best avoided though for all involved. *See* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 484 (E.D. Pa. 1962).

and the court simply reverts to the customary review that is found in step three.[333] However, if the evidence indicates that the attorney was hired to represent the entity-at-large, then the court should proceed to the second step to determine whether the entity actor was an agent of the entity with sufficient authority to speak on its behalf.[334]

2. STEP 2: WAS THE PERSON WHO COMMUNICATED WITH THE ENTITY'S ATTORNEY AN AGENT OF THE ENTITY AT THE TIME OF THE COMMUNICATION?

As inanimate creatures of law, entities such as corporations and government agencies are unable to act on their own behalf and must instead rely on the people comprising the entity to carry out any tasks.[335] Considering this reality of entity operation, the tenets of agency law are most applicable to determining the authority of an individual within the entity, as it consists of well-established rules that dictate how one must act on behalf of another.[336] Since attorney-client privilege is the client's to control, agency law can best determine whether a person is an authorized speaker of the entity client.[337]

An *agent* is one who receives authority to act on behalf of another, called the *principal*.[338] The authority granted by the principal can be either express[339] or implied.[340] Although determining whether the parties have created an agency is usually an issue governed by state law,[341] the Restatement sets forth elements that

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333. *See infra* p. 44.

334. The Restatement agrees on this point, stating: "When the client is a corporation or other organization the organization's structure and organic law determine whether a particular agent has authority to retain and direct the lawyer." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14(f) (2000)). In order to determine whether such a relationship exists, "it is necessary to look at the words and actions of the parties." Hashemi v. Shack, 609 F. Supp. 391, 393 (S.D.N.Y. 1984) (quoting People v. Ellis, 397 N.Y.S.2d 541, 545 (Sup. Ct. 1977)); *In re* Persaud, 467 B.R. 26, 39 (Bankr. E.D.N.Y. 2012).

335. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985); RICE, *supra* note 7, § 4:28 (2d ed. 1999); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819); Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 766 (2012).

336. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW. INST. 2006).

337. City of St. Louis v. Praprotnik, 485 U.S. 112, 172 n.22 (1988) (dissent) (discussing how certain government actors are authorized to act on its behalf and that "the pyramidal structure of authority pervades the law.").

338. 3 AM JUR 2D AGENCY § 1; RESTATEMENT (SECOND) OF AGENCY § 1 (AM. LAW. INST. 1958).

339. 3 AM JUR 2D AGENCY § 1; RESTATEMENT (SECOND) OF AGENCY § 1 (AM. LAW. INST. 1958).

340. 3 AM JUR 2D AGENCY § 1; RESTATEMENT (SECOND) OF AGENCY § 1 (AM. LAW. INST. 1958).

341. *In re* Agriprocessors, Inc., 490 B.R. 374, 389 (N.D. Iowa 2013); *see, e.g.*, Carn v. Heesung PMTech Corp., 579 B.R. 282, 308 (M.D. Ala. 2017) (applying Alabama law); Trois v. Apple Tree Auction Ctr., Inc., 882 F.3d 485, 490 (5th Cir. 2018) (applying Texas law); Boelter v. Hearst Commc'ns, Inc., 269 F. Supp. 3d 172, 194 (S.D.N.Y. 2017) (applying Michigan law); Dye v. Tamko Bldg. Prods., 275 F. Supp. 3d 1314, 1321 (M.D. Fla. 2017) (applying Florida law); Tanasi v. CitiMortgage, Inc., 257 F. Supp. 3d 232, 278 (D. Conn. 2017) (applying Connecticut law); Rezac Livestock Comm'n Co. v. Pinnacle Bank, 255 F. Supp. 3d 1150, 1158–59 (D. Kan. 2017) (applying Kansas law). *But see* Jamison v. First Credit Servs., 290 F.R.D. 92, 100 (N.D. Ill. 2013) (applying federal law of agency, which mirrors the principles outlined within the Restatement (Third) of Agency); Alan, Sean, & Koule, Inc. v. S/V Corsta V, 286 F. Supp. 2d 1367, 1374 (S.D. Ga. 2003) (citing the Restatement (Third) of Agency for the source of federal law on agency).

adequately summarize the factors commonly considered by courts.[342] In order to create a valid agency: (1) a principal and an agent; (2) must mutually agree, either expressly or by implication; (3) that the agent has a level of authority to act on the principal's behalf; (4) which remains subject to the principal's control.[343] A key component required of any agency analysis is whether the principal retained authority over the agent.[344] While job titles can be a helpful factor in assessing authority, the actor's position is but one aspect to consider since employees and independent contractors can both qualify as agents.[345] If the parties formed the fiduciary relationship of an agency, then the agent's communications to the entity attorney qualify as having been made on behalf of the entity client.[346]

3. STEP 3: DID THE COMMUNICATION BETWEEN THE ENTITY AGENT AND THE ENTITY ATTORNEY SATISFY THE TEST PUT FORTH FOR CLIENTS WHO ARE PEOPLE?

Finally, having examined the attorney and the person involved, the court must then turn its focus to the communication in the case. The court should use the same rule for attorney-client privilege that applies to human clients, as well.[347] As set out in Part I, communications between the entity attorney and the entity agent are privileged and exempt from discovery if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[348]

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342. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW. INST. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

343. *Id*.

344. Hollingsworth v. Perry, 570 U.S. 693, 713 (2013) (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. f (AM. LAW. INST. 2005)).

345. RESTATEMENT (THIRD) OF AGENCY § 1.02 (AM. LAW. INST. 2006); *see, e.g*., Fisher v. Townsends, Inc., 695 A.2d 53, 60–61 (Del. 1997) (citing Bradbury v. Phillips Petroleum Co., 815 F.2d 1356, 1360 (10th Cir. 1987); *see* Weiss v. Security Storage Co., 272 A.2d 111, 114 (Del. Super. 1970), *aff'd*, 280 A.2d 534 (Del. Super. 1971). Although a person cannot be a servant and an independent contractor, a person can be an independent contractor and an agent. *See* Johnson v. Bechtel Assocs. Prof'l Corp, 545 F. Supp. 783, 785 (D.D.C. 1982), *aff'd in part, rev'd in part on other grounds*, 717 F.2d 574 (D.C. Cir. 1983); *In re* United States, 367 F.2d 505, 509 (3d Cir. 1966)).

346. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW. INST. 2006).

347. *See supra* Part I.

348. United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950). My analysis of reported citations to a rule on the attorney-client privilege found the definition put forth by John Henry Wigmore in his seminal work Evidence to be among the most cited variations. *See also* John E. Sexton, A Post-

By settling on a uniform definition of the attorney-client privilege, courts can avoid the risks associated with varyingly stated rules.[349] Having satisfied the first two prongs of the test, a court should hold the communications are privileged if they meet the elements of this widely-cited rule.

B. THE PUBLIC VEIL OF GOVERNMENT-ENTITY CASES

As a result of the public function performed by government agents, courts created tests that are different than those found in private-entity cases.[350] Although they differ in their reasoning, the courts include *the public* in their perspective when applying the privilege to government-entities.[351] This public component places special emphasis on the responsibility of government—and, by extension, its agents—to govern in a manner that promotes public transparency. Courts are divided, however, on determining whether this public interest is best furthered by disclosing communications between government agents and government attorneys or by providing them with the same protections afforded corporations and human clients.[352]

On balance, a common-law rule should stem from precedent, operate in furtherance of its underlying purpose, and apply in a consistent and logical manner to give adequate notice to those whom the law impacts.[353] Multiple cases stand for the rule that communications between a government agent and a government attorney are privileged.[354] It is also well-settled that communications in the corporate-entity context are privileged when they satisfy certain requirements.[355] Although some sources distinguish the role of public sector attorneys from those in the private

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Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. Rev. 443 n.5 (1982).

349. *See* discussion, *supra* Part I.

350. *See* discussion, *supra* Parts I and III.

351. *See* discussion, *supra* Part III.

352. *See* discussion, *supra* Part III.

353. *See, e.g.*, O'Neal v. McAninch, 513 U.S. 432, 443–44 (1995) (creating a new common-law rule regarding the review of habeas corpus petitions based upon "precedent and purpose"); Lorenzo v. SEC, 139 S. Ct. 1094, 1100 (2019) (deciding the case by "examining the relevant language, precedent, and purpose"); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 810–11 (1976) (reviewing the "underlying policy" of a federal law concerning the water rights of Native Americans); Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 613–14 (1991) (reviewing the "underlying policy" of a National Labor Relations Board rule to resolve the case); Weinberger v. Salfi, 422 U.S. 749, 722 (1975) (noting the "underlying policy objectives" leading to a law); Schultz v. Boy Scouts of Am., 480 N.E.2d 679, 686 (1985) (stating that "rules are enforced so that the underlying policy . . . is effectuated"); Graham v. John Deere Co., 383 U.S. 1, 10–11 (1966) (describing how the "underlying policy of the patent system" made rulemaking difficult); *In re* Winship, 397 U.S. 358, 375 (1970) (noting the influence of the juvenile-justice system's underlying policy of rehabilitation) (Harlan J. concurring); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 602 (6th Cir. 1995) (reaching a conclusion that is "logical and consistent with the national policy the Supreme Court" set forth). In addition, the requirement for adequate legal notice of the law is rooted in the Constitution. *See* U.S. CONST. amend. XIV; Shelley v. Kraemer, 334 U.S. 1, 16 (1948) (citing U.S. CONST. amend. XIV and Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673 (1930)).

354. *See, e.g.*, Brinckerhoff v. Town of Paradise, 2010 U.S. Dist. LEXIS 126895, at *12 (E.D. Cal. Nov. 18, 2010); United States v. Doe (*In re* Grand Jury Investigation), 399 F.3d 527, 534 (2d Cir. 2005).

355. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 383–85 (1981).

sector,[356] both attorney types share far more in common.[357] For instance, private and public attorneys must both give competent legal advice and divulge any ongoing crimes or acts of wrongdoing.[358] In addition, the fundamental purpose of the privilege does not change based on its context.[359] Whether the client is a government agent, corporate executive, non-profit director, or a person in their individual capacity, the attorney-client privilege serves the purpose of facilitating candor between client and attorney.[360] The similarities between corporate and government entities should weigh in favor of applying the same standard in the government-entity context.

Any new rule governing the privilege application should operate in furtherance of facilitating candid attorney-client conversations.[361] Cases where the privilege does not apply in the government-client context because of a perceived "public interest" stand in contrast to the privilege's underlying purpose of promoting candid attorney-client conversations.[362] Often, in the same opinions, judges confusingly state that the identical conversations between a government agent and their private attorney would be privileged.[363] This begs the question that if public interest requires disclosure of evidence that a government official committed a crime, why should the case be any different based on the attorney's status?[364] After all, the public's interest in "exposing wrongdoing by public officials" does not disappear when the government official happens to speak to a different type of attorney.[365]

Furthermore, assuming arguendo that the judges in *Clinton Cases I* [366] and *II*[367] accurately defined the public's interest in justice as divulging criminal wrongdoing by elected officials, the rule appears irrational when applied to scenarios involving crimes of varying seriousness. For example, consider two hypotheticals

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356. *See*, *e.g.*, *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir. 1997) (stating that government attorneys have a duty to the public that differs from their private counterparts).

357. *Compare* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348–49 n.4 (1985) (noting the requirement that corporate entities must act through agents who derive their authority from outside sources and owe a duty to others), *with* RICE, *supra* note 7, § 4:28 (stating that government entities must act through agents), *and* The Federalist No. 49, at 313–14 (James Madison) (Clinton Rossiter ed., 1961) (declaring that government obtains its power from the public), *and* Clark v. Byrne, 397 A.2d 719, 724 (N.J. Super. 1978) (noting the government's "duty to act in the public interest").

358. *See* MODEL RULES OF PROF'L CONDUCT Pmbl. (1983); *In re* Grand Jury Matter #3, 847 F.3d 157, 165 (3d Cir. 2017) (holding that "the crime-fraud exception operates to prevent the perversion of the attorney-client relationship.").

359. *See* Upjohn Co. v. United States, 449 U.S. 383, 403 (1981) (Burger, C.J., concurring in part).

360. *See id.* at 389.

361. *Id.* at 393.

362. *See, e.g.*, *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997); *In re* Lindsey, 148 F.3d 1100 (D.C. Cir. 1998).

363. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 921.

364. *Id.* at 920–21.

365. *Id.*

366. *Id.*

367. *In re* Lindsey, 148 F.3d 1100, 1108–09 (D.C. Cir. 1998).

involving an elected official, whom we will call "Senator Joe Smith." In the first scenario, Senator Smith is charged with the minor offense of speeding ten miles per hour over the posted speed limit while travelling to an event outside the district he represents. Senator Smith discusses the case with his government counsel in order to get an opinion on his available defenses. Here, the judges in *Clinton Cases I* and *II* would permit the publicizing of such communications based on their beliefs that justice requires disclosure of "wrongdoing by public officials."[368]

In the second scenario, Senator Smith is charged with the far more serious crime of murder. Rather than speaking with his government counsel, however, Senator Smith happens to consult a private attorney on the matter. During conversations with his private-practicing lawyer, Senator Smith states that he committed the offense of murder but wants to vigorously fight the charge in hopes of being found not guilty. In this case, the judges in *Clinton Cases I* and *II* would find such communications privileged, even though allowing evidence the senator committed murder seems to advance the public's interest in "exposing wrongdoing by public officials" much more than the introduction of evidence that he is guilty of speeding.[369] In fact, if the disclosure of criminal evidence is the interest in justice guiding application of the attorney-client privilege, *Clinton Cases I* and *II* have opened the door for attorneys to argue the privilege should not apply in any context when doing so conceals evidence that the defendant is guilty of the charged crime.[370]

The hypotheticals involving Senator Smith help reveal the true motivation for the privilege's inconsistent application in government-privilege cases. According to the rationales in *Clinton Cases I* and *II*, the public's interest in justice turns not on the defendant's role as a government official, but on the attorney's status as a government versus private attorney.[371] Put another way, according to *Clinton Cases I* and *II*, cases involving government officials invoking the attorney-client privilege hinge on the source of the attorney's paycheck, rather than the title of the defendant.[372] Neither court fully explained why the public's interest in justice suddenly shifts from *crime-solving*, in cases when a government official consults

368. *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 921; *In re Lindsey*, 148 F.3d at 1108–09.

369. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 921.

370. In *In re Grand Jury Subpoena Duces Tecum*, the court stated there is a "strong public interest in honest government and in exposing wrongdoing by public officials." 112 F.3d 910, 921 (8th Cir. 1997). By comparing the many similarities between government and corporate entities, a party in litigation could argue the same rule should apply in both scenarios. The same party could highlight the number of high-profile corporate scandals as further reason for permitting the introduction into evidence of conversations between business executives and in-house counsel. *See* Sachin Waikar, *Businesses Behaving Badly: The State of Corporate Scandal in 2019*, INSIGHTS BY STANFORD BUS. (Mar. 15, 2019), https://www.gsb.stanford.edu/insights/businesses-behaving-badly-state-corporate-scandal-2019 [https://perma.cc/T9AK-F2QP] (citing business experts who "agreed that the potential for U.S. corporate misbehavior remains high").

371. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920–21; *In re Lindsey*, 148 F.3d at 1108–09.

372. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920–21; *In re Lindsey*, 148 F.3d at 1108–09.

a government attorney, to *evidence-preservation*, in scenarios when the government official communicates with a private attorney.[373] Applying the privilege equally to entity agents, regardless of their attorney type, would resolve this inconsistent and illogical application of the privilege.

A likely counterargument to a uniform entity-privilege rule is that government agents could use the privilege to shield illegal activity. However, parties making this argument have not been successful since the well-known crime-fraud exception to the privilege prevents any client, including a government official, from using the privilege as a shield to plan or carry out illegal activity.[374] Lastly, since the entity client is the holder of the privilege, a future government agent could always revoke the privilege if the successive agent determines it is in the client's best interest to do so.[375]

Combining these principles based on reason and experience, an illustrative model of the three-step rule reflects the public enshrouding—not interrupting—the communications between a government client and a government attorney. The client is the entity, which is connected to agents by a flow of authority. Non-agents are linked to the entity as well, but only by virtue of employment. Should an authorized agent exceed their sphere of delegated authority, they would be relegated to the same status as non-agents.[376] In the end, the rule distinguishes between the privileged communications that occur between the client's agent and the client's attorney and the discussions that occur between entity non-agents and the entity attorney.[377]

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373. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920–21; *In re Lindsey*, 148 F.3d at 1107–09. The court in *In re Lindsey* acknowledged that while the "government attorney-client privilege . . . is rather absolute in civil litigation," it was untested in criminal cases. *In re Lindsey*, 148 F.3d at 1107. The court then goes on to discuss the public's interests in open and honest government that override the privilege in criminal cases. *Id*. at 1107–14. However, rather than conclude its holding by comparing these asserted interests to the interests at work in the aforementioned civil cases, the court turns to a brief mention of public versus private attorneys. *Id*. at 1114 ("In sum, it would be contrary to tradition, common understanding, and our governmental system for the attorney-client privilege to attach to White House Counsel in the same manner as private counsel."). The potentials for comparison in these difficult cases (*public* attorneys versus *private* attorneys, *government* clients versus *private-citizen* clients, and *civil* cases versus *criminal* cases) invites confusion and speaks to the need for careful analysis.

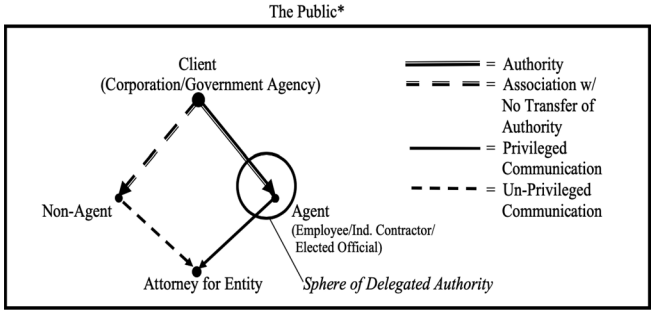
374. *See, e.g*., *In re* Grand Jury Proceedings (Gregory P. Violette), 183 F.3d 71, 75 (1st Cir. 1999) (stating that the crime-fraud exception "grew up in the shadow of the attorney-client privilege"); Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995). The crime-fraud exception's low bar only strengthens the argument that it serves as a solid deterrent to clients using the attorney-client privilege to hide ongoing crimes. Auburn K. Daily & S. Britta Thornquist, *Has the Exception Outgrown the Privilege?: Exploring the Application of the Crime-Fraud Exception to the Attorney-Client Privilege*, 16 GEO. J. LEGAL ETHICS 583, 590–91 (2003) (arguing the crime-fraud exception has become too broad and easy to apply).

375. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985) (holding that a corporate entity successor-in-interest can revoke a predecessor's claim of privilege); Jason Batts, *The Weintraub Principle: Attorney-Client Privilege and Government Entities*, 92 S. CAL. L. REV. POSTSCRIPT 1, 11–14 (2018).

376. *See* Tenner v. Prudential Ins. Co. of Am., 872 F. Supp. 1571, 1573 (E.D. Tex. 1994) (noting the inability of an agent to speak for the principal when the agent exceeds authority).

377. Communications by authorized agents to the entity attorney are privileged client communications, whereas discussions between other entity actors and the entity attorney are classified as witness statements.

ILLUSTRATIVE MODEL OF THE REVISED ENTITY-PRIVILEGE TEST



* If the "client" is a government entity, *the public* is accounted for by encapsulating the actors, authority, and communications involved.

V. TEST SUITE FOR THE ENTITY-PRIVILEGE TEST

The three-pronged test developed and illustrated in Part IV derives from well-established legal principles, which is intended to ease the burden on decision-makers confronting entity-privilege cases and provide improved notice to entity actors as to what communications are privileged. In order to determine whether these goals are met, it is necessary to apply the test to real-world scenarios. The cases of *Upjohn* and *Clinton II* analyzed in Part III serve as appropriate tests for our analysis since both cases involve an entity, various potential agents, and entity counsel.[378]

A. PRIVATE-ENTITY TEST: UPJOHN CO. V. UNITED STATES

In *Upjohn*, the corporation claimed that certain communications between in-house counsel and employees—made at the direction of management—were protected from disclosure by the attorney-client privilege.[379] The first task is to determine whether the attorney involved represents the entity or the employees by looking at the context of the attorney's representation, including any written agreements.[380] Serving as in-house counsel creates a presumption that the attorney represents the entity.[381] The decision notes that the corporate attorney had "been Upjohn's General Counsel for 20 years."[382] In this case, the presumption is confirmed by the questionnaires that were sent to company employees, which stated that the inquiry was part of an investigation by "the *company's* General

378. *See supra* Part III.
379. Upjohn Co. v. United States, 449 U.S. 383, 383–85 (1981).
380. *See supra* pp. 42–43.
381. *See supra* note 332.
382. *Upjohn*, 449 U.S. at 386.

Counsel."[383] Therefore, the first step in the analysis reveals that the attorney involved represented the corporate entity.

Second, it must be determined whether the individual who communicated with the entity's attorney was an agent of the entity at the time of the communication.[384] An agency exists where a principal and an agent mutually agree that the agent has authority to act on the principal's behalf but subject to the principal's control.[385] Here, the Court's opinion provides strong evidence that the respondents to the company questionnaire were agents of Upjohn whose scope of authority included the power to speak on behalf of the company to in-house counsel.[386] The questionnaires were "sent to 'All Foreign General and Area Managers' over the Chairman's signature."[387] As supervisors, they were members of the control group and therefore likely to have authority to communicate on behalf of Upjohn.[388] Furthermore, by sending letters from the head of the corporation that ordered a response, the entity expressly empowered the employees with authority to communicate with in-house counsel on the corporation's behalf as to matters outlined in the letter.[389] Therefore, the employees were agents of Upjohn at the time they communicated with the company's in-house counsel.

Having examined the statuses of the attorney and the corporate employees, focus for the third prong shifts to the communications at issue to determine whether they satisfy the test for attorney-client privilege.[390] Reviewing each element of the rule articulated in Part I,[391] the communications between Upjohn agents and its corporate counsel were privileged. The company was the client of the in-house counsel, who was a member of the bars of two states, and the communications were confidential and made for the purpose of securing a legal opinion rather than for an ongoing crime or tort.[392] In addition, the privilege was not waived after being claimed.[393] An illustrative model of the new rule applied to *Upjohn* appears below.

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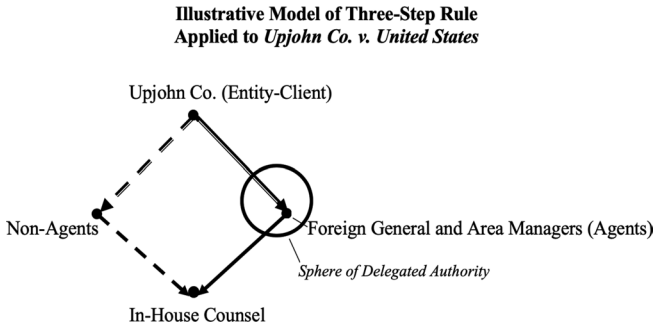
383. *Id*. at 387.
384. *See supra* p. 42.
385. RESTATEMENT (THIRD) OF AGENCY § 1.01 AM. LAW. INST. 2006).
386. *Upjohn*, 449 U.S. at 386.
387. *Id*.
388. *Id*.
389. *See id*. (directing the employees to respond).
390. *See supra* pp. 43–44.
391. United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

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

Id.
392. *Upjohn Co*., 449 U.S. at 394–97.
393. *Id*.



B. PUBLIC-ENTITY TEST: IN RE LINDSEY

In re Lindsey involved communications between President Bill Clinton and Bruce Lindsey, Deputy White House Counsel and Assistant to the President, which were relevant to a criminal investigation.[394] Lindsey claimed the communications were protected by the attorney-client privilege and therefore not subject to discovery.[395] The first prong of the test for entity-privilege asks whether the attorney is representing the entity of the White House or President Clinton individually.[396] The dual role of Lindsey as attorney and political adviser deserves careful consideration and more discussion than the court engaged in to properly answer this first prong.[397] The burden is on the client to prove whether the attorney was consulted in a legal capacity, since conferring with an attorney "as a friend or . . . advis[e]r" does not invoke the privilege.[398] Thus, any communications that the White House could not prove occurred between President Clinton and Lindsey as an attorney would be discoverable. As the court stated, however, since there is "little doubt that at least *one*" discussion occurred because of Lindsey's status as an attorney, further analysis is warranted.[399] Lindsey's title of "Deputy White House Counselor" also suggests he represented the government entity.[400] Therefore, the first prong is satisfied for any purely legal conversations that occurred between the President and Lindsey.[401]

Second, the test requires an examination of the entity actor's employment to determine whether the person was an authorized agent of the entity at the time of the communication.[402] While the first prong requires more information from the White House to reach an accurate determination, the second prong is quickly

394. *In re* Lindsey, 148 F.3d 1100, 1102–03 (D.C. Cir. 1998).
395. *Id.* at 1103.
396. *See supra* p. 42.
397. *In re Lindsey*, 148 F.3d at 1103.
398. *Id.* at 1106 (quoting 1 MCCORMICK ON EVIDENCE § 88, at 322–24 (4th ed. 1992)).
399. *Id.* at 1107.
400. *Id.*
401. Lindsey is a Deputy White House Counsel who is "admitted to practice in Arkansas." *Id.* at 1103.
402. *See supra* pp. 48–49.

satisfied since the President is the chief executive of the White House.[403] As the entity's highest-ranking official, there can be no question in this instance that President Clinton was authorized to speak on the entity's behalf to an attorney.[404] Therefore, the facts of the case satisfy the second prong.[405]

Third, it must be determined whether the communications between the President and the White House attorney meet the test for attorney-client privilege for human clients.[406] Here again the court's opinion falls short of providing the information necessary to properly determine whether this prong is satisfied, since the specific communications are either not discussed or redacted out of privacy concerns.[407] Upon arriving at this third step the court would likely need to perform an in-camera review[408] to privately assess whether the Wyzanski test for attorney-client privilege incorporated into this prong is satisfied.[409] Communications that meet this and the prior two requirements would be protected by the attorney-client privilege.

While not a step in the analysis, the impact of the public in decisions applying the privilege to government entities requires a brief discussion.[410] The public undoubtedly has an interest in ensuring that President Clinton and others within his Administration provide evidence in furtherance of the criminal investigation into their activities.[411] However, the dilemma for a court is not in determining

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403. U.S. CONST. art. II, § 1.

404. As the highest-ranking official of the United States government, the President satisfies the test for "agency." *See supra* pp. 48–49.

405. An exception could occur in the corporate context if a private entity's board of directors, bylaws, operating agreement, or other corporate documents prohibited the chief executive from having authority to seek legal advice on behalf of the corporation. *See* Lettieri v. Am. Sav. Bank, 437 A.2d 822, 826 (1980) (noting the power of bylaws to limit agent authority). While the question of whether a president, governor, or other public official's authority to consult with government attorneys could be restricted poses an interesting question for further research, any such limitation would have to come from a statute and would likely face a spirited legal challenge from the impacted government agency and official.

406. *See supra* pp. 49–50.

407. *See In re* Lindsey, 148 F.3d 1100 (D.C. Cir. 1998) (containing twenty instances of "sealed material" throughout the opinion).

408. United States v. Zolin, 491 U.S. 554, 574–75 (1989) (describing the criteria necessary for in-camera review).

409. As discussed in Part I above, the Wyzanski test states that communications are privileged when:

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

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

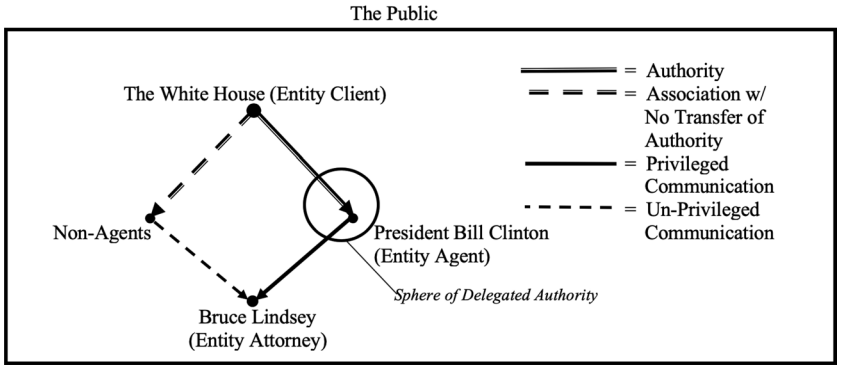
410. *See* discussion, *supra* Part III.

411. *See In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997); *In re* Lindsey, 148 F.3d 1100 (D.C. Cir. 1998).

whether this interest exists, but more accurately on defining its limits.[412] Just as the public's interest in solving crime does not permit piercing the privilege between human clients and their attorneys or between government clients and their private attorneys, neither should the communications between President Clinton and Lindsey be discoverable.[413] The fundamental purpose of the privilege to foster candid conversations between attorney and client should outweigh the public's interest in criminal investigations, just as it does when a government employee hires a private attorney.[414] The crime-fraud exception provides sufficient protection in cases where a client seeks to shield illegal acts from discovery.[415] In addition, absent statutory guidance, it is impossible to determine whether the public's interest in solving crime is greater than or subservient to its interest in safeguarding the ability of their elected officials to receive candid legal advice.[416]

The illustrative model below reflects the operation of the test in *Clinton Case II*. Authority flows from the White House to President Clinton, who then communicates on behalf of the entity client with the entity attorney, Lindsey. The communications are unbroken since they occurred with Lindsey in his capacity as an attorney and meet the test for the privilege contained within the third prong. As an elected official, President Clinton has a

Illustrative Model of Three-Step Test Applied to *Clinton Case II*



412. *See* discussion, *supra* Part III.

413. *See* United States v. Doe (*In re* Grand Jury Investigation), 399 F.3d 527 (2d Cir. 2005); Brinckeroff v. Town of Paradise, No. Civ. S-10-0023, 2010 U.S. Dist. LEXIS 126895 (E.D. Cal. Nov. 18, 2010).

414. *In re Lindsey*, 148 F.3d at 1104.

415. *See, e.g.*, H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 KY. L.J. 1191 (1998); Marjorie A. Shields, Annotation, *Crime-Fraud Exception to Attorney-Client Privilege in State Courts–Contemplated Crime*, 9 A.L.R.6th 363 (2005).

416. *See* Doe, 399 F.3d at 534 (citing the existence of a Connecticut statute regarding the attorney-client privilege that is evidence of the public's interest).

broad sphere of delegated authority that is limited only by the United States Constitution and federal laws.[417] So long as the conversations between President Clinton and Lindsey did not violate either of these authorities, the President operated within his sphere of delegated authority.

CONCLUSION

Considering the current circuit split after more than four centuries of case law on the topic of attorney-client privilege, it is clear that selecting the best method for applying the privilege to entities is not readily obvious. A consistent solution that is both legally sound and operates in furtherance of the privilege's underlying purpose has evaded scholars and judges since the issue first arose.[418] The resulting multitude of approaches have all fallen short of providing the sound guidance that is most helpful to entity actors in our common-law system. An examination of these decisions using the interdisciplinary approach of illustrative modeling confirms the inaccuracy of the traditional theory of entity attorney operations, which has informed judicial opinions since its initial proposal. However, by incorporating the well-established principles of agency law to create the three-step process outlined above, judges can now solve these difficult cases in a consistent manner that is rooted in sound logic and policy. The combination of Judge Wyzanski's widely accepted privilege definition with fundamental agency-law principles provides courts and entity actors with a helpful list of elements to guide attorney-employee conversations. In addition, applying the privilege consistently regardless of entity or case type creates an approach that advances the privilege's underlying purpose—facilitating candid attorney-client conversations. In an era where the privilege has once again risen to the forefront of public discussion, this *rethinking* of the attorney-client privilege has the potential to form the next chapter in the storied history of a law that forms the very basis for legal practice.

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417. *See* U.S. CONST. art. II, § 1, cl. 1; Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009).

418. *See* discussion, *supra* Part III (analyzing the inconsistent approaches employed by courts in cases involving corporate and government entities).