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ONE PRIVILEGE TO RULE THEM ALL? SOME POST-SARBANES-OXLEY AND OTHER REFLECTIONS ON A FEDERALLY CODIFIED ATTORNEY-CLIENT PRIVILEGE

*Timothy P. Glynn**

Recently, the attorney-client privilege has been the subject of increased public and scholarly interest. Attorney-client confidentiality concerns, including the privilege, were front and center in the debate over new rules of professional conduct for issuer counsel mandated by Section 307 of the Sarbanes-Oxley Act of 2002.¹ In addition, the decision of the Department of Justice

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1. Pub. L. No. 107-204, sec. 307, 116 Stat. 784 (codified at 15 U.S.C. § 7245 (Supp II 2002)); see 17 C.F.R. §§ 205.1–.7 (2004) (containing the final rules). Section 307 and Securities and Exchange Commission (“SEC”) rules, and their effect on confidentiality and relationship to the privilege, have received an enormous amount of attention. See, e.g., Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release Nos. 33-8186, 34-47283, 68 Fed. Reg. 6324, 6325 (proposed Feb. 6, 2003) (discussing the significant number of comments submitted on the noisy withdrawal provision and its effect on confidentiality); John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 360–63 (2004) [hereinafter Coffee, *Gatekeeper Failure*]; John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1310 (2002) (discussing the gatekeeping function of attorneys in the wake of recent corporate scandals) [hereinafter Coffee, *Attorney as Gatekeeper*]; Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004) (contending that both the final regulations and proposed regulations pursuant to Sarbanes-Oxley will not adversely affect client confidences); Michael L.

("DOJ") to allow monitoring of communications between detained terrorism suspects and their attorneys² has spawned an enormous amount of controversy and commentary within the bar and legal academia, much of which has focused on the privilege.³ Moreover, the Advisory Committee on the Federal Rules of Evidence has decided to survey the state of federal evidentiary privileges,⁴ evincing renewed interest, even though it has no authority to alter such privileges.⁵

Fox, *To Tell or Not to Tell: Legal Ethics and Disclosure After Enron*, 2002 COLUM. BUS. L. REV. 867, 908 (2002) (arguing that even under the up-the-ladder reporting requirement, confidentiality will suffer); Susan J. Stabile, *Sarbanes-Oxley's Rules of Professional Responsibility Viewed Through a Sextonian Lens*, 60 N.Y.U. ANN. SURV. AM. L. 31, 44-48 (2004) (discussing the new and proposed requirements under Sarbanes-Oxley and concluding, after addressing parallel issues in the attorney-client privilege context, that these requirements will not adversely affect client confidences); *Panel Three: Ethical Dilemmas Associated with the Corporate Attorney's New Role*, 52 AM. U. L. REV. 655, 665-91 (2003) (discussing the ramifications of Section 307 of the Sarbanes-Oxley Act of 2002 on the attorney-client privilege); see also Letter from Seventy-seven Law Firms to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 18, 2002) (expressing concerns regarding the proposal of a "noisy withdrawal requirement"), available at <http://www.sec.gov/rules/proposed/s74502/77lawfirms1.htm>.

2. On October 31, 2001, the Justice Department announced that it had the authority to monitor conversations between detainees and their attorneys whenever the government has "substantial reason" to believe that the conversations could facilitate violence or terrorism by passing on information or instructions. See 28 C.F.R. § 501.3(d) (2004).

3. See, e.g., Paul R. Rice & Benjamin Parlin Saul, *Is the War on Terrorism a War on Attorney-Client Privilege?*, 17 CRIM. JUST. 22, 23-24 (2002) (noting that the monitoring of inmate conversations will create further uncertainty regarding the attorney-client privilege); see also Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233, 1245 (2003) (arguing that the Bureau of Prisons regulations will chill attorney-client communications). But see R. Aubrey Davis III, *Big Brother the Sneak or Big Brother the Sentry: Does a New Bureau of Prisons Regulation Truly Abrogate the Attorney-Client Privilege?*, 27 HAMLINE L. REV. 163, 189-90 (2004) (concluding that the procedural safeguards of the regulations ensure that the regulations will not affect the privilege); Viet D. Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 404-05 (2002) (contending that the Bureau of Prisons regulations will not curtail the privilege).

4. See Advisory Comm. on Evidence Rules, *Minutes of the Meeting of October 18, 2002*, <http://www.uscourts.gov/rules/Minutes/1002EVMin.pdf>.

5. See Rules Enabling Act, 28 U.S.C. § 2072 (2000).

The heightened attention will hopefully serve the interrelated functions of illuminating the existing uncertainties in privilege protections and producing genuine interest in reform. This symposium therefore comes at a particularly opportune time, providing another forum for exploring the current state of evidentiary privileges, including the attorney-client privilege, and the merits of codification.

In a previous article, *Federalizing Privilege*,⁶ I sought to demonstrate that existing attorney-client privilege protections are far too uncertain to serve the ends of the modern privilege. After tracing both the scope and sources of this uncertainty, I argued that the common-law method has not and cannot produce privilege doctrine that provides sufficient certainty. Furthermore, piecemeal reforms, including codification of a set of privilege rules applicable only in the federal courts, while useful, would also fall short.⁷ I thus concluded that Congress should enact preemptive privilege legislation, providing uniform protections for attorney-client communications that would apply in every proceeding in federal and state court, as well as in arbitration, administrative, and legislative proceedings.⁸ Federal privilege legislation that provides clear, unqualified, and generally applicable privilege protections will produce a level of certainty sufficient to reap the benefits of the privilege while lowering its transactions costs.⁹

In this article, I again argue that the existing privilege regime is unacceptable. I do so after considering the fresh critiques of corporate-client confidentiality and the need for certainty that emerged in the debates over Section 307 of the Sarbanes-Oxley Act and its regulatory progeny. I also trace why recent developments—

6. Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59 (2002).

7. *Id.* at 62–63, 134–41.

8. *Id.* at 64, 133.

9. *Id.* at 64. By “unqualified,” I do not mean without exceptions. A qualified privilege, as I use the term, means a privilege that is subject to a judge’s discretionary or post hoc balancing of interests on a case-by-case basis. Any privilege regime, including an unqualified or absolute privilege, ought to contain exceptions and waiver doctrines. These exceptions and doctrines are both categorical and defined in advance, giving attorneys and clients notice of the limits of the protection.

including judicial decisions, law enforcement practices, and trends in dispute resolution—only enhance my claim that privilege protections are intolerably uncertain.

Given this, and given that the privilege is here to stay in one form or another, I then address the vexing question of how to reform the existing regime. The resolution of this question necessarily hinges on an assessment of the benefits and risks of codifying the privilege compared to the benefits and risks of allowing privilege doctrine to continue to develop on a jurisdiction-by-jurisdiction, case-by-case basis. But the choice is not simply one of codification versus common law. Obviously, attorney-client privilege codes may vary in substance (in other words, in the nature of their protections) and one's prediction of the content will affect his or her *ex ante* assessment of the benefits and risks of codification. Yet, importantly, codes may also vary in breadth and depth of coverage. For example, a privilege code may simply be a set of court-made rules intended for application in a jurisdiction's judicial proceedings. It may be intrajudicial but statutory, thus potentially applying beyond judicial proceedings. Or, as I have advocated, a federal codification may be statutory and preemptive, extending to all judicial and non-judicial proceedings.

In the end, I adhere to the view that a federal, preemptive privilege would be the best method of achieving sufficiently certain privilege protections, and would thereby maximize the privilege's benefits. Nevertheless, I recognize that this kind of reform is unlikely. The issue, then, is whether codification of the privilege at the federal level, on balance, is superior to a common-law privilege even if the resulting code is less ambitious in scope than my previous proposal. I conclude that federal codification is superior to retaining the existing approach, not only because of the systemic problems with the common law but also because the statutory approach to formulating privilege doctrine offers a genuine opportunity for a balanced deliberative process and has the potential to produce far clearer substantive rules, long-term interjurisdictional convergence, and collateral protections for client confidences.

Part I revisits the need for reasonable certainty through the lens of very recent developments, including the treatment of confidentiality concerns in the Sarbanes-Oxley Act and underlying

securities regulations, and in various privilege decisions and trends. These developments—and in particular, the Sarbanes-Oxley experience—shed new light on the interaction between the attorney-client privilege and other areas of regulation and illuminate why and how pressures on the privilege threaten its potential social benefits. Part II addresses whether, and how, to reform the existing regime. It first traces why the common-law method of developing privilege doctrine is inadequate and responds to some of the arguments against codification which favor retaining the common law. It then shows why federal reform that is less ambitious, but more plausible, than preemptive privilege legislation is still preferable to retaining the common law. This article concludes by offering suggestions on other measures—beyond substantive privilege protections—that will enhance the effectiveness of a federally codified privilege.

I. THE NEED FOR GREATER CERTAINTY:
A SUMMARY AND UPDATE

In *Federalizing Privilege*, I argued that existing privilege protections are so uncertain that they threaten the modern purposes of the attorney-client privilege.¹⁰ This contention was based on two

10. *Id.* at 142–43. The dominant, modern rationale for the attorney-client privilege is that “it fosters client candor and full communication between attorneys and clients, which produce social benefits that outweigh the privilege’s social costs.” *Id.* at 69; *see, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); 1 MCCORMICK ON EVIDENCE § 87, at 344 (John W. Strong et al. eds., 5th ed. 1999). These social benefits include facilitating effective legal representation, enhancing the ability of counsel to protect client rights and interests, preserving the integrity of the adversarial process, fostering respect for legitimate expectations of privacy, and promoting compliance with the law and the underlying aims of the law. *See Glynn, supra* note 6, at 68–71 (discussing the various justifications for the privilege and the ends it serves). Among these interests, promoting ongoing legal compliance and observance of the law is most important in the non-litigation, corporate setting. *See Upjohn*, 449 U.S. at 392 (emphasizing the role of the privilege in promoting corporate compliance); Coffee, *Attorney as Gatekeeper, supra* note 1, at 1307–08 (suggesting that the promotion of legal compliance is the primary potential benefit of the privilege in the securities context). The most important adverse consequence of the privilege is that it may inhibit discovery of relevant communications and may thereby create obstacles to ascertaining the truth. *See Glynn, supra* note 6, at 71–72. Thus, there is general acceptance of the utility of the privilege. There is also agreement that it should be construed narrowly and that certain limitations, such as the crime-fraud

premises. First, a level of certainty—"reasonable certainty"—in privilege protections is needed to enhance (or at least avoid chilling) client candor, and correspondingly, this is needed to produce the purported social benefits of the privilege, including, *inter alia*, facilitating legal compliance.¹¹ Second, the existing privilege falls far short of providing this level of certainty in most circumstances.¹² Indeed, the current regime, which is characterized by intrajurisdictional confusion, interjurisdictional conflict, and decentralized decision making, has produced privilege law that is both ambiguous in its doctrine and unpredictable in its application.¹³

This article will not retrace the arguments supporting these premises. Recent developments, however, shed new light on the need for reasonable certainty and the failings of the existing regime.

A. Sarbanes-Oxley, Confidentiality, and the Corporate Client

The issue of certainty regarding the scope of protection of client confidences has received rare public attention in the debate over how to fix corporate governance in the wake of Enron and other Wall Street scandals. Keenly aware that corporate counsel failed to prevent the underlying misconduct¹⁴ and, worse, sometimes

exception, are necessary to reduce or prevent misuse of the privilege and resulting social harm. *See id.* at 71–73, 79–81. The privilege's aggregate benefits and costs have not been, and cannot be, verified empirically, although the privilege is accepted in every jurisdiction and few argue that it should be abandoned. *See id.* at 73, 79–81. The lingering question is how to maximize the foregoing benefits of the privilege while limiting the potential costs.

11. *Id.* at 71.

12. *Id.* at 142–43.

13. *Id.* at 98–121 (outlining in detail the conflict and confusion surrounding the privilege's basic elements, important exceptions, and various waiver doctrines).

14. *See* New Release, Committee on Energy and Commerce Democrats, Statement of Congressman John Dingell on Enron (Nov. 29, 2001) (restating Judge Stanley Sporkin's critique from *Lincoln Savings & Loan Ass'n v. Wall*, 743 F. Supp. 901, 919–20 (D.C. 1990), available at <http://www.house.gov/commerce/democrats/press/107nr28.htm>. "Where was the SEC? Where was FASB? Where was Enron's audit committee? Where were the accountants? *Where were the lawyers?*" *Id.* (emphasis added).

participated in it,¹⁵ Congress enacted Section 307 of the Sarbanes-Oxley Act.¹⁶ This section directed the Securities and Exchange

15. 148 CONG. REC. S6552, S6555–56 (daily ed. July 10, 2002) (statements of Sens. Edwards, Enzi, and Corzine) (discussing how lawyers failed to prevent corporate corruption and sometimes were central participants in it); see Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 198–210 (2003) [hereinafter Koniak, *Corporate Fraud*] (outlining how lawyers have been central to recent corporate wrongdoings); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1239–43 (2003) [hereinafter Koniak, *Hurlyburly*] (noting that lawyers actively participated in ongoing corporate violations).

16. Section 307 of the Sarbanes-Oxley Act provides:

Not later than 180 days after the date of the enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

15 U.S.C. § 7245 (Supp II 2002). This section was the result of an amendment offered by Senators Edwards, Enzi, and Corzine. See 148 CONG. REC. S6580 (daily ed. July 10, 2002). The substance of the amendment is based on a recommendation for an up-the-ladder reporting rule contained in a letter forty law professors submitted to the SEC, which was forwarded to Congress after the SEC took no action. See *id.* at S6552 (statement of Sen. Edwards) (referring to the letter and how then-Chairman Harvey L. Pitt never responded to his inquiry regarding whether to act consistent with the letter's recommendations); *id.* at S6557 (stating that the amendment parallels what the letter recommended); Letter From Several Professors of Securities Regulation and/or Professional Responsibility of Noted Law Schools to Harvey L. Pitt, Chairman, SEC (May 7, 2002) [hereinafter Letter from Several Professors] (asking the SEC to promulgate a rule requiring "a lawyer who represents a corporation in connection with its securities law compliance to inform the client's board of directors if the lawyer knows that the client is violating the

Commission ("SEC") to promulgate rules of professional conduct for attorneys practicing before it, mandating that issuer attorneys report material violations of securities laws to chief legal or executive officers and then, if no appropriate remedial action is taken, to a committee of outside directors.¹⁷ The SEC's consideration of these "up-the-ladder" reporting requirements and its initial proposal to require corporate counsel to make a "noisy withdrawal"¹⁸ from issuer representation in certain circumstances (i.e., informing the SEC of the decision to withdraw) produced vigorous public discussions about the role of client confidentiality in facilitating legal compliance.¹⁹

Many, including the American Bar Association ("ABA"), criticized aspects of up-the-ladder reporting requirements²⁰ and, even more so, the proposed noisy withdrawal obligations.²¹ A core criticism was that some of the new requirements would chill client candor by undermining the confidential relationship attorneys and their clients enjoy as a result of attorneys' professional obligation to maintain confidentiality and the protections afforded by the attorney-

securities laws and senior management does not promptly rectify the violation."), available at <http://www.abanet.org/buslaw/corporateresponsibility/pitt.pdf>; see also 148 CONG. REC. S6555 (statement of Sen. Enzi) ("I am usually in the camp that believes States should regulate professionals within their jurisdiction. However, in this case, the State bars as a whole have failed.").

17. 15 U.S.C. § 7245.

18. The SEC originally proposed, and continues to consider, requiring an attorney to resign and report violations to the SEC when a corporate client has not made an appropriate response after being notified of an ongoing material violation. See Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release Nos. 33-8186, 34-47283, 68 Fed. Reg. 6324, 6324 (proposed Feb. 6, 2003) (setting forth the proposed noisy withdrawal requirements and the alternative of an issuer report to the SEC).

19. See *supra* note 1. The SEC received over 150 comment letters during the initial comment period on the proposed rules. Stabile, *supra* note 1, at 39.

20. See American Bar Association, Letter from Alfred P. Carlton, Jr., President, to Jonathan G. Katz, Secretary, SEC (Dec. 18, 2002) (commenting on the up-the-ladder requirements and urging changes to them), available at <http://www.sec.gov/rules/proposed/s74502/apcarlton1.htm>; see also Letter from Seventy-seven Law Firms, *supra* note 1 (commenting on the same).

21. See Letter from Alfred P. Carlton, *supra* note 20 (urging on behalf of the ABA that the noisy withdrawal provisions not be adopted); Letter from Seventy-seven Law Firms, *supra* note 1.

client privilege.²² Full and frank attorney-client communications, the critics have contended, are necessary for attorneys to serve the critical function of fostering legal compliance with securities laws.²³ Others have disagreed, arguing that these new obligations are unlikely to reduce communications with attorneys within the corporation;²⁴ that, even if some communications were chilled, most socially desirable communications would not be chilled;²⁵ and that,

22. For example, in a December 18, 2002, letter from seventy-seven law firms, the firms contended that regulations under the Act will result in a loss of candor and trust within the attorney-client relationship and, consequently, "the public will inevitably be harmed in some cases when it need not have been." Letter from Seventy-seven Law Firms, *supra* note 1; see also *Panel 2: The Evolution of Corporate Governance*, Washington, D.C., Friday, November 22, 2002, 52 AM. U. L. REV. 613, 624 (2003) (comments of Professor Roberta Karmel) ("Although the SEC says that it does not intend to impair zealous advocacy essential to the SEC's processes, or discourage issuers from seeking effective and creative legal advice, in my opinion, this is precisely what the rule is going to do. It is going to make securities attorneys into a band of policemen working partly for their clients and partly for the SEC.").

23. See Letter from Seventy-seven Law Firms, *supra* note 1; Robert J. Jossen, *Dealing with the Lawyer's Responsibilities Under the Sarbanes-Oxley Act of 2002: Ethical Dilemmas and Practical Considerations*, in ALI-ABA COURSE OF STUDY: SARBANES-OXLEY INSTITUTE, 667, 711 (2003) (referring to the comments of Susan P. Koniak et al.) ("[R]equiring noisy withdrawal would not further the [SEC]'s goals, because it would cause clients to exclude attorneys from meetings where sensitive information was exchanged that could lead an attorney to think a material violation has been committed."), WL SJ064 ALI-ABA 667, 711; see also *Panel 2: The Evolution of Corporate Governance*, *supra* note 22, at 627 (comments of Professor Stuart Kaswell) ("It will turn into a fear relationship where they are afraid to view the lawyers as part of the team to keep the company out of trouble. I think that the net effect of that will backfire.").

24. See *Stabile*, *supra* note 1, at 44-45 ("The first question is whether there is any concern that the up-the-ladder reporting requirement will have a chilling effect on attorney-client communication. The simple answer is no. . . . [C]lients already know such reporting is possible in the case of violations of law. Since client reaction is hardly likely to depend on the particulars of the reporting standard, if any chilling were likely, it would already be occurring.").

25. See *Coffee*, *Attorney as Gatekeeper*, *supra* note 1, at 1307-08 ("[T]he practical issue becomes whether gatekeeper obligations would necessarily chill desirable attorney-client communications. . . . A starting point for this analysis should be the recognition that the client knows little law and will almost always want to know if contemplated action is illegal. From this premise, it follows that the corporate official contemplating prospective action will still inquire of counsel whether the course of action under consideration is

on balance, the benefits of mandated attorney disclosure would exceed the costs of reduced candor.²⁶

The SEC has promulgated final rules that include up-the-ladder reporting requirements.²⁷ After acknowledging the need to study carefully the impact of a noisy withdrawal requirement on client candor, however, the Commission agreed to defer its decision on such a provision.²⁸ It has yet to enact a final rule regarding noisy withdrawal and has asked for comments on less onerous alternatives, including mandating attorney withdrawal without attorney notice to the agency.²⁹

The implications of this debate for the role of lawyers in corporate governance, and correspondingly, the role of the attorney-client privilege in the regulation of the corporation could not be more profound. There is growing agreement that issuers' attorneys, along

lawful. . . . In short, it is the ex post inquiry by the client of the attorney that is most likely to be chilled.”).

26. *See id.* at 1309–10 (noting that “even if it were true that clients would consult their lawyers less often, this impact could be more than fully offset by the fact that it would become more dangerous to disregard the lawyers’ advice”); *see also* Koniak, *Corporate Fraud*, *supra* note 15, at 229–30 (arguing in favor of a robust noisy withdrawal or disclosure requirement).

27. *See* 17 C.F.R. § 205.3(a)–(c) (2004); *see also* Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185, 34-47276, 68 Fed. Reg. 6296 (Feb. 6, 2003) (setting forth the final up-the-ladder requirement and providing commentary on the rule) [hereinafter Final Rule]. The rules also provide for permissive disclosure on the part of the attorney in circumstances in which the attorney believes it is necessary to prevent the issuer from committing a material violation of securities laws that is likely to cause substantial financial injury to the issuer or investors, to prevent the issuer from committing perjury or committing a fraud upon the SEC, or to rectify substantial injuries to the issuer or investor. *See* 17 C.F.R. § 205.3(d). This permissive disclosure provision adds little to the permissive disclosures allowed under the rules of professional conduct of most states. *See* M. Peter Moser & Stanley Keller, *Sarbanes-Oxley 307: Trusted Counselors or Informers?* 49 VILL. L. REV. 833, 838 (2004) (“This permissive reporting rule resembles exceptions in the ABA Model Rules and lawyer conduct rules that apply in all but eight states.”).

28. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release Nos. 33-8186, 34-47283, 68 Fed. Reg. 6324, 6324–37 (proposed Feb. 6, 2003). The SEC has yet to take final action on its proposed “noisy withdrawal” provisions.

29. *See id.* at 6329–30 (discussing proposed Section 205.3(e), which would require the issuer to report the withdrawal of the attorney).

with auditors, market analysts, independent board members, and perhaps others, must be viewed as “gatekeepers,” private intermediaries upon which the integrity of the securities markets depend.³⁰ And Congress and the SEC, along with many practitioners and scholars, now agree that our securities and corporate law regimes should be structured—or perhaps more aptly, restructured—to facilitate such gatekeeping.³¹ Yet, although federal securities laws in general and most of the Sarbanes-Oxley Act seek to foster market integrity largely through disclosure,³² the attorney-as-gatekeeper function may not be best served by more attorney disclosure.

30. See Coffee, *Attorney as Gatekeeper*, *supra* note 1, at 1305–08 (discussing the gatekeeping role); Leslie Wharton, *What Impact Will the New SEC Rules Have on the Attorney-Client Privilege?* 10 BUS. TORTS J. 4 (2003) (“In the post-Enron environment . . . the SEC may be more inclined to proceed against counsel, whose failure as ‘gatekeepers’ the SEC views as a major contributor to issuer non-compliance.”), http://www.arnoldporter.com/pubs/files/Wharton_BTJ_Sum_2003.pdf. Obviously, since many commentators have now adopted the term “gatekeeper,” it has no single meaning, and the views regarding how gatekeeping is best achieved certainly will differ. As I use the term, a gatekeeper is a professional, sufficiently independent and appropriately positioned to assess issuer disclosures and protect investors through disclosure, withholding necessary consent to issuer actions, or other means. As I discuss, the optimal means of serving this gatekeeping function may vary by the type of gatekeeper. See, e.g., Coffee, *Gatekeeper Failure*, *supra* note 1.

31. See, e.g., 148 CONG. REC. S6552, S6555–56 (daily ed. July 10, 2002) (statements of Sens. Edwards, Enzi, and Corzine) (emphasizing, in offering the amendment that became Section 307, the role attorneys play in ensuring market integrity); Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release Nos. 33-8186, 34-47283, 68 Fed. Reg. 6324, 6325 (proposed Feb. 6, 2003) (“[T]he Commission, and the investing public, must be able to rely upon the integrity of in-house and retained lawyers who represent issuers before the Commission. Attorneys also play an important and expanding role in the internal processes and governance of issuers, ensuring compliance with applicable reporting and disclosure requirements, including requirements mandated by the federal securities laws.”); see also William H. Donaldson, *Speech by SEC Chairman: Remarks to the Practicing Law Institute* (Nov. 6, 2003) (“One of the [Act’s] most important objectives is to strengthen the performance of the traditional ‘gatekeepers’ to the markets, especially public company accountants, research analysts and lawyers.” (emphasis added)), available at <http://www.sec.gov/news/speech/spch110603whd.htm>.

32. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (stating, in the full title that the purpose of the Act is “[to] protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws”).

Indeed, if the instrumentalist justifications for corporate counsel's obligation to maintain confidentiality and the corporate attorney-client privilege are sound,³³ then shielding at least some attorney-client confidences from disclosure will foster greater issuer compliance with securities laws and, hence, shareholder interests, even if this occasionally means that some intracorporate information will not be revealed or discovered.³⁴

Much has been said and written about the SEC's various proposals and their implications for the privilege. This article will not reexamine the entire debate. Rather, it will offer several observations on what Sarbanes-Oxley, the SEC's actions, and the underlying debate tell us about where the attorney-client privilege fits into the larger discussion of corporate governance and how to approach privilege reform.

To begin with, Congress's passage of Section 307 and the SEC's actions reflect intent to strike a balance between maintaining the relationship of trust and confidence between counsel and the corporation and achieving greater scrutiny of securities attorneys' conduct.³⁵ On one hand, Section 307 makes clear Congress's desire

33. *See supra* note 31 (summarizing these justifications).

34. *See, e.g., supra* note 31; *see also* *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (indicating that ensuring the client's compliance with the law is one of the ends of the corporate privilege); JOHN WILLIAM GERGACZ, *ATTORNEY-CORPORATE CLIENT PRIVILEGE* § 1.12 (3d ed. 2001) (stating that the privilege promotes law-abiding behavior); *see also* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release Nos. 33-8186, 34-47283, 68 Fed. Reg. 6324, 6326 (proposed Feb. 6, 2003) ("At the same time, the Commission does not want the rule to impair zealous advocacy, which is important to the Commission's processes. The Commission also does not want the rule to discourage issuers from seeking and obtaining appropriate and effective legal advice.").

35. *See, e.g.,* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release Nos. 33-8186, 34-47283, 68 Fed. Reg. 6324, 6326 (proposed Feb. 6, 2003) (stating the Commission believes that the proposed rules "deter instances of attorney and issuer misconduct, and, where misconduct has occurred, reduce its impact on issuers and their shareholders. At the same time, the Commission does not want the rule to impair zealous advocacy, which is important to the Commission's processes. The Commission also does not want the rule to discourage issuers from seeking and obtaining appropriate and effective legal advice."); *see also* 148 CONG. REC. S6552, S6555-57 (daily ed. July 10, 2002) (statements of Sen. Enzi, Sen. Edwards, and Sen. Sarbanes) (discussing the care that was taken to ensure that the

to have the SEC monitor more closely how issuer attorneys act. Indeed, despite protests that regulation of the practice of law is best left to the bar and individual jurisdictions of practice,³⁶ Congress decided to impose more rigorous or at least more clear standards of professionalism and other legal constraints on securities lawyers,³⁷ and the SEC has since acted pursuant to that mandate.³⁸ At the same time, however, Congress and the SEC have seemingly embraced the notion that protecting client confidences assists in promoting compliance with the law.³⁹ For example, Section 307's up-the-

amendment that became Section 307 would not threaten the attorney-client privilege nor mandate that disclosures be made outside the corporate client).

36. See Cohn, *supra* note 3 (arguing that even proposed regulations, such as the noisy withdrawal provisions, threaten the independence of the legal profession); Gary Young, *ABA Moves to Work with SEC on New Conduct Rules*, NAT'L L.J., Nov. 18, 2002, at A31 ("Before Section 307 became law, the ABA's main complaint was that it put attorney discipline, until now the exclusive domain of the state courts, into the hands of a federal agency."); Roberta S. Karmel, *A Bid to Regulate the Entire Bar*, N.Y. L.J., Dec. 19, 2002, at 3 ("[S]ince the substantive provisions of Sarbanes-Oxley changes this line between federal and state law only with respect to a few particularized matters, such as the composition of audit committees and loans to executive officers and directors, it would be anomalous if Congress expanded the SEC's jurisdiction to regulate attorneys to matters beyond the SEC's jurisdiction to regulate public corporations.").

37. See 148 CONG. REC. at S6562 (statement of Sen. Edwards) (discussing the need to mandate through new rules of professional conduct that lawyers, in addition to accountants and executives ensure that the law is being followed); *id.* at S6555 (statement of Sen. Enzi) ("I am usually in the camp that believes States should regulate professionals within their jurisdiction. However, in this case, the State bars as a whole have failed.").

38. Indeed, in considering a noisy withdrawal requirement, the SEC appears to have construed its mandate broadly, at least initially. See Otis Bilodeau, *SEC Rules on Lawyers Draw Flak, Plan Blasted by Corporate Bar and by Advocates of Reform*, LEGAL TIMES, Nov. 11, 2002, at 1 ("The SEC's summary of the proposed rules makes clear that the commission has opted to cover more territory than Sarbanes-Oxley specifically requires."). Some, however, contend that the SEC ultimately did not go far enough in ensuring attorneys report misconduct up the ladder. See, e.g., Koniak, *Hurlyburly*, *supra* note 15, at 1274-77.

39. See Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release Nos. 33-8186, 34-47283, 68 Fed. Reg. 6324, 6326 (proposed Feb. 6, 2003) ("The Commission also does not want the rule to discourage issuers from seeking and obtaining appropriate and effective legal advice."). Senator Edwards stressed that the reporting requirements that were to be embodied in Section 307 would be strictly internal, and impose no

ladder requirements impose no external disclosure obligation on issuer counsel (which would reveal intracorporate confidences).⁴⁰ Likewise, the Commission's decision to defer its final determination on noisy withdrawal—whether correct or not—shows its sensitivity to client confidentiality concerns.⁴¹

Neither Section 307 nor the underlying regulations directly address the substance of attorney-client privilege protections. Nevertheless, the privilege has been part of the conversation throughout, and these provisions—and the balance they strike—reflect the value Congress and the SEC place on attorney-issuer confidentiality, for which the attorney-client privilege provides core protection.⁴² In fact, in offering the amendment that became Section 307, Senator Enzi emphasized that the up-the-ladder reporting requirement would be entirely intra-corporate and would not breach

obligation to report externally to the SEC. *See* 148 CONG. REC. at S6557 (“[T]he only obligation that [Section 307] creates is the obligation to report to the client. . . . There is no obligation to report anything outside the client—the corporation.”).

40. In his statements supporting the amendment that became Section 307, Senator Enzi emphasized that the reporting requirements for lawyers would be less onerous than those required for accountants and that up-the-ladder obligations would not breach the privilege. *See* 148 CONG. REC. at S6555 (statement of Sen. Enzi).

41. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release Nos. 33-8186, 34-47283, 68 Fed. Reg. 6324, 6326 (proposed Feb. 6, 2003) (“The Commission also does not want the rule to discourage issuers from seeking and obtaining appropriate and effective legal advice. In this regard, the Commission today is proposing for comment alternative provisions to the ‘noisy withdrawal’ provisions contained in the Proposing Release.”). Critics suggest this is an example of the Commission succumbing to pressure from the bar and legal organizations. *See, e.g.,* Koniak, *Corporate Fraud*, *supra* note 15, at 230. The ABA and other legal groups clearly influenced the decision. Nevertheless, I believe that the Commission appropriately considered the implications for issuer-attorney confidentiality. Ultimately, as I state below, I support a noisy withdrawal provision, but I believe preserving confidentiality in general is essential in facilitating attorney gatekeeping.

42. *See, e.g.,* Stabile, *supra* note 1, at 43 (noting that although the attorney's ethical obligation to keep client confidences and the attorney-client privilege are not co-extensive in terms of their protection, they emanate from the same concern).

the privilege.⁴³ Similarly, the SEC has acknowledged the role the privilege plays in protecting confidences and has sought to ensure that the rules are consistent with the aims of the privilege.⁴⁴ This recognition is embodied in the SEC's final up-the-ladder provision, which states that, by making the required report to the issuer's officers or directors, "an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer."⁴⁵

Indeed, in my view, neither the up-the-ladder requirements, nor a narrowly tailored noisy withdrawal provision will undermine the aims of client confidentiality or the privilege. Up-the-ladder reporting is entirely consistent with the justification for the corporate privilege.⁴⁶ This privilege does not ensure that each corporate actor's communications with counsel will be kept confidential vis-à-vis other corporate actors; on the contrary, the entity is the client, and thus, counsel must share gathered information with corporate

43. 148 CONG. REC. at S6555; *see also id.* at S6557 (statements of Sens. Edwards and Sarbanes) (confirming in an interchange the importance of the internal nature of the reporting requirement).

44. *See, e.g.*, Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185, 34-47276, 68 Fed. Reg. 6296, 6306-07 (Feb. 6, 2003) (withdrawing an attorney-documentation requirement in part out of concerns for client vulnerability to adverse judicial decisions on the privilege); Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release Nos. 33-8186, 34-47283, 68 Fed. Reg. 6324, 6329 (proposed Feb. 6, 2003) (emphasizing privilege concerns).

45. 17 C.F.R. § 205.3(b)(1) (2004). The SEC does, however, allow attorneys to use the report—which may otherwise be privileged information owned by the issuer—in connection with any investigation, proceeding, or litigation in which the attorney's compliance with up-the-ladder requirements is at issue. *See id.* §205.3(d)(1).

46. *See, e.g.*, 148 CONG. REC. at S6555 (statement of Senator Enzi) ("The attorney owes a duty to its client which is the corporation and the shareholders. By reporting a legal violation to management and then the board of directors, no breach of the privilege occurs, because it is all internal."); Stabile, *supra* note 1, at 48-49; *see also* Moser & Keller, *supra* note 27, at 837 (suggesting that up-the-ladder requirements produce benefits and have found general acceptance because they are consistent with existing legal norms). This does not mean that the particular up-the-ladder reporting regime the SEC ultimately adopted is perfect. It could, for example, provide clearer guidance for attorneys in some contexts, which would assist them in satisfying their professional duties.

decision makers.⁴⁷ The up-the-ladder requirements simply define who the appropriate decision makers are and mandate how and when attorneys must share certain information with these decision makers.⁴⁸

Moreover, a noisy withdrawal provision that provides for intracorporate exhaustion (disclosure to upper management with the corresponding opportunity to correct) before notice of withdrawal to the SEC—for which each of the proposed withdrawal rules provide⁴⁹—will not chill the candor the privilege may promote as long as the parameters of the obligation are sufficiently precise so as to not create the appearance of some broad duty to disclose.⁵⁰ In

47. See 17 C.F.R. § 205.3(a) (clarifying that the issuer, rather than individual officers, directors, or employees is the client); see also 148 CONG. REC. at S6555–56 (statements of Sens. Enzi and Corzine) (same); *Letters from Several Professors*, *supra* note 16 (stating that the corporation is the client and that attorneys therefore have an ethical obligation to inform the corporation's directors of corporate wrongdoing); Koniak, *Corporate Fraud*, *supra* note 15, at 217 (describing the failures of lawyers in Enron). “[T]he lawyers’ client was the company, not management or directors, and when criminal activity was about to jeopardize the company’s future and thus the fortunes of its shareholder-owners, lawyers had to act to protect the client by telling management and directors to cease or notify the authorities.” *Id.* Under state and federal corporate law, corporate decision makers are those persons that corporate law—state and federal—assigns authority to act on behalf of the entity. See, e.g., DEL. CODE ANN. tit. 8, §141(a) (2002) (allocating to directors the power to manage the affairs of the corporation).

48. 17 C.F.R. § 205.3(a) (discussing reporting obligations of issuer attorneys). Indeed, Section 307 and the underlying rules address the pre-existing widespread practice among corporate counsel to report only to officers or other insiders, not to the truly independent members of the board (if there are any). They therefore addresses the ongoing *corporate law* problem of undue insider influence and weak boards of directors. See, e.g., 148 CONG. REC. at S6551 (indicating that lawyers who start to believe and act as if the CEO, rather than the entity, is the client is one cause for the problems on Wall Street).

49. See Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release Nos. 33-8186, 34-47283, 68 Fed. Reg. 6324, 6324 (proposed Feb. 6, 2003); see also 17 C.F.R. § 205.3(b) (requiring an attorney to initially “report such evidence to the issuer’s chief legal officer (or the equivalent thereof) or to both the issuer’s chief legal officer and its chief executive officer (or the equivalents thereof) forthwith”).

50. Absent sufficiently clear obligations, both the attorney and the issuer may be deterred from communicating. See Moser & Keller, *supra* note 27, at 848–49 (suggesting the mere existence of a noisy withdrawal requirement is

fact, the proposed withdrawal provisions require no direct disclosure of client confidences, nor would they significantly expand corporate attorneys' existing withdrawal obligations.⁵¹ Also, if exhaustion and the up-the-ladder requirement serve their purpose, there will almost never be a need for such a withdrawal.⁵² And, in the rare circumstance in which issuer counsel is compelled to withdraw, the underlying communications may not be privileged anyway, since withdrawal-precipitating communications may reflect decision maker intent to induce counsel to assist in fraudulent or criminal conduct and, hence, may fall within even a narrowly tailored crime-fraud exception to the privilege.⁵³

likely to deter communications). Although I am concerned about the misperceptions and, hence, the candor-detering effects of a mandatory noisy withdrawal provision, I believe that a carefully drawn provision that is both clear in its scope and its status as a "last resort" will not deter most communications.

51. See Koniak, *Hurlyburly*, *supra* note 15, at 1270; Stabile, *supra* note 1, at 47; Am. Bar Ass'n Task Force on Corporate Responsibility, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, July 16, 2002, 58 BUS. LAW. 189, 209 (2002) (outlining preliminary recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct). There is, however, some tension between the permissive disclosure provisions and some state disclosure rules. See, e.g., Brooke A. Masters, *New Rules Leave Lawyers in Bind on Whistle-Blowing*, WASH. POST, Aug. 6, 2003, at E01 (discussing the tensions between the SEC's final and proposed rules and those promulgated and supported by state bar associations). But see James M. McCauley, *Corporate Responsibility and the Regulation of Corporate Lawyers*, VA. LAW REG., Nov. 2002, at 3 (noting that thirty-seven states permit disclosure to prevent a client's ongoing fraud and 4 states require such disclosure), available at http://www.vsb.org/publications/valawyer/nov02/legal_ethics.pdf.

52. See Moser & Keller, *supra* note 27, at 848 (opposing withdrawal, but suggesting that it will apply in the rarest of situations). Indeed, New Jersey's rules of professional conduct provide for mandatory disclosure to prevent certain prospective financial harms resulting from fraud. See N.J. RULES OF PROF'L CONDUCT R. 1.6(b)(1), 1.13.

53. Although the scope and operation of the crime-fraud exception is far from clear, see *supra* note 10 and accompanying text, at minimum, the exception prevents clients from using the privilege to shield from discovery communications with counsel made for the purpose of furthering or facilitating the commission of a crime or fraud. See, e.g., *United States v. Zolin*, 491 U.S. 554, 562-63 (1989) (addressing the crime-fraud exception). To determine whether the exception applies, a court will engage in an in camera review of the allegedly privileged communications after the party seeking discovery

Thus, Sarbanes-Oxley and the SEC's new rules will not, in all likelihood, conflict with the privilege or otherwise threaten the relationship of trust and confidence between issuers and their attorneys. The far greater danger, in my view, is that a new attorney-as-gatekeeper regime will fail to achieve its purposes. Heightened standards of professionalism are insufficient, alone, to facilitate attorney gatekeeping.⁵⁴ Up-the-ladder reporting, for example, will foster compliance only if the principals in the corporate structure—high-ranking corporate officers, directors, and securities lawyers—otherwise have sufficient incentives to facilitate monitoring and full communication within the enterprise.⁵⁵ That individual officers and employees (who may have conflicting incentives and neither own nor control corporate confidences) might be disinclined to speak freely with corporate counsel is not news.⁵⁶ It is therefore incumbent

demonstrates a factual basis adequate to support a reasonable and good faith belief that such a review may reveal evidence that the exception applies. See *id.* at 572.

54. See, e.g., David J. Beck, *The Legal Profession at the Crossroads: Who Will Write the Future Rules Governing the Conduct of Lawyers Representing Public Corporations?* 34 ST. MARY'S L.J. 873, 879–80 (2003) (“[I]t is not enough that the attorney be aware of these professional responsibilities. The attorney now must strive to make the corporation’s officers, managers, and directors understand that the attorney’s duties run *solely* to the corporation itself. . . . The attorney representing a corporation, therefore, must separate the interests of the corporation from those of the individual representatives with whom the attorney interacts and to whom the attorney must answer.”).

55. See Stabile, *supra* note 1, at 49 (“The voluntary compliance model, however, works only when companies actually conform their behavior in accordance with the law. Sole reliance on an up-the-ladder reporting requirement assumes that the board to whose attention the violation of law is brought has the ability and the will to address the problem.”); Beck, *supra* note 54, at 880 (“Compliance with the up-the-ladder reporting provision will require that outside counsel remain vigilant in their role, and that their unbridled duties of care and loyalty are to the corporation.”); see also *Panel Three: Ethical Dilemmas Associated with the Corporate Attorney’s New Role*, *supra* note 1, at 666–67 (“In a practical world, I do not know of a single general counsel who honestly believes that they would report up-the-ladder of their management, and even beyond their management to the board”)

56. See Robert A. Desilets, Sr., *The Model Rules of Professional Conduct and the Securities Attorney: Confidentiality, Confusion, and the Need for Change*, 23 CAP. U. L. REV. 611, 612 (1994) (noting that there are a “myriad of competing interests” within the corporation); see also Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve*

upon corporate decision makers to compel cooperation with counsel and to develop effective oversight and information gathering mechanisms to ensure that both they and counsel receive as much reliable information as possible.

Plainly speaking, the law must create *layers* of incentives for decision makers to keep counsel genuinely “in the loop” on all securities matters and then for principal corporate actors, including attorneys, to act appropriately on the information they receive. Recent events on Wall Street offer a stark reminder that such incentives cannot be taken for granted.⁵⁷ Sarbanes-Oxley and its regulatory progeny have sought to address these problems in a variety of ways beyond the rules of professional conduct discussed here, including facilitating greater director independence and oversight;⁵⁸ expanding disclosure obligations for various high-

Corporate Lawyers' Professional Conduct, 17 GEO. J. LEGAL ETHICS 1, 27 (2003) (“A corporation has no single pair of eyes whose reliability can give the lawyer confidence in the information received. No matter how a lawyer tries to ascertain the truth in a corporate context, there will always be the prospect that the appearance is other than the reality.”); Am. Bar Ass’n, *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 150 (2003) [hereinafter *ABA Task Force Report*] (“Direct operational control of American public corporations is, and must remain, primarily in the hands of their senior executive officers . . . This . . . may give rise to potential conflicts of interest and other motivational problems that present persistent challenges for effective corporate governance.”).

57. See, e.g., Koniak, *Corporate Fraud*, *supra* note 15, at 196–211; see also Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1190 (2003) (“[Enron’s managers’] fraud could not have been carried out without the lawyers’ active approval, passive acquiescence, or failure to inquire and investigate.”).

58. See, e.g., 15 U.S.C. § 78j–1 (2000) (requiring that audit committees be independent and defining independence); 15 U.S.C. § 7245(2) (Supp II 2002) (“[I]f the counsel or officer does not appropriately respond to the evidence . . . requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors *comprised solely of directors not employed directly or indirectly by the issuer*, or to the board of directors.” (emphasis added)); 17 C.F.R. § 205.2(k)(1) (2004) (defining qualified legal compliance committee as consisting of “at least one member of the issuer’s audit committee . . . and two or more members of the issuer’s board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, *interested persons*.” (emphasis added)).

ranking officers;⁵⁹ and enhancing professional, civil, and criminal sanctions for officers and attorneys who fail to comply with securities mandates.⁶⁰

These improvements may not be adequate, however. To begin with, like many commentators, I believe other aspects of Sarbanes-Oxley do not go far enough in promoting appropriate incentives on the part of corporate officers, directors, and various gatekeepers (including attorneys).⁶¹ In addition, although Section 307 is an important step in the right direction, I agree with some of the critics that the up-the-ladder reporting requirements would be more

59. See, e.g., 15 U.S.C. § 7241 (Supp II 2002) (providing additional reporting requirements for certain officers).

60. See, e.g., Pub. L. No. 107-204, secs. 304-05, 801-906, 116 Stat. 745, 778-79, 800-06 (2002) (codified as amended in various sections of the U.S.C.) (providing enhanced professional, civil, and criminal penalties for corporate officials who violate federal securities laws); 17 C.F.R. § 205.6 (providing for civil and professional penalties for attorneys who fail to comply with their professional obligations); Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002-03: On Sideshow Prosecutions, Spitzer's Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443, 455 (2004) (discussing the severe criminal penalties the Act imposes on those found guilty of violating relevant portions of federal securities laws).

61. For example, I believe Congress should have done more to ensure that the bulk of directors will be truly independent. See, e.g., *ABA Task Force Report*, *supra* note 56, at 177-78 (arguing in favor of mandating that a majority of the board be independent, and listing other proponents of such a mandate). Moreover, I agree with Professor Koniak that Congress should have abrogated *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), and thereby revived the "aiding and abetting" theory—applicable against lawyers and others corporate agents who assist in securities fraud—in private actions under Section 10b-5. See Koniak, *Hurlyburly*, *supra* note 15, at 1268. I also agree with Professor Coffee that corporate actors including attorneys should be subject to sanctions or liability for failing to act with due diligence. See Coffee, *Attorney as Gatekeeper*, *supra* note 1, at 1310-11. I am also in favor of subjecting highest-ranking officers to strict or near-strict liability for securities fraud attributable to the issuer. See also Coffee, *Gatekeeper Failure*, *supra* note 1, at 346-53 (discussing the benefits of a strict liability for various corporate actors, yet concluding that a modified strict liability system would be most effective). Indeed, I recently argued that high-ranking corporate officers ought to be vicarious liable for corporate torts and tort-like statutory violations. See Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329 (2004).

effective if they were clearer and more demanding.⁶² And I believe regulation of counsels' conduct ought to go further, including not only a noisy withdrawal requirement, but also, as Professor Coffee has advocated, some kind of due diligence obligation, at least for attorneys serving the gatekeeping function.⁶³

Yet, in addition, although the SEC has emphasized the importance of maintaining attorney-issuer confidentiality in promoting compliance,⁶⁴ it has not and perhaps cannot regulate extrinsic pressures on such confidences, including pressures on the attorney-client privilege. The Commission recognized as much in withdrawing a provision from its final up-the-ladder rules that would have required attorneys to retain documentation of their internal

62. See, e.g., Koniak, *Hurlyburly*, *supra* note 15, at 1274–77; Jossen, *supra* note 23, at 699 (Koniak comments) (“Any lawyer worth her salt will almost always be able to conclude that it is not ‘unreasonable’ to conclude that the evidence before her demonstrates legal conduct. Why? Because lawyers are trained to reimagine evidence of illegality as evidence of legality. Because the ethos of lawyers is not to report up the corporate ladder. . . . The [SEC]’s standard is an invitation to inaction.”); see also Coffee, *Attorney as Gatekeeper*, *supra* note 1, at 1310–13 (proposing additional attorney obligations, including a due diligence obligation and a certification requirement); Coffee, *Gatekeeper Failure*, *supra* note 1.

63. See, e.g., Coffee, *Gatekeeper Failure*, *supra* note 1, at 359–60. I am also sympathetic to arguments in favor of requiring independent (outside) issuer counsel to certify securities disclosures in addition to performing due diligence. See *id.* at 355–56. I would tentatively question the need and advisability of such a requirement, if it were imposed on all attorneys assisting in securities transactions, not just those serving the independent gatekeeping function. As long as issuer counsel is properly constrained by a combination of robust professional obligations (e.g., up-the-ladder reporting, noisy withdrawal, and due diligence obligations) and the risk of biting civil and criminal sanctions, there should be sufficient incentives to uncover, report appropriately, and seek to prevent or remedy inadequate disclosures. Moreover, the specter of direct public disclosures by all corporate attorneys is more likely to chill candor and communication with counsel than are the other existing and proposed obligations, even when corporate decision makers seek in good faith to comply with securities requirements. See *infra* notes 72–73 and accompanying text.

64. See Jossen, *supra* note 23, at 705 (“[T]he [SEC] apparently took concerns that ‘our clients will not confide in us anymore’ seriously enough to lead it to change from its original proposal to its alternatives”); *id.* at 719 (noting that adverse effects on attorney-client privilege will ultimately lead to harm for the issuers, markets, and economy).

reporting efforts.⁶⁵ Indeed, the Commission stated that while it “may be of the view that such documentation should be protected by the attorney-client privilege, the *applicability of the privilege will be decided by the courts,*” and, “*thus, there is considerable uncertainty as to whether it will be protected.*”⁶⁶ Convinced that this risk might increase issuers’ vulnerability in litigation and foster a perception of attorneys as conflicted, the Commission concluded that the potential adverse effects of such a documentation requirement on client candor outweigh its potential benefits.⁶⁷

Given this recognition, and the broader emphasis on confidentiality, it is somewhat surprising that the discussion of Sarbanes-Oxley has largely overlooked the fundamental question of whether existing attorney-client privilege protections are otherwise sufficient to ensure corporate decision makers and attorneys promote full communication and, correspondingly, facilitate legal compliance. If not, then the benefits of confidentiality Section 307 and the underlying rules seek to preserve may be jeopardized. In other words, no one has addressed whether reform of *underlying* attorney-client privilege law might be needed or at least helpful in facilitating the attorney gatekeeping the post-Sarbanes-Oxley securities regime envisions.⁶⁸

65. See Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185, 34-47276, 68 Fed. Reg. 6296, 6306-07 (Feb. 6, 2003).

66. *Id.* at 6307 (emphasis added).

67. See *id.* at 6306-07.

68. The closest the discussion has come to this involved another withdrawn provision of the up-the-ladder requirements, which would have provided that the privileged status of issuer-attorney communications would not be waived vis-à-vis third parties if the communications were shared with the Commission pursuant to a confidentiality agreement. See *id.* at 6312. With regard to such a “selective waiver” rule, the Commission stated as follows:

Several commentators stated that it was uncertain if the Sarbanes-Oxley Act granted the Commission the authority to promulgate a rule that would control determinations by state and federal courts whether a disclosure to the Commission, even if conditioned on a confidentiality agreement, waives the attorney-client privilege or work product protection, and a few suggested that the proposed paragraph would conflict with Federal Rule of Evidence 501. They noted that this is an unsettled issue in the courts, or suggested that the Commission’s proposed rule runs contrary to the bulk of decisional

A few defenders of the original noisy withdrawal proposal have questioned the extent to which protecting attorney-client communications—via attorney confidentiality obligations or the privilege—is actually necessary to promote compliance.⁶⁹ Their principal contention is that corporate decision makers seeking to comply with securities laws have other, sufficient incentives to promote socially beneficial communications with counsel.⁷⁰ Although I support a clear and narrowly tailored noisy withdrawal requirement, I believe that protection for many client confidences is

authority on this issue. A few also noted that proposed legislation before Congress in 1974, supported by the Commission, that would have enacted a provision permitting issuers to selectively waive privileges in disclosures to the Commission was ultimately not passed by Congress. The concern was expressed that attorneys might disclose information to the Commission in the belief that the evidentiary privileges or that information were preserved, only to have a court subsequently rule that the privilege was waived.

Id. (citations omitted). Ultimately, the Commission decided not to adopt the rule because it was “mindful of concerns” that such disclosures to the Commission might not be protected (despite the Commission’s view that they should be) and that such protection would serve the public interest. *See id.*

69. *See Coffee, Attorney as Gatekeeper, supra* note 1, at 1307–08 (arguing that, because the client does not know the law and will seek to avoid post-Enron prosecution and regulatory action, *ex ante* communications are not likely to be chilled); *Stabile, supra* note 1, at 34 (questioning the need for confidentiality in the corporate context in part because “corporations have little choice but to communicate with their attorneys, regardless of the privilege, given the extent to which their activities involve legal issues and the costs of not receiving necessary legal advice”); *see also* William H. Simon, *Perspective: Managerial Confidentiality is Overrated*, N.Y. L.J., Oct. 2, 2003, at 2 (“Despite these longstanding risks, agents continue to seek legal advice, in part because there are compensating inducements to do so, and risks of not doing so. . . . The Sarbanes-Oxley Act, by increasing the threat of both kinds of liability [civil and criminal], will probably have a far greater effect in encouraging legal consultation than any attorney-disclosure duty could have in reducing it.”).

Professor *Stabile* also suggests that because it lacks empirical support, we ought to reject the proposition that the attorney-client privilege promotes candor or legal compliance. *See Stabile, supra* note 1, at 45. However, as I have argued previously, we cannot verify the effects of the privilege one way or the other. *See Glynn, supra* note 6, at 129–32. Yet, a majority of commentators and policy makers believe it does have a candor-inducing effect, and few continue to argue that the privilege ought to be abandoned in the corporate context or elsewhere.

70. *See* sources cited *supra* note 69.

necessary. Corporate decision makers who want to comply with securities laws may face a strong disincentive to promote full communications with corporate attorneys regarding sensitive matters, if those communications themselves might prejudice the decision makers or the issuer in ongoing or future regulatory, civil, or criminal proceedings.⁷¹ Hence, the attorney-client privilege serves an important buttressing function, reducing the disincentive to communicate or facilitate communications with counsel on such matters. Faced with the specter of potential adversaries taking advantage of attorney-client communications, corporate decision makers and counsel may discourage all but the most essential communications in preparing securities disclosures.⁷²

71. See Glynn, *supra* note 6, at 77. The fact that corporate decision makers may want to comply with the law does not mean that they necessarily will act to maximize communications between corporate actors and counsel. If attorney-client communications were available to adversaries, issuers and their decision makers might be (more) vulnerable to liability, sanctions, or embarrassment, even if the decision makers seek *ex ante* to conform corporate activities to the law. The desire to comply with legal requirements does not preclude the possibility of a lawsuit or regulatory action. Compliance is uncertain in complex regulatory contexts, many things can go wrong, and legal challenges can emerge despite good faith efforts to adhere to legal requirements. And, in an adversarial proceeding, attorney-client communications may provide fodder for adversaries since they may contain frank cost-benefit analyses regarding legal risks, discussions of past legal mistakes or problems, expressions of doubts as to the appropriate course of action, revelations of legal concerns, legal critiques of potential business strategies, statements of displeasure with legal advice or the law, rejected options for compliance that look superior in hindsight, and *many* other sensitive matters. This prospect is enough to deter attorneys and decision makers from having a full and detailed sharing of information and ideas, despite the desire to comply with the law. Again, the SEC recognized this when it ultimately removed its documentation requirement from the up-the-ladder rules, in part out of a concern that the vulnerability of such documents to disclosure in later judicial proceedings (given the uncertainty of the privilege) could deter communications with counsel.

72. See, e.g., Glynn, *supra* note 6, at 77–78 (discussing the benefits of the corporate privilege and scholarship on the subject). This is consistent with the fears expressed about the noisy withdrawal provision, *see supra* notes 18–26 and accompanying text. Again, in my view, a clearly articulated and narrowly drawn withdrawal provision would not have a damaging impact. Indeed, clear and narrowly drawn exceptions to privilege rules, like clear and narrowly drawn exceptions to confidentiality rules, would not deter socially beneficial corporate communications since lawyers and their clients would be able to

Indeed, if protection of attorney-client confidences does not have the potential to enhance compliance with the law, then perhaps the up-the-ladder reporting and the proposed noisy withdrawal requirements are far too easy on attorneys: corporate attorneys ought to be treated like corporate managers and other gatekeepers, and should have a duty to disclose various communications or potential violations directly to the market or the SEC.⁷³ Few advocate treating attorneys exactly like other corporate actors, however, largely because such treatment would be contrary to the predominant view—now adopted explicitly by the SEC and implicitly endorsed by Congress⁷⁴—that protecting attorney-client communications assists in promoting issuer compliance with securities laws.⁷⁵

assess at the time of the communication whether or not it is likely to be protected. However, uncertain protections, and vague, malleable, or open-ended exceptions or waiver doctrines foster unpredictability and, hence, may chill decision maker efforts to facilitate communications with counsel.

73. Accountant-auditors, for example, are required to report illegal acts for which senior management takes no remedial action to both the board of directors and the SEC. See 15 U.S.C. 78j-1(b)(2)-(3) (2000). Of course, broad attorney disclosure obligations would have a more direct and significant impact on intra-corporate candor with attorneys than watered down or uncertain privilege protections, given that disclosure resulting from the absence of the privilege may be temporally distant and would not occur unless the issuer is subject to information demands as part of a civil, criminal, or administrative action. Thus, one could argue that initial protection of client confidentiality is necessary to promote client candor while the privilege is not. However, the risk of disclosure in later proceedings may chill many of the communications initially protected by confidentiality rules. Thus, without adequate privilege protection, one must question the utility of rules that preserve client confidentiality (such as up-the-ladder provisions), particularly in light of their immediate costs (e.g., denying the market or the SEC immediate access to material information or information on wrongdoing). Indeed, to my knowledge, no one who has participated in the debate over Section 307 has argued that issuers should have no attorney-client privilege protection.

74. See 148 CONG. REC. S6555 (daily ed. July 10, 2002) (statement of Sen. Enzi) (emphasizing the need to maintain attorney-client confidentiality and distinguishing the obligations of attorneys from those of accountants). Indeed, even in the initial letter of that spawned Section 307, forty professors recognized that what lawyers would be obligated to do under an up-the-ladder reporting regime would be substantially less demanding than the disclosure obligation imposed on auditors by federal securities law. See Letters from Several Professors, *supra* note 16. Thereafter, the letter suggested that although some signatories believed that in certain circumstances a lawyer

But, again, this prevailing view appears premised on the unspoken assumption that existing privilege protections are sufficiently certain to promote (or avoid chilling) client communications. This assumption is problematic. As I have argued, existing uncertainties in privilege protections, if known to corporate decision makers and their attorneys, would deter communications.⁷⁶ Intra-issuer communications regarding securities matters are no exception. The parameters of the corporate privilege are highly uncertain.⁷⁷ Moreover, because securities claims and enforcement

should be required to do more than report to the board of directors, others did not because “lawyers and auditors have different roles in a representation.” *Id.*

75. See *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1989) (stating that the uncertainty of attorney-client privilege in the corporate context “threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law”); *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985); see also Michael J. Riordan, *The Attorney-Client Privilege and the “Posthumous” Corporation—Should the Privilege Apply?*, 34 TEX. TECH. L. REV. 237, 247 (2003) (discussing the justifications for the corporate privilege); Glynn, *supra* note 6, at 76–78 (discussing the differing views on the corporate privilege and defending the privilege in the corporate context); Jack P. Friedman, *Is the Garner Qualification of the Corporate Attorney-Client Privilege Viable After Jaffee v. Redmond?*, 55 BUS. LAW. 243, 245 (1999) (“The primary purpose of the attorney-client privilege is to encourage open, candid, and full communication between client and lawyer. This serves the administration of justice by enabling a lawyer to give legal advice based on knowledge of all of the facts that prompted the client to seek legal counsel. The legal advice that a fully informed lawyer gives to a client also facilitates compliance with the law. This is especially relevant for corporations, which are subject to complex laws and regulations.” (citations omitted)). Again, no one advocates that *all* attorney-client communications should receive absolute protection; for example, a narrowly tailored crime-fraud exception to the privilege is largely beyond dispute.

76. See Glynn, *supra* note 6, at 62, 74 (“Sufficient certainty or predictability that [attorney-client] confidences will be protected from disclosure is essential to promote, and avoid chilling, client candor. . . . If either client or attorney has significant doubts about the communication’s protected status, each person will be less willing to engage in the interchange.”).

77. See Jossen, *supra* note 23, at 719 (comments of the Bar Association of the City of New York) (“There is no uniform rule of attorney-client privilege which is applicable in all jurisdictions, contexts and proceedings. Thus, the imposition of a duty to report, coupled with the varying approaches to the corporate attorney-client privilege taken by federal courts and the courts of the fifty states, would result in uncertainty in the application of the attorney-client

actions (state and federal) may be brought in a wide variety of state and federal courts and in non-judicial fora, the uncertainty is only enhanced.⁷⁸

One example illustrates this point: some jurisdictions, including the Fourth Circuit, still cling to the erroneous view that the client's intent to disclose the final version of a document means that the privilege never attaches, and hence, drafts of the document are not privileged.⁷⁹ Also, whether and when such drafts are protected is

privilege, particularly in determining when, or if, the privilege has been waived." (citation omitted)); *see also Sarbanes-Oxley: Will It Destroy the In-House Role?*, LAWYER, Mar. 3, 2003, at 2 (indicating that much of the uncertainty surrounding corporate privilege stems from the question of who the in-house counsel represents: "the corporation, management, employees, or shareholders . . . [o]r a government regulator such as the SEC or the civil courts.").

78. For example, the Securities Act of 1933 provides as follows:

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter [15 U.S.C. §§ 77 et seq.] and under the rules and regulations promulgated by the Commission in respect thereto, and, *concurrent with State and Territorial courts . . .* of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, *or in the district where the offer or sale took place*, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

15 U.S.C. § 77v(a) (2000) (emphasis added); *see also* Securities Act of 1933, 15 U.S.C. § 77t(b) (2000) (explaining that for violations of 15 U.S.C. §§ 77, "the Commission may, in its discretion, bring an action *in any district court of the United States . . .* to enjoin such acts or practices" (emphasis added)).

79. *See In re Grand Jury Proceedings*, 727 F.2d 1352, 1358 (4th Cir. 1984) (holding that a document is privileged only if it contains information that is intended to be kept confidential, regardless of whether it is subsequently published or not); *United States v. (Under Seal)*, 748 F.2d 871, 874-76 (4th Cir. 1984) (holding that privilege is lost when a client expressly authorizes his or her attorney to perform services that reflect intent to disclose the information to third parties); *see also* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 5:13 (2d. ed. 1999) ("Despite the illogic and inherent unfairness, many cases can be found in which courts summarily deny the protection of the privilege to drafts of documents that are being prepared by counsel for distribution to third parties."). These cases remain precedent in the circuit, although the court has recently refused to extend their approach to oral communications surrounding the preparation of a document.

still unsettled in other jurisdictions.⁸⁰ The Fourth Circuit's position and the lack of clarity elsewhere has enormous implications in the securities context.⁸¹ Reviewing and modifying drafts of registration statements, press releases, periodic disclosures, and other documents intended for publication to the market is what securities lawyers do.⁸² The privilege will provide little protection for core aspects of such legal services if adversaries have access to the underlying drafts and corresponding changes. The fact that only a minority of jurisdictions take the draconian view should provide little comfort, given that issuers subject to federal disclosure requirements usually sell securities on national exchanges and therefore may face state or federal securities claims anywhere in the country.

See In re Grand Jury Subpoena, 341 F.3d 331, 336 (4th Cir. 2003). Other courts have followed the Fourth Circuit's lead on drafts. *See Fordham v. Onesoft Corp.*, No. Civ. A. 00-1078-A, 2000 WL 33341416, at *3 (E.D. Va. Nov. 6, 2000); *Gordon v. Newspaper Ass'n of Am.*, No. LF-768-3, 2000 WL 140602, at *2 (Va. Cir. Ct. Feb. 4, 2000); *Burroughs Wellcome Co. v. Barr Labs., Inc.*, 143 F.R.D. 611, 618 (E.D.N.C. 1992).

80. *See RICE*, *supra* note 79, § 5:13 (discussing disparate approaches to drafts and the confusion between the confidentiality of communications and underlying information); Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 996-1002 (1999) (discussing the scope of waiver in the context of drafts of documents prepared for release to third parties). Courts differ in their approaches to drafts of documents. *See Women's InterArt Ctr., Inc. v. N.Y.C. Econ. Dev.*, No. 03 Civ. 2732, 2004 U.S. Dist. LEXIS 13878, at *11-*12 (S.D.N.Y. July 21, 2004) (holding that drafts of letters retain their privilege only if they contain confidential information); *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 633 (M.D. Pa. 1997) (stating that drafts are privileged only if they contain information that is not ultimately disclosed); *see also In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2nd Cir. 1984) (noting that, because privilege attaches to communication and not information, privilege attaches to drafts unless it is waived); *Alexander v. FBI*, 198 F.R.D. 306, 312 (D.D.C. Dec. 13, 2000) ("Drafts of documents that are prepared with the assistance of counsel for release to a third party are protected under attorney-client privilege."); *State ex rel. Benesch, Friedlander, Coplan & Arnoff LLP v. City of Rossford*, 746 N.E.2d 1139, 1144-45 (Ohio Ct. App. 2000) (holding that only information contained in the drafts that is not subsequently disclosed is privileged) (citing *Apex Mun. Fund v. N-Group Sec.*, 841 F. Supp. 1423, 1428 (S.D. Tex. 1993)).

81. *Supra* note 79.

82. *See, e.g., Coffee, Attorney as Gatekeeper, supra* note 1, at 1302 (stating that attorneys have a principal role in the drafting of disclosure documents).

Thus, given that underlying privilege protections are highly uncertain in the securities context, one must question whether the privilege, in its current form, undermines compliance goals. Also, if the privilege is not fundamentally reformed, privilege protections continue to become even less certain, and counsel and clients gain a greater awareness of the scope and depth of this uncertainty, then we ought to reconsider whether exempting issuer attorneys from more direct disclosure obligations is socially beneficial.

All of this—Sarbanes-Oxley and its regulatory progeny, the corresponding emphasis on attorneys as gatekeepers, the uncertain state of underlying privilege law, and the potential impact of this uncertainty on gatekeeping—also provides three broader lessons about the role of the attorney-client privilege and privilege reform. First, although the Sarbanes-Oxley Act and SEC rules promulgated thereunder do not purport to alter privilege doctrine, these reforms and the surrounding debate highlight the central role of the privilege.⁸³ This is a healthy reminder that privilege doctrine is inherently part of the fabric of not only the law governing lawyers, but also the law in other areas, including that which governs corporations. It also teaches that the question of whether and how to reform the privilege must not be answered in a vacuum, without reference to its direct effects on other areas of substantive regulation.

Second, Sarbanes-Oxley and the underlying regulations offer an example of why there is a significant federal interest in ensuring that the privilege law actually serves its purpose of enhancing legal compliance. There is an obvious federal interest in ensuring the integrity of securities markets.⁸⁴ In light of the failure of corporate attorneys to prevent Enron and the other market debacles, Congress rejected claims that the regulation of attorneys should remain within the exclusive purview of individual state bars and judicial

83. See Standards of Professional Conduct for Attorneys Practicing Before the SEC, 17 C.F.R. § 205.3(b)(1) (2004) (“[A]n attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney’s representation of an issuer.”); see also *supra* notes 27–41 and accompanying text (discussing Congress’ passage of Section 307 and the SEC’s response to the mandate for clearer standards of professionalism).

84. Compare Koniak, *Corporate Fraud*, *supra* note 15, at 221 (referring to securities law and corresponding practice as a realm of “unquestioned federal supremacy”).

authorities.⁸⁵ Congress and the SEC have not gone that far with the privilege specifically, but in their approach to facilitating legal compliance, they have recognized the role the protection of client confidences plays.⁸⁶ The privileged status of at least some of these confidences is one of the building blocks upon which the new gatekeeping regime rests.⁸⁷ Thus, it is a matter of federal concern that the purposes of the privilege are threatened by the uncertainty of underlying privilege protections.

Third, the foregoing lends further support to the claim that a privilege crafted and controlled by the judiciary is inadequate. As an initial matter, if the privilege is part of the fabric of corporate law and of the regulatory backdrop that frames attorneys as gatekeepers for the securities markets, then privilege doctrine should be developed and enforced in light of these considerations. Judicial decision makers, who develop privilege doctrine *ex post* in the context of particular discovery disputes, are not in the best position to engage in the careful balancing that is required. And the SEC is

85. *See, e.g.*, 148 CONG. REC. S6555 (daily ed. July 10, 2002) (statement of Sen. Enzi) (“I am usually in the camp that believes States should regulate professionals within their jurisdiction. However, in this case, the State bars as a whole have failed.”). Some, including the ABA, argued that the regulation of attorneys should be left to the states. *See* Letter from Robert E. Hirshon, President, American Bar Association, to Senator John Edwards (June 20, 2002), <http://www.abanet.org/poladv/letters/107th/business062002.html>. Other scholars agree with Congress that local regulation has not worked. *See Panel 2: The Evolution of Corporate Governance*, *supra* note 22, at 619–20 (comments of Professor Richard Painter) (“[Lawyers are] still very much self-regulated compared with broker-dealers, accountants, and other professions. But we are losing parts of that as we go along here, and I think we will continue to do so if we don’t hold organizations such as the American Bar Association, such as our state and local bar associations, accountable to come up with rules that make sense and avoid these types of problems in the future.”); *see also Panel Two: The Evolution of Corporate Governance*, *supra* note 22, at 637 (“There is a real problem of fifty state bar associations trying to regulate securities lawyers. It hasn’t worked. We haven’t had any disciplinary cases against these big-firm lawyers. It’s the same pattern we see with broker-dealers, accountants, and every other gate-keeper profession—that self-regulation is lost gradually as people abuse it.”); Koniak, *Corporate Fraud*, *supra* note 15, at 211–12 (arguing state regulation of attorneys and other kinds of regulation have not worked).

86. *See supra* notes 14–16 and accompanying text.

87. *See supra* notes 44–45 and accompanying text.

likely incapable of correcting judicial decisions that strike the wrong balance, since it seems doubtful the agency has the authority to abrogate or preempt federal or state privilege law.⁸⁸ Indeed, the federal courts' disparate approaches to selective waiver have already frustrated the SEC's efforts by deterring issuers from voluntarily sharing privileged information with the agency, something the SEC believes would benefit investors and the public.⁸⁹ Finally, strong historical evidence suggests that judicial control of privilege doctrine has led to uncertainty, a result that is unsurprising, given that judicial law making is piecemeal, relatively slow, and decentralized.⁹⁰ If an uncertain privilege itself threatens to undermine attorneys' ability to ensure legal compliance, and hence, the integrity of the securities markets, then Congress has yet another reason for removing privilege law-making from the judiciary.

88. The Commission indicated that its rules of professional conduct would preempt conflicting state standards. 17 C.F.R. §205.1 (2004) ("Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern."). However, its authority to do so has already been challenged. See Letter from Alfred P. Carlton, Jr., *supra* note 20 ("The Commission cannot itself establish its authority to preempt state privilege rules. Only Congress can speak to that."); see also Moser & Keller, *supra* note 27, at 845-47 (discussing state bar association challenges to the SEC's authority to preempt conflicting state professional rules of conduct). The Commission has all but conceded that it currently cannot preempt or abrogate privilege law. See Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185, 34-47276, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003).

89. The SEC chose to withdraw one of its provisions addressing selective waiver in part because it recognized that it may not have the authority to preempt privilege law. See Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185, 34-47276, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003); *supra* note 68. In so doing, it emphasized the benefits of selective waiver for investors. Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185, 34-47276, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003). The uncertainty of underlying privilege doctrine also was an important factor in the SEC's decision to withdraw its documentation requirement for up-the-ladder reporting, another provision which the SEC believed offered potential benefits. See *supra* note 44 and accompanying text.

90. See Glynn, *supra* note 6, at 98-121.

B. Other Recent Developments Affecting the Attorney-Client Privilege

A number of other recent developments shed light on the debate over whether and how to reform the attorney-client privilege. Of these, the DOJ's decision to allow monitoring of conversations between terrorism suspects and their attorneys has received the most attention. The new regulation authorizes Bureau of Prisons personnel to monitor conversations between detainees and their attorneys whenever the government has substantial reason to believe that the conversations could facilitate violence or terrorism by passing on information or instructions.⁹¹

Although the new rule has its defenders,⁹² most legal scholars have criticized it as both unjustified and detrimental to the attorney-client relationship.⁹³ Many of these scholars argue, despite DOJ assurances to the contrary, that the potential for such monitoring without judicial oversight will render privilege protections highly uncertain, thereby chilling client and attorney candor and harming the attorneys' ability to render legal advice.⁹⁴ It is worth noting that, absent an unlikely Supreme Court determination that this kind of monitoring violates the Sixth Amendment, or some other kind of national reform, state law enforcement officials may implement similar practices, further weakening privilege protections in the criminal context.⁹⁵

91. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(d) (2004).

92. See Davis, *supra* note 3, at 189–90 (concluding that the procedural safeguards of the regulations ensure that the regulations are both constitutional and protective of the privilege); see also Dinh, *supra* note 3, at 404 (noting that the limited scope of the regulations will prevent any abrogation of the privilege).

93. See Rice & Saul, *supra* note 3, at 23–24 (noting that the Bureau of Prisons regulations are too vague and will render the privilege more uncertain); Cohn, *supra* note 3, at 1245; see also Kristen V. Cunningham & Jessica L. Srader, *The Post 9-11 War on Terrorism . . . What Does it Mean for the Attorney-Client Privilege?*, 4 WYO. L. REV. 311, 327 (concluding that the regulations give the Department of Justice unlimited discretion in monitoring conversations and such unchecked discretion is contrary to the judicial oversight deemed necessary by the United States Supreme Court).

94. See Rice & Saul, *supra* note 3, at 23–24.

95. Such a Supreme Court finding is unlikely in part because the Supreme Court rarely takes privilege cases. In addition, whether the Sixth Amendment

Also, while battles over the attorney-client privilege continue in state and federal court litigation, there has been little movement toward resolution of the many areas of conflict since *Federalizing Privilege* was published. Importantly, the Supreme Court has not addressed the attorney-client privilege directly since its 1998 decision in *Swidler & Berlin v. United States*⁹⁶ and therefore has not assisted in promoting convergence.⁹⁷ At the same time, courts around the country have continued to take differing approaches to the elements of the privilege, its exceptions, and the various waiver doctrines. For example, the confidentiality requirement continues to baffle in numerous ways, including the treatment of drafts discussed above,⁹⁸ the privileged status of certain electronic communications,⁹⁹ and the scope of the joint defense or common interest doctrine.¹⁰⁰

guarantees some privilege protection is unresolved, as is whether this policy would violate any such guarantee. See *id.*; Davis, *supra* note 3, at 189–90. Of course, the justification for monitoring in the terrorism context can be extended to or used in other contexts in which there is a potential threat to public safety.

96. 524 U.S. 399 (1998) (holding that the attorney-client privilege survives the death of the client).

97. Since *Swidler*, the Court has not addressed the attorney-client privilege directly.

98. See *supra* notes 79–82 and accompanying text.

99. See Carl Pacini et. al., *Accountants, Attorney-Client Privilege, and the Kovel Rule: Waiver Through Inadvertent Disclosure Via Electronic Communication*, 28 DEL. J. CORP. L. 893, 917 (2003) (noting that some courts have outright refused to consider cellular phone conversation confidential, while other Courts have suggested that when technological advancements in cell phones result in a reasonable expectation of privacy such communication may be considered confidential); RICE, *supra* note 79, § 5:20 (discussing lingering issues with the maintenance of confidentiality when communicating via electronic means, although noting that the privilege issues are often resolved without reference to the confidentiality requirement); see also *United States v. Mathis*, 96 F.3d 1577, 1583 (11th Cir. 1996) (not considering the effects of technological advancements and concluding that communications via cellular phones would not be protected under the privilege).

100. *Lugosch v. Congel*, 219 F.R.D. 220, 236 (N.D.N.Y. 2003) (noting that recent surveys have shown that the federal circuits are not in agreement on the joint defense or common interest doctrine); RICE, *supra* note 79, § 4:4 (discussing differing views on whether individual joint clients can waive privilege protection without the consent of the other joint clients); George S. Mahaffey Jr., *Taking Aim at the Hydra: Why the "Allied-Party Doctrine" Should Not Apply in Cases When the Government Declines to Intervene*, 23 REV. LITIG. 629, 660 (2004) (stating that the common interest or allied-party

Further, there is continuing uncertainty over the distinction between legal and non-legal advice, including the applicability of the privilege to communications with in-house counsel.¹⁰¹ Courts continue to articulate differing, sometimes amorphous standards for determining the scope of the crime-fraud exception¹⁰² and they

doctrine has yet to be recognized or clarified by the Supreme court, and has engendered a good deal of confusion in the judiciary).

101. See Alexander C. Black, Annotation, *What Corporate Communications Are Entitled to Attorney-Client Privilege—Modern Cases*, 27 A.L.R. 5TH 76, 99 (2004) (“[B]ecause in-house counsel are often intimately involved in the corporation’s business affairs, application of the privilege to their communications poses particular concerns. Thus, some courts have concluded that corporate communications involving in-house counsel require special scrutiny as to whether the requirements of the privilege have been met.”). For example, some courts have applied the “primary purpose” test to determine whether attorney-client communications are privileged. See *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1127 (N.D. Cal. 2003) (“In general, legal advice is implicated ‘if the nonlegal aspects of the consultation are integral to the legal assistance given and the legal assistance is the *primary purpose* of the consultation.’” (quoting RICE, *supra* note 79, § 7:3, at 39)). However, the Ninth Circuit has recently suggested that a “because of” standard would apply in the work product context, see *In re Grand Jury Subpoena*, 357 F.3d 900 (9th Cir. 2004), and a lower federal court in the circuit extended this test to determine whether advice is legal advice in the attorney-client privilege context. See *Visa U.S.A., Inc. v. First Data Corp.*, No. C-02-1786JSW, 2004 WL 1878209, at *4 (N.D. Cal. Aug. 23, 2004) (“The Court discerns no reason why and neither of the parties has advanced any reason why, for purposes of determining the discoverability of documents that have both a legal purpose and a nonlegal purpose . . . the methodology in *In re Grand Jury Subpoena* should not be applied to the attorney-client privilege.”). That court stated explicitly that this standard is more protective than the primary purpose test. See *id.*

102. For a general discussion of the crime-fraud exception, see Glynn, *supra* note 6, at 113–15; Kendall C. Dunson, *The Crime-Fraud Exception to the Attorney-Client Privilege*, 20 J. LEGAL PROF. 231 (1996); see also *Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 280, 288 (E.D. Va. 2004) (noting that courts have expanded the crime-fraud exception beyond more traditional examples of crime and fraud). For example, the District of Columbia Circuit Court has articulated a very broad definition of the crime-fraud exception, which includes any “other type of misconduct fundamentally inconsistent with the basic premises of the adversary system.” *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982); see Stuart M. Gerson & Jennifer E. Gladieux, *Advice of Counsel: Eroding Confidentiality in Federal Health Care Law*, 51 ALA. L. REV. 163, 191 (1999) (noting that the D.C. Circuit Court has expanded “crime” to include such misconduct). Other courts have adopted a similarly expansive approach; for example, in *Rambus*, 222 F.R.D. at 290, the court expanded the

continue to disagree over whether the fiduciary duty exception first articulated in *Garner v. Wolfinbarger*¹⁰³ applies in non-derivative shareholder actions.¹⁰⁴ And various waiver doctrines, including the

exception to include the spoliation of evidence. However, other courts seemly take a narrower view of the exception. See *United States v. McDonald*, No. 01-CR-1168, 2002 WL 31056622, at *1 (E.D.N.Y. Aug. 6, 2002) (limiting the scope of the exception by requiring the attorney to have the intent to further a crime); see also *Prudential Ins. Co. v. Massaro*, No. CIV. A. 97-2022, 2000 WL 1176541, at *6 (D.N.J. Aug. 11, 2000) (“The crime-fraud exception does not extend to tortious conduct generally, but is limited to communications to and from an attorney in furtherance of a crime or fraud.”).

103. 430 F.2d 1093, 1103–04 (5th Cir. 1970). The *Garner* court determined in the context of a derivative shareholder action that “where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.” *Id.* It then articulated a non-exclusive nine-factor test for determining whether plaintiff shareholders have established “good cause” to pierce the privilege. *Id.* The factors are as follows: “the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders’ claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders’ claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.” *Id.* at 1104.

104. See, e.g., *RMED Int’l, Inc. v. Sloan’s Supermarkets, Inc.*, No. 94 Civ. 5587, 2003 U.S. Dist. LEXIS 71, at *13–*16 (S.D.N.Y. Jan. 6, 2003) (discussing the split in circuit authority on the issue and the fact that the Second Circuit had yet to recognize the exception expressly, and deciding that the exception does apply in the non-derivative context). The reach of the fiduciary duty exception to other types of relationships likewise remains unresolved. See, e.g., *Glynn*, *supra* note 6, at 107–10 (discussing the disagreements over and controversy surrounding the doctrine); Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 786–87 (2002) (noting the disparate treatment of the *Garner* exception across jurisdictions).

selective waiver, subject matter waiver, and inadvertent disclosure doctrines remain unsettled.¹⁰⁵

In addition to this continuing parade of doctrinal disagreements within the courts, several recent developments further buttress my contention that federal and state courts are no longer able to control the privilege doctrine and its application. As argued in *Federalizing Privilege*, the increasing number of matters that are adjudicated or resolved in non-judicial settings, including arbitration and administrative proceedings, exacerbates the uncertainty of privilege protection.¹⁰⁶ Decision makers in these fora may not be bound to uphold any particular aspect of privilege law, may have insufficient

105. See, e.g., RICE, *supra* note 79, § 9:28 (discussing selective waiver through partial disclosure); Jody E. Okrzesik, *Selective Waiver: Should the Government Be Privy to Privileged Information Without Waiving the Attorney-Client Privilege and Work Product Doctrine?*, 34 U. MEM. L. REV. 115, 120 (2003) (discussing the multiple approaches the circuit courts have taken to selective waiver, including both its permission and disallowance and whether selective waiver under a confidentiality agreement is valid); Thomas R. Mulroy & Eric J. Munoz, *The Internal Corporate Investigation*, 1 DEPAUL BUS. & COMM. L.J. 49, 65 (2002) (discussing whether there is waiver in the context of internal corporate investigations). Courts continue to articulate and apply differing tests to determine whether the privilege has been inadvertently waived. Compare *Murray v. Gemplus, Int'l*, 217 F.R.D. 362, 366 (E.D. Pa. 2003) (applying a five factor test to determine if inadvertent disclosure results in privilege waiver), with *Chester County Hosp. v. Independence Blue Cross*, No. 02-2746, 2003 U.S. Dist. LEXIS 25214, at *22 (E.D. Pa. Nov. 7, 2003) (holding that when inadvertent disclosure occurs, "it is appropriate to ask whether the circumstances surrounding the disclosure evidenced conscious disregard of the possibility that an adversary might obtain the protected materials" in determining if such disclosure waives the privilege); see also CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 202, at 401 (2d ed. 1994) ("Courts are divided on whether the attorney-client privilege is lost by accidental or inadvertent disclosure."); RICE, *supra* note 79, § 9:70 (indicating that some courts refuse to find waiver when the privilege holder has used reasonable efforts to protect confidentiality, while other courts have rejected an inadvertence exception); Pacini et al., *supra* note 99 at 908-15 (discussing different approaches); John T. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure—Federal Law*, 159 A.L.R. FED. 153 (2000) (discussing cases).

106. Glynn, *supra* note 6, at 126-32 (discussing the increasing number of adversarial proceedings that are occurring outside of the traditional courtroom setting, the largely unknown status of privilege protections in those proceedings, the potentially insufficient expertise of non-judicial decision makers in these settings and the limits on judicial review).

expertise to engage in the difficult balancing of interests, and may be largely immune from judicial or appellate oversight.¹⁰⁷ These problems will arise more frequently as adjudications outside state and federal courts increase. For example, the status of the privilege in military tribunals, which are not bound by the Federal Rules of Evidence, has recently received scholarly attention.¹⁰⁸ And the role of the privilege in enforcement proceedings before self-regulatory organizations, including the New York Stock Exchange and other private adjudicatory bodies, remains largely unsettled.

Yet, judicial control of the privilege may also be declining in more traditional settings. For example, upstream law enforcement and prosecutorial tactics can subvert the privilege and its purposes despite supposed downstream judicial oversight.¹⁰⁹ Again, the new rules allowing monitoring of terrorism suspects permits access to what may otherwise be privileged attorney-client communications.¹¹⁰ Although the DOJ has argued that the monitoring will not affect the privilege because such conversations will not be admissible in a criminal proceeding, the monitoring itself chills candor and communication.¹¹¹ In addition, federal prosecutors more and more frequently demand that corporate criminal defendants and principals “voluntarily” waive their privilege protections in exchange for

107. See *id.*

108. See, e.g., Panel Discussion, *The USA-PATRIOT Act and the American Response to Terror: Can We Protect Civil Liberties after September 11?*, 39 AM. CRIM. L. REV. 1501, 1509 (2002) (noting that without sensible guidelines regulating communications in the military tribunal context “you’re breaching the privilege which is something that is very important”); Rice & Saul, *supra* note 3, at 28 (discussing the uncertainty of the privilege in the military tribunal context).

109. See 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, 515–83 (2003) (noting many recent federal prosecutorial attempts at curtailing the attorney-client privilege including the pressures to waive the privilege under corporate sentencing guidelines); Susan W. Crump, *The Attorney-Client Privilege and Other Ethical Issues in the Corporate Context Where There is Widespread Fraud or Criminal Conduct*, 45 S. TEX. L. REV. 171, 175–89 (2003) (noting a variety of pressures in-house counsel faces to waive the privilege).

110. See Rice & Saul, *supra* note 3, at 23–24.

111. See Cunningham & Srader, *supra* note 93, at 325 (noting that monitoring of conversations will stifle communications, regardless of the procedural safeguards); Rice & Saul, *supra* note 3, at 23.

various kinds of more favorable treatment (e.g., in charging and sentencing) based on cooperation.¹¹² While such waivers may seem socially beneficial in particular cases, a standard practice of demanding waivers in white collar criminal investigations—combined with high settlement or plea bargain rates—would all but eviscerate any apparent protection the privilege may provide.¹¹³ Again, courts may have some ability to check such waiver demands, but, as a practical matter, this oversight is extremely limited. Furthermore, at this point, nothing is preventing state prosecutors from applying similar pressures in their criminal matters.¹¹⁴

112. See Cole, *supra* note 109, at 540 (noting how prosecutors may lessen a corporation's culpability if the privilege is waived); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 154 (2000) (“[F]ederal prosecutors more and more frequently go so far as to state that unless a company provides its privileged information to the government, the company will be deemed not to have cooperated.”); see also Memorandum from the Deputy Attorney General of the United States of America, to All Component Heads and United States Attorneys, Part II.A.4 (June 16, 1999) (stating that the factors to be considered in determining whether to charge a corporation include, inter alia, the corporation's “timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, *the waiver of the corporate attorney-client and work product privileges*” (emphasis added)), <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> [hereinafter Holder Memorandum].

113. See Molly McDonough, *A Tell-All Approach: Opening Corporate Investigations Fosters Credibility with the Feds*, 90 A.B.A. J. 24 (2004) (discussing arguments why pressure “to waive privilege is likely to make clients less candid if they believe their lawyers will turn into agents of the government”); Cole, *supra* note 109, at 543–44 (“Of particular concern is the potential for prosecutors to intrude unnecessarily into the attorney-client relationship and frustrate the important policy objectives that underlie the attorney-client privilege and the work product doctrine. Unfortunately, the approach to evaluating cooperation and voluntary disclosure that is set forth in the Holder Memorandum does not reflect appropriate sensitivity to privilege issues.”). This practice is particularly problematic in the early stages of an investigation, before charges or an indictment are imminent. It also may have ripple effects, since the sharing of information with government officials may waive the privilege in other proceedings. See *supra* note 68 (discussing the split in authority on the issue of selective waiver).

114. Benedict P. Kuehne, *Protecting the Privilege in the Corporate Setting: Conducting and Defending Internal Corporate Investigations*, 9 ST. THOMAS L. REV. 651, 652–53 (1997) (“In recent years, corporations and business organizations have been frequent targets of criminal investigations at both the state and federal levels. . . . The 1990s may well be remembered as the decade

The attorney-client privilege, therefore, may be even more uncertain than it was a few years ago. And the sources of this uncertainty are widespread: intrajurisdictional confusion, interjurisdictional conflict, and extrajudicial decisions and pressures all contribute to the problem. The privilege provides some protection, but this protection is highly unpredictable.

The securities context again provides a useful illustration. Whether the privilege will protect issuer-attorney communications in an adversarial proceeding may depend on multiple factors, including: the jurisdiction in which the matter is brought, whether the matter is adjudicated in a judicial or nonjudicial forum, the jurisdiction's treatment of drafts, the court's treatment of communications with in-house counsel, the court's view of the scope of the corporate privilege, the judge's application of the *Garner* exception discussed below, and whether the matter could spawn a criminal inquiry inviting heavy-handed prosecutorial tactics. Further, the risk of a tainting disclosure is multiplied, given that securities litigation is often complex, involving multiple matters in multiple fora. In light of all of this, the reasonably informed attorney or corporate decision maker assessing the risk of disclosure at the time of the communication might be well-advised to assume that any given communication may not be protected.

Despite this enormous uncertainty, the risk of ultimate disclosure of client confidences is limited by other variables. For example, in the transactional context, the risk of an adverse privilege determination leading to disclosure is reduced by the fact that the content of the client confidences may never be the subject of a suit, prosecution, or administrative inquiry.¹¹⁵ In addition, constitutional concerns may chill prosecutorial overstepping in some circumstances,¹¹⁶ and the norms of legal practice may temper zealous

when traditional business practices came to be viewed with suspicion by law enforcement agencies." (emphasis added)).

115. Of course, the risk of an adversarial proceeding or regulatory action will vary by industry and area of regulation. In heavily regulated and litigated areas, including securities, it is more probable that there will be a future proceeding in which communications are sought.

116. The Sixth Amendment provides a potential limitation on prosecutorial conduct. However, whether and to what extent the Amendment protects

pursuit of potentially privileged communications in both judicial and extrajudicial proceedings. Furthermore, client tolerances for disclosure risk vary.¹¹⁷

Nevertheless, if the privilege is to enhance social utility optimally, its protections must be certain enough to provide some confidence at the time of the attorney-client communication regarding whether disclosure of the content of the discussion will be compelled¹¹⁸ and, correspondingly, some confidence that the communications themselves will not make the client *more* vulnerable to civil, criminal, or administrative liability.¹¹⁹

Perhaps most attorneys, individual clients, and corporate decision makers continue to have such confidence. Indeed, attorneys and their clients have not stopped communicating altogether and many seem to assume their communications will remain confidential. Yet, at least in many contexts, such confidence appears largely based on a misperception of the risk.¹²⁰ We do not, and cannot, know the

attorney-client confidentiality and the privilege remains unresolved. *See supra* note 95.

117. *See* Glynn, *supra* note 6, at 82.

118. *See id.* at 82–85.

119. *See* Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185, 34-47276, 68 Fed. Reg. 6296, 6307 (noting the concern that a documentation requirement related to up-the-ladder reporting might create a “treasure trove” of potentially discoverable material given the uncertainty of the privilege, and hence, might deter communications because issuers would face increased vulnerability); *see also supra* note 71 (discussing such vulnerability). This does not mean that all attorney-client communications should be protected. If appropriately defined in advance, the crime-fraud exception and other exceptions can address socially harmful client-attorney communications without eviscerating reasonable certainty regarding privilege protections.

120. I am not suggesting that attorneys or their clients are suffering from some kind of collective denial, or that attorneys are incapable of assessing risks or understanding the nuances of privilege doctrine. I am arguing, nevertheless, that attorneys and their clients generally assume that the privilege is more protective than it is. Indeed, this may be the most useful finding running through the limited attempts to determine empirically the effects of the privilege. *See* Glynn, *supra* note 6, at 80–81 (discussing various surveys of attorneys, clients, and corporate personnel). In my discussions with practicing attorneys, I have found that perceptions of the privilege are consistent with these studies. In fact, most attorneys with whom I discuss these matters are shocked by the various limitations and exceptions to privilege protection and the overall amount of uncertainty in the doctrine. A possible explanation for

extent to which existing uncertainties have already chilled attorney-client candor.¹²¹ Going forward, we should not assume such misperceptions will endure, nor should the social benefits of the privilege depend on them.¹²² There is also no guarantee misperceptions will always flow in the direction of overvaluing the privilege's protections; the uncertainties of the privilege, in combination, may foster an impression that the privilege offers little or no protection.¹²³

Thus, as I argued in *Federalizing Privilege*, the existing situation is intolerable.¹²⁴ Perfect certainty is not achievable, nor is it necessary. The existing regime falls far short of even providing reasonable certainty, however. A base level of predictability that, over time, is necessary to enhance attorney-client communications, would reap the benefits of the privilege.

this misperception is that the sources of the uncertainty—both substantive and structural—are sufficiently disparate that it takes a fair amount of study to understand its scope and depth. It may be that only those attorneys and scholars who deal with privilege issues thoroughly or regularly develop a sense of the whole. Perhaps in other circumstances attorneys may realize how tenuous privilege protections are, but they choose, despite the risks of ultimate disclosure, not to share the full extent of their concerns with their clients out of a fear that the clients will stop communicating with them.

121. Again, there is no empirical evidence proving the effects of various factors on attorney-client privilege. The difficulty in conducting such a study, together with the fact that it is virtually impossible to collect data on confidential communications, accounts for the lack of data. See Glynn, *supra* note 6, at 71–73, 79–80.

122. See Glynn, *supra* note 6, at 85.

123. Indeed, the uncertainty of the privilege may have a bigger (even inflated) impact if the threat of regulatory, civil, or criminal inquiries that may lead to disclosures appears high. Given the attention Sarbanes-Oxley and a number of high-profile cases have received, such an appearance may currently exist in the securities context. In addition, overdeterrence may result from an attorney or a client being caught off guard when communications they thought were privileged turned out to be unprotected.

124. Glynn, *supra* note 6, at 62 (“Indeed, an uncertain privilege offers nothing but harm: it inhibits access to the truth and creates enormous transaction costs while failing to enhance attorney-client communication and candor. Thus, today’s highly uncertain privilege is intolerable.”).

II. APPROACHES TO ATTORNEY-CLIENT PRIVILEGE REFORM

We must consider fundamental reform if, as I have contended, the attorney-client privilege is so uncertain that its very purposes are threatened. Yet, that is only a starting point—the need for reform invariably raises the question of the appropriate means of crafting and declaring privilege doctrine. Since the initial debates over the Federal Rules of Evidence in the early 1970s,¹²⁵ the choice, at least at the national level, has been framed as one of codification versus common law. There is a range of choices on multiple axes, however. Thus, for example, reform at the federal level may come in the form of preemptive legislation, legislation that codifies federal attorney-client privilege law but does not preempt state law, or “judicial” codification of privilege law through the Advisory Committee process. Of course, there is also the possibility of no codification—which leaves intact the existing common-law regime—and seeking reform on a case-by-case basis. In addition, a code may set forth a detailed and exclusive set of rules outlining the elements of the privilege, privilege exceptions, and waiver doctrines, or it may set forth merely broad guiding principles and definitions, leaving to courts (explicitly or implicitly) the authority to fill in gaps or to “add” exceptions. Moreover, substantive privilege doctrine—whether codified or common law—may be supplemented by other reforms aimed at increasing predictability, such as a national choice-of-law rule or an amendment to the Federal Arbitration Act¹²⁶ that extends privileges to arbitration proceedings and/or enhancing judicial oversight of privilege determinations in these proceedings.

No approach to reform is perfect, and each offers its own mix of benefits and costs or risks. On balance, however, leaving the current, largely common-law regime intact, and simply seeking reform on a case-by-case or jurisdiction-by-jurisdiction basis is the least

125. The draft of the Federal Rules of Evidence contained provisions governing attorney-client privilege and precluding common-law development of the doctrine. *Rules of Evidence for the United States Courts and Magistrates*, 56 F.R.D. 183, 230–61 (1973). Although there was support for those provisions, there was also adamant opposition that ultimately led to their demise. The opposition included commentary and testimony by members of both the judiciary and the subcommittee. See Broun, *supra* note 104, at 772–79.

126. 9 U.S.C. §§ 1–14 (2000).

attractive option, offering little potential for short or long-term improvement.¹²⁷ Indeed, the recent developments described above demonstrate further the inadequacy of a court-centered, common-law attorney-client privilege. Some form of codification, therefore, is needed. Among the possibilities, the best option remains preemptive federal privilege legislation that provides a single, clear, and unqualified set of privilege protections applicable in state and federal, and judicial and nonjudicial proceedings. Federal codification without preemption is the next best option, although its overall effectiveness will depend on a variety of factors.

A. The First Inquiry: Is the Shift to a Codified Privilege Appropriate?

In the federal system, the starting point for any discussion regarding privilege reform is whether the existing common-law approach ought to be replaced by a codified privilege. As I argued in *Federalizing Privilege*, the prevailing common-law regime, in the federal courts and many states,¹²⁸ is a central factor contributing to the current uncertainty.¹²⁹ Without retracing my entire argument, it is worth repeating that the common-law method is structurally ill-equipped in the modern age to produce clear and predictable privilege protections that strike the right balance between the extrinsic values the privilege serves and the intrinsic costs of the privilege to the truth-seeking process.¹³⁰ Judicial decision-making regarding the privilege is decentralized, post hoc, case-specific, slow, and subject to limited appellate oversight. Conflicting approaches, limited doctrinal guidance, and case-specific qualifications are likely to emerge and remain in such a system. This claim is supported by

127. See, e.g., Broun, *supra* note 104, at 780 (“[T]he courts have, with characteristic caution, moved the law forward—slowly. However, given the reality of acting only on a case-by-case basis, whether they have moved the law with sufficient completeness, alacrity or certainty is another question.”).

128. These include not only pure common-law systems, but also states that have “codified privileges” offering little or no detail on elements, exceptions, and waiver doctrines. For example, New York has a statute that recognizes the privilege, but provides no details. See N.Y. C.P.L.R. 4503 (Consol. 2002).

129. See Glynn, *supra* note 6, at 62 (describing how Congress left the development of privilege to the courts when it chose not to adopt privilege doctrine into the Federal Rules of Evidence in 1975).

130. See *id.* at 136–42.

the privilege's modern history and the recent developments described above.¹³¹ This inherently court-centered approach to the privilege also does not address the status of the doctrine in the growing body of extra-judicial proceedings. Nor has it served as a meaningful check against external forces, including increasingly aggressive law enforcement and prosecutorial tactics, which apply pressure on the privilege. Given all of this, I believe there is little hope that significant, meaningful reform can be achieved through judicial decision making.

Nevertheless, the common-law method is not without its defenders. Professor Rice, for example, argues forcefully that the common-law approach is superior to codification.¹³² Many of his concerns about codification relate specifically to the Advisory Committee process, some of which I will touch on below.¹³³ Yet, he also argues that the common law is superior codification because the "vital and dynamic" common-law process allows for flexibility and change, facilitating beneficial developments in privilege doctrine.¹³⁴ He cites to the recognition and growth of the "fiduciary duty," or "*Garner*" exception,¹³⁵ as an example of a positive development that would not have occurred under a rules-based system.¹³⁶ Indeed, he

131. Moreover, to date, court-made choice-of-law determinations in cases where two or more conflicting privilege doctrines may apply have only exacerbated the problem. See Glynn, *supra* note 6, at 121–25.

132. Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?* 53 HASTINGS L.J. 817, 836 (2002); see also Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?* 15 GEO. J. LEGAL ETHICS 477, 479 (2002) ("The bar should defer to the courts in establishing disclosure standards for client information on a case by case basis under the evidentiary attorney-client privilege.").

133. See *infra* note 156 and accompanying text.

134. Rice, *supra* note 132, at 836 ("Why should we relegate privilege rules that are currently vital and dynamic to the [Advisory] Committee's relatively stagnated process? Under common-law principles, a number of new privileges have been recognized and established privileges have continued to evolve.").

135. See *supra* note 103.

136. Rice, *supra* note 132, at 838 (noting that the *Garner* court was able to create this exception because Rule 501 allows privilege doctrine to be developed through the common-law method).

Uniformity is not an end in itself. It is desirable only if it does not sacrifice long-term benefits—including evolution of the law—that flow from open and continuous debate. . . . I fear that codification will come at the expense of the developments we are currently witnessing.

notes that the California Supreme Court refused to recognize this exception solely because, in codifying the privilege, the state legislature had not recognized the exception and had made recognition of new exceptions a legislative prerogative.¹³⁷ Professor Rice's concern that codification would stifle beneficial development is consistent with those expressed by other scholars who have cautioned that codification would inappropriately "freeze" privilege doctrine.¹³⁸

I agree that there have been some beneficial developments in privilege doctrine since the 1970s. It is also true that a federal codification that provides a detailed set of rules not subject to judicial modification would largely freeze privilege doctrine, would be slow to respond to calls for reform, and might inhibit useful doctrinal developments.¹³⁹ Indeed, my proposal for a single, preemptive codification of privilege doctrine might cause even greater stagnation than less ambitious proposals, since even state courts and legislatures would no longer be free to create or alter privilege doctrine.

The current regime's potential for producing beneficial growth is outweighed by its costs, however. These include both enormous transaction costs and significant uncertainty that endangers the very purposes the privilege is supposed to serve.¹⁴⁰ Moreover, while the

It may translate into little more than trading uniformity for the rich public debate we have experienced under Rule 501.

Id. at 836.

137. *Id.* at 838 ("The court in *Dickerson* [v. Superior Court, 185 Cal. Rptr. 97, 100 (Ct. App. 1982)] acknowledged the wisdom of the federal fiduciary duty exception, but refused to adopt it because the California legislature had not recognized it.").

138. See Barbara C. Salken, *To Codify or Not to Codify—That is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641, 684–87 (1992) (noting that opponents of codification have argued that such action would make the privilege too inflexible); see also Glynn, *supra* note 6, at 144–45 (addressing this argument).

139. I should also note that I do not take Professor Rice's concerns regarding codification lightly, since he has an enormous amount of expertise in this area. There is also much on which he and I agree, although we differ on the merits of codification and may not place the same value on the corporate privilege.

140. See Glynn, *supra* note 6, at 62 ("Indeed, an uncertain privilege offers nothing but harm: it inhibits access to the truth and creates enormous transaction costs while failing to enhance attorney-client communication and

common law is not frozen, it is paralyzed—that is, incapable of overcoming the systemic limitations described above that prevent convergence or other means of achieving greater certainty. Indeed, the federal judiciary has shown itself to be largely incapable of responding to problems in privilege doctrine and application in either a timely or adequate manner. Almost thirty years after Congress enacted Rule 501, the Supreme Court has resolved few doctrinal conflicts, and conflicts and confusion remain over core issues, including the confidentiality requirement, the scope of the corporate privilege, the crime-fraud exception, and the parameters of various waiver doctrines.¹⁴¹ This is true even in some of the rare circumstances in which the Supreme Court has addressed the privilege, such as *Upjohn Co. v. United States*,¹⁴² where the Court rejected the “control group” approach, but explicitly refused to provide a general rule for determining which employee communications to corporate counsel are privileged.¹⁴³

Moreover, although I agree the fiduciary exception is appropriate in some circumstances, application of *Garner* in the corporate context raises concerns similar to those I discussed with regard to Sarbanes-Oxley. First, the scope of the exception remains unresolved.¹⁴⁴ Further, the underlying issue *Garner* addresses in the corporate setting is whether and when plaintiff shareholders may claim that they, rather than corporate management, ought to control the corporation, and hence, the privilege the corporation owns (such that they may gain access to privileged corporate

candor.”); *see also* *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (“If the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”).

141. Indeed, given this history, I am not at all convinced that judicial resolutions to doctrinal questions arrive any faster than legislative ones.

142. 449 U.S. 383 (1981).

143. *See id.* at 396–97.

144. *See* Glynn, *supra* note 6, at 107–10 (discussing the disagreements over and controversy surrounding the doctrine); *see also* Broun, *supra* note 104, at 786–87 (noting the disparate treatment of the *Garner* exception across jurisdictions); *see also supra* note 103 and accompanying text.

communications).¹⁴⁵ That issue—like the question of how to facilitate attorney gatekeeping in the securities context and that of the proper scope of the corporate privilege in *Upjohn*—lies at the intersection of privilege doctrine and corporate law.¹⁴⁶ Again, given the complex mixture of interests at stake, leaving the resolution to judges acting ex post in response to individual discovery disputes is likely to produce not only inconsistent decisions, but also outcomes that may be contrary to other regulatory ends.

For example, some federal courts have found that the *Garner* exception applies in cases involving securities claims brought by individuals on their own behalf.¹⁴⁷ This extension of *Garner* is conceptually flawed.¹⁴⁸ Worse, if shareholders bringing securities

145. It is axiomatic that those acting on behalf of the corporation owe fiduciary duties to the corporate entity, not directly to its shareholders. See Friedman, *supra* note 75, at 272–73; see, e.g., *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). Thus, shareholders cannot simply claim that they are directly owed fiduciary duties or that they are entitled to all corporate communications. Rather, they must demonstrate that there are reasons why they, instead of corporate management, are entitled to act on behalf of the entity. See *id.* at 348 & n.4 (stating that the power to control waiver of the privilege ordinarily lies with managers because they are ones given that authority under state corporate law). Those entitled to control the corporation at a given time control its privilege. See, e.g., *id.* at 348–49 (stating that the power to control the corporation lies with those who, at the time of the waiver, control the corporation).

146. Indeed, control of corporate activities goes to the heart of corporate law, and the inquiry regarding when shareholders are entitled to take the reins of the corporation from the directors, who otherwise have the right to manage the affairs of the corporation, is not an easy one.

147. See *Fausek v. White*, 965 F.2d 126, 130–31 (6th Cir. 1992); *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988); *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, No 94 Civ. 5587, 2003 U.S. Dist. LEXIS 71, at *14 (S.D.N.Y. Jan. 6, 2003); *Bairnco Corp. Sec. Litig. v. Keene Corp.*, 148 F.R.D. 91, 98 (S.D.N.Y. 1993). Other courts have refused to extend the exception in the corporate context beyond derivative suits. See, e.g., *Weil v. Investment/Indicators, Research & Mgmt.*, 647 F.2d 18, 23 (9th Cir. 1981) (holding that a shareholder acting in an individual capacity may not use the *Garner* exception); see also Friedman, *supra* note 75, at 249–56 (discussing the split in authority).

148. Non-derivative claims—those brought by individual shareholders seeking individualized relief—do not seek enforcement of claims on behalf of the corporation—and management does not owe fiduciary duties directly to individual shareholders. Shareholders in these suits therefore should not be able to take advantage of a doctrine that purports to limit the privilege based on

claims may utilize *Garner* to overcome the attorney-client privilege simply upon showing “good cause”—a fungible concept subject to the discretion of a particular judge—then the privilege provides little assurance of protection in the securities context.¹⁴⁹ Although this

a fiduciary relationship. See, e.g., *Weil*, 647 F.2d at 23; Robert R. Summerhays, *The Problematic Expansion of the Garner v. Wolfenbarger Exception to the Corporate Attorney-Client Privilege*, 31 TULSA L.J. 275, 308 (1995) (“However, where the plaintiff shareholders seek to recover individually, as in 10b-5 actions, there appears to be little justification for elevating their interests above those of non-plaintiff shareholders.”).

149. The “good cause” standard has been criticized as harming predictability of the corporate privilege. See *Shirvani v. Capital Investing Corp.*, 112 F.R.D. 389, 390–92 (D. Conn. 1986) (stating that the doctrine “[is] ill-defined in origin and has been troublesome in application.”); Friedman, *supra* note 75, at 263. Further, I have already discussed why post hoc qualifications and balancing tests are problematic. See Glynn, *supra* note 6, at 147–48.

That said, this exception may not be that troublesome in a derivative action, because shareholder claims to privileged communications would only arise after the shareholders has otherwise shown that they are entitled to “step into the shoes” of the board of directors, a demonstration that is rather onerous, usually requiring significant failures on the part of the board. See, e.g., Friedman, *supra* note 75, at 274–80 (discussing derivative suit procedures and the right of shareholders to control the litigation upon overcoming these hurdles).

But the same cannot be said for securities claims. The operation of the “good cause” test in securities cases creates enormous uncertainty. In this context, there are no derivative suit hurdles to overcome, and the allegedly inadequate or fraudulent disclosures necessarily would have already occurred. Moreover, given the multi-factored “good cause” test *Garner* articulates, it seems that the test is either highly unpredictable or would be relatively easy to satisfy most of the time. For one thing, several of the factors (i.e. whether the communication relates to past actions, whether the advice relates to the litigation itself, and whether the communications are identified) will almost always point to disclosure when ex ante attorney-client communications regarding securities matters are sought. See *supra* note 103 (stating the factors). These factors, combined with a non-frivolous securities claim and a showing of potential relevance are enough to demonstrate good cause, at least according to a recent case in the Southern District of New York. See *RMED*, 2003 U.S. Dist. LEXIS 71, at *15–*20 (finding the privilege should be pierced because several factors pointed toward disclosure including the “most important” factor, plaintiffs’ need for the information, which was satisfied by a showing of relevance to the elements of the claims). If this is so, then there is little or no privilege protection for ex ante communications regarding corporate disclosures. As long as plaintiffs have a meritorious claim and can identify potentially relevant communications from the privilege log, they are likely to gain access to the communications.

sounds protective of shareholder interests,¹⁵⁰ the real interests of the shareholder are at risk if one accepts the (prevailing) view that protecting issuer-attorney confidences facilitates compliance with securities laws, and, hence, furthers shareholder interests ex ante by increasing the probability of adequate disclosures.¹⁵¹ Moreover, the justification for this risk is made more suspect when one considers that the crime-fraud exception to the attorney-client privilege already

150. Our securities regime could be structured such that anytime shareholders offer some evidence that there has been wrongdoing, they would be entitled, ex post, to gain access to issuer communications with counsel. This would be the correct approach if one believes that the corporate privilege, which would preclude such access, does not promote candor or compliance with the law. See Paul R. Rice, *The Corporate Attorney-Client Privilege: Loss of Predictability Does Not Justify Crying Wolf* in *Wolfinbarger*, 55 *BUS. LAW.* 735, 741 (2000) (expressing doubts about the utility of the corporate privilege). Yet, this is contrary to the prevailing view, now shared by Congress and the SEC, that, when combined with other constraints and incentives, the corporate privilege can promote greater candor and communication with corporate counsel, and accordingly, compliance with the law. See *supra* notes 10–13 and accompanying text.

151. See *supra* notes 35–45 and accompanying text. Indeed, the SEC has explicitly emphasized the benefits to shareholders privilege protections may provide. See, e.g., *Implementation of Standards of Professional Conduct for Attorneys*, Release Nos. 33-8185, 34-47276, 68 Fed. Reg. 6296, 6306–07, 6312 (Feb. 6, 2003). In determining how to further shareholder interests from the securities perspective, an ounce of prevention is worth a pound of cure. This is made apparent by Enron and a number of the other recent collapses, in which corporate failures precluded substantial recovery for defrauded investors. Even when the defendant remains solvent or insurance is available, investors rarely receive full compensation in securities cases. Obviously, civil and criminal liability for securities violations, along with other sanctions, serve a critically important deterrence function, see *supra* notes 60, 123, but litigation rarely leads to full recovery for shareholder losses. This does not mean that the protection the privilege provides is costless for shareholders, although the actual social costs of the privilege, like its social benefits, are impossible to establish empirically and there are other significant limits on privilege protections, such as the crime-fraud exception, that will limit these costs. But the limited financial benefit of ex post litigation for shareholders is something to consider when balancing the costs of more certain or more vigorous privilege protection against the privilege's potential compliance-promoting effects. See *Implementation of Standards of Professional Conduct for Attorneys*, Release Nos. 33-8185, 34-47276, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003) (suggesting that private securities litigants would benefit from a selective waiver doctrine that allows the SEC to view privileged issuer communications, but retains its privileged status against other, private parties).

makes available to shareholder plaintiffs issuer-attorney communications that the court finds (*in camera*) were made for the purpose of furthering a crime or fraud.¹⁵² Likewise, this extension of *Garner* is inconsistent with the balance Sarbanes-Oxley and its regulatory progeny strike between closer regulation of insider and attorney conduct and preserving issuer-attorney confidentiality.¹⁵³ The common-law approach therefore has produced a potentially useful limitation in the fiduciary duty exception, but it has also spawned and failed to correct harmful extensions of the doctrine.

As a result of the lack of leadership and lack of clarity in the current regime, individual decision makers (judicial and nonjudicial) are often free to pick and choose among conflicting and undefined doctrines. This reduces the privilege to an *ad hoc* balancing of

152. The court will conduct such an *in camera* review if the shareholder plaintiff makes a *prima facie* showing that the corporate decision makers sought the attorney's legal advice or assistance for the purpose of furthering a crime or fraud. *See United States v. Zolin*, 491 U.S. 554, 572–73 (1989). To make the *prima facie* showing, the plaintiff must present a factual basis adequate to support a good faith belief by a reasonable person that an *in camera* review may reveal evidence that the exception applies. *See id.* at 572. Although the scope of the crime-fraud exception and its application are unclear, *see supra* note 10 and accompanying text, no one disputes the utility of narrowly drawn crime-fraud exception. At least in the securities context, the court's inquiry will be focused on discerning specific wrongful purposes and, hence, more predictable than an unwieldy "good cause" inquiry. Indeed, the privilege-limiting effects of the crime-fraud exception distinguish securities fraud cases from derivative actions, since derivative actions may be premised on various breaches of duties that do not involve allegedly fraudulent or criminal activities.

153. *See supra* notes 35–41 and accompanying text. Obviously, the protection of shareholders is the purpose of securities regulation and the impetus for recent reform, including Section 307. Yet, as Senators Edwards, Enzi, and Corzine each indicated, that purpose would be best achieved through a system by which issuer counsel was required to report failures of insider wrongdoing to independent directors, who are supposed to protect shareholders. *See* 148 CONG. REC. S6552, S6555–56 (daily ed. July 10, 2002). As I indicated, *more reform is needed* to protect shareholders, including greater assurances of director independence and more biting sanctions for insider and attorney misconduct. *See supra* note 46 and accompanying text. And, of course, courts should enforce important limitations on the privilege, including the crime-fraud exception. However, a meaningful privilege should accompany the new reforms to ensure corporate decision makers are not deterred from keeping counsel fully informed.

interests in particular cases, which eviscerates predictability and offers little assurance of correct or socially beneficial outcomes.¹⁵⁴ For these reasons, clarifying and then freezing most aspects of the privilege is desirable, even if some beneficial developments are inhibited, as long as the codified rules are sufficiently detailed and generally strike the right balance between promoting attorney-client candor and other countervailing interests.

Of course, some (perhaps many) doubt that legislative or judicial rule-making bodies, Congress or the Advisory Committee, can draft a sufficiently clear and detailed set of privilege rules or produce a code that strikes the right balance between providing too much or too little protection. Although no code would be entirely free from ambiguity, privilege protections need not be absolutely clear. They simply need to be clear enough for attorneys and their clients to make reasonable assessments at the time of communication. I have little doubt that the Advisory Committee, if it decides to do so, could craft an attorney-client privilege code that would resolve and clarify most of the privilege's elements, exceptions, and waiver doctrines. Congress now has the resources to do the same.¹⁵⁵

More troubling, however, is the question of whether a legislative or quasi-legislative process is likely to produce the right substantive outcome. Many may hesitate to endorse codification for fear that special interests opposed to their views of the privilege would influence the outcome, and that this outcome would then be "frozen" into the law indefinitely. Professor Rice, for example, has criticized the Advisory Committee's rule-making process as lacking openness and being subject to undue influence by special interests.¹⁵⁶

I agree with Professor Rice that, if the Advisory Committee engages in the drafting of a privilege code, it should adopt a more open process. Yet, no matter what process the Advisory Committee might employ, any judicial codification of the attorney-client privilege will have to survive congressional review. The Supreme

154. The privilege's ends, and the corresponding need for certainty, distinguish the privilege from most other rules of evidence. Thus, the arguments here, which address only the attorney-client privilege, may not apply with equal force to other rules of evidence.

155. See Glynn, *supra* note 6, at 153–54.

156. Rice, *supra* note 132, at 832–33, 839–40.

Court, and hence, the Advisory Committee, has no authority to promulgate privilege rules, because Congress has reserved that power for itself.¹⁵⁷ Since Congress will have the final say as to the content of a privilege code, the risk regarding possible outcomes largely depends on an assessment of whether Congress, rather than the Advisory Committee acting independently, is likely to get it right.

If Congress attempts to codify attorney-client privilege law, greater access is assured, but the outcome obviously is not. Special interests no doubt will seek to influence the legislation, and I too view the legislative process with healthy skepticism. In *Federalizing Privilege*, I contended nevertheless, that there is a good chance that Congress may enact appropriately measured privilege legislation because of a rare balance of highly interested, cross-cutting, and influential constituencies.¹⁵⁸ Recent events may support this claim: although I do not want to overstate the case, the Sarbanes-Oxley Act's treatment of attorneys—and its underlying confidentiality and privilege implications—provides some indication of Congress's ability to strike the right balance.¹⁵⁹ Legal organizations and corporate interests initially opposed inclusion of any provision

157. See 28 U.S.C. § 2074(b) (2000) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”). Congress could amend the Rules Enabling Act (“REA”) and authorize the Supreme Court the authority to promulgate such rules. That seems unlikely, however, unless Congress has a sense of what the outcome will be. This is also unlikely since members of Congress will hear from active constituencies, including legal groups and other interested parties. Moreover, if Congress amends the REA to allow the Supreme Court to promulgate privilege rules along with other rules of evidence, Congress will still be able to object, preventing the new rules from becoming final. See *id.* § 2074(a) (delineating the procedure for delivering proposed rules for congressional approval).

158. See Glynn, *supra* note 6, at 154 (contending that while entities such as well-organized industry groups will advocate for broader privilege protections, constituencies such as law enforcement officials will seek to limit privilege protections, thereby balancing the pressures exerted on Congress). I make this claim as one who believes the privilege is socially beneficial, but should be narrowly tailored in both the civil and criminal (and corporate and individual) contexts to achieve its ends. Thus, for example, I favor a robust (but clear and finite) crime-fraud exception, an appropriately tailored fiduciary duty exception, and a balanced subject matter waiver doctrine.

159. See *supra* notes 154–155 and accompanying text.

governing the conduct of lawyers,¹⁶⁰ and the SEC initially did not respond to calls for regulation of lawyer conduct.¹⁶¹ Yet, convinced by those pressing for corporate reform, Congress included such a provision.¹⁶² On the other hand, Congress demonstrated its sensitivity to confidentiality and privilege concerns by adopting Section 307 instead of a provision that would treat attorneys identically to other corporate actors or mandate significantly greater attorney disclosure, which would have threatened client confidences.¹⁶³ Section 307 is not perfect, but Congress did seek to strike a balance between competing interests.¹⁶⁴ The SEC has now largely followed Congress's lead,¹⁶⁵ and legal organizations have come to accept at least the up-the-ladder approach.¹⁶⁶

The criminal defense bar and its supporters may have the greatest fear of codification, given legislative propensities to favor law enforcement interests.¹⁶⁷ Yet, at this point, even this constituency should view codification as an attractive option. Not only will they have pro-privilege allies,¹⁶⁸ but recent developments,

160. Letter from Robert E. Hirshon to Senator John Edwards, *supra* note 85 (stating the opposition of the ABA to federal legislation or agency regulations of attorney professional conduct); *see also supra* notes 20–23 and accompanying text (discussing the ABA's and law firms' opposition to the regulation of attorney professionalism).

161. *See* Koniak, *Corporate Fraud*, *supra* note 15, at 220 (describing how then-Chairman Harvey Pitt did not respond to requests for assistance on addressing the conduct of lawyers).

162. *See id.* at 220–21 (describing how Congress included the amendment that became Section 307 despite pressure from legal organizations).

163. *See supra* notes 35–41 and accompanying text.

164. In my view, Sarbanes-Oxley's primary shortcomings lie elsewhere. *See supra* note 61 and accompanying text.

165. *See supra* notes 35–41 and accompanying text.

166. *See*, Moser & Keller, *supra* note 27, at 837; Letter from Alfred P. Carlton, Jr., President, American Bar Association, to the Securities Exchange Commission (April 2, 2003) (accepting the up-the-ladder provisions, while seeking some clarification in the final rules), *available at* <http://www.sec.gov/rules/proposed/s74502/aba040203.htm>. Indeed, with the recent changes, the ABA's model rules now provide for up-the-ladder reporting that is very similar to those contained in the SEC's rules. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (2004); *see also* ABA Task Force Report, *supra* note 56, at 166–70, 174–76 (discussing such changes).

167. *See* Glynn, *supra* note 6, at 155.

168. This was demonstrated by the widespread and swift reaction of the ABA and other legal organizations to perceived threats to the privilege and

including a potentially unwieldy crime-fraud exception, the monitoring of communications, and aggressive prosecutorial tactics, also show a marked deterioration of privilege protections in the criminal context.¹⁶⁹ Some of these developments are, as a practical matter, largely beyond judicial control. Other protections depend upon judges' acceptance of privilege doctrines that may result in the exclusion of evidence in the particular criminal matters before them, a context in which the pressure to be permissive may be at its greatest.

Thus, although the common-law approach to developing privilege doctrine offers some advantages, it offers no realistic potential for self-correction or meaningful change. Codification therefore offers the only avenue for reform. Yes, it is not without risk, but for the above reasons, and because the current regime is both costly and harmful to the aims of the privilege, codification is worth that risk.

B. *What Type of Codification?*

In *Federalizing Privilege*, I advocated federal privilege legislation that would be statutory, preemptive, and applicable both in judicial and non-judicial proceedings.¹⁷⁰ I showed why this approach would produce a level of certainty sufficient to reap the potential benefits of the privilege while reducing its transaction costs.¹⁷¹ At the same time, I argued that less ambitious reforms, such as a codification that applies only in federal question and federal criminal cases, offer potential benefits but do not address other causes of uncertainty, such as confusing and conflicting state-law doctrines and the growing mass of non-judicial adjudications.¹⁷² The recent developments discussed in this Article strengthen the case for a single, national, attorney-client privilege. Sarbanes-Oxley, for example, not only signals a congressional willingness to alter the law governing lawyers and accordingly, the law governing attorney-

client confidentiality in the context of Sarbanes-Oxley and by similar responses to the Justice Department's monitoring rule. *See supra* notes 20–23.

169. *See* discussion *infra* Part I.B.

170. Glynn, *supra* note 6, at 146–51 (advocating national privilege legislation that would preempt contrary state privilege law for various reasons).

171. *Id.*

172. *Id.*

client confidences, but also suggests another reason for doing so. If Congress views the attorney-client privilege as part of a legal framework that potentially fosters compliance with federal law, then it has an interest in ensuring that nonfederal decision makers (e.g., state legislatures, individual judges, arbitrators, and agencies) do not threaten legitimate privilege protections or create uncertainties that undercut the privilege's compliance-enhancing effects.¹⁷³ In addition, recent judicial decisions demonstrate that interjurisdictional conflicts continue to abound, and other developments offer further evidence that federal and state judges are losing the ability to protect client confidences.

Yet, among all possible outcomes, this kind of reform is the most unlikely.¹⁷⁴ A codification of federal privilege law that is non-preemptive, that applies only to matters involving federal questions (civil and criminal), is far more probable. Such reform, although more limited, would still be beneficial. A set of federal rules that delineates the elements of the privilege, defines the scope of the privilege's exceptions, and clarifies the circumstances in which privilege protections are waived would bring far greater certainty—and undoubtedly enhance the perception of certainty—in the federal context. This is particularly true if the code makes explicit that privilege protections are unqualified, or, in other words, not subject to *ex post* judicial modifications or exceptions. And this set of rules will provide federal leadership on the privilege, which has been largely absent since Congress enacted the Federal Rules of Evidence.¹⁷⁵ This leadership will, over time, promote convergence and, accordingly, greater certainty.¹⁷⁶ Some disparate state-law approaches may remain, but, overall, parameters of the privilege are likely to be far more certain than they are today.

Nevertheless, if reform at the federal level is limited in this way, those involved in drafting the new code ought to think broadly about how to maximize the benefits of codification. Such thinking, which

173. *Id.*

174. In private correspondence, Professor Broun has made this point a number of times. I agree that this type of reform is a long shot.

175. *See supra* note 97.

176. *See Broun, supra* note 104, at 789–90 (discussing convergence in other areas of evidence since enactment of the Federal Rules of Evidence).

has received insufficient attention in the debate over privilege reform, requires looking beyond the four corners of privilege doctrine itself to other means of ensuring that communications that should be privileged are in fact protected. Thus, there are additional suggestions for ways to enhance the benefits of a federally codified privilege.

First, and fundamentally, the drafters should recognize that the privilege is a doctrine that provides substantive protections for client confidences, rather than a mere procedural rule. This conception is consistent with Congress's decision to reject the set of rules governing evidentiary privileges that the Supreme Court originally proposed as part of the original Federal Rules of Evidence.¹⁷⁷ Indeed, although the privilege has procedural effects, its end is extrajudicial influence over primary conduct, including compliance with the law.¹⁷⁸ Federal privilege legislation embodying this conception would be both broader and more effective. For example, because the ends of the privilege are extrajudicial, there is no reason why its means, the protection of client confidences, ought to be limited to judicial proceedings. As emphasized above, the status of privilege protections in the growing mass of extrajudicial adjudicatory proceeding contributes to uncertainty. A federally codified attorney-client privilege therefore ought to apply not only in federal question and federal criminal cases, but also to proceedings involving federal matters outside federal court, including, *inter alia*, federal agency proceedings, proceedings before SROs operating under a federal regulatory mandate, arbitration proceedings involving underlying federal questions, and perhaps matters adjudicated before military tribunals.

As a practical matter, this view provides another reason, in addition to process concerns and other constraints discussed above, why Congress should codify the privilege instead of delegating reform to the Supreme Court. The Supreme Court and its judicial rule making bodies have no authority to extend the privilege beyond the jurisdiction of the federal courts. Thus, while the Advisory Committee and the Judicial Conference certainly should participate

177. See Glynn, *supra* note 6, at 88–89, 165.

178. See *id.*

in the drafting process, a new privilege code containing such broad privilege protections must be statutory.

Second, the effectiveness of privilege reform depends, in part, on ensuring that federal law enforcement officials and agencies do not act in ways that cause excessive erosion of privilege protections. Although Congress may or may not choose to rein in federal officials and regulators, if such reform is going to happen, it will most likely be through comprehensive privilege legislation, where the interrelationship between such practices and the ends of the privilege are apparent. Congress is also in the best position to determine the extent to which government actions that erode privilege protections (e.g., prisoner monitoring, heavy-handed prosecutorial techniques, and forced disclosures) are truly necessary to serve legitimate law enforcement interests. Although there is no guarantee that Congress would strike the right balance, Sarbanes-Oxley offers some reason for optimism. With assistance and feedback from multiple constituencies, Congress is far more likely to do so than the agencies themselves, or than judges whose oversight is either ineffective or post hoc.

Third, Congress and the Advisory Committee ought to consider additional “procedural” changes that will facilitate expedited review and hopefully clarification of any ambiguities in new privilege rules. They should consider, for example, providing for expanded interlocutory appellate review of some kinds of privilege determinations. Likewise, Congress should consider amending the Federal Arbitration Act to provide for judicial review of privilege determinations in arbitration proceedings governed by the new privilege code. These kinds of mechanisms will increase the courts’ ability to resolve interpretation issues in a timely manner, enhancing certainty.

Finally, even if Congress does not regulate the substance of state privilege law, it can substantially increase certainty by adopting a national privilege choice-of-law rule along with privilege rules governing federal matters.¹⁷⁹ A choice-of-law rule would not bring

179. Currently, states apply varying choice-of-law rules in determining which privilege doctrine applies when there is a conflict. See Glynn, *supra* note 6, at 121–25; Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909, 916–18 (1991).

about uniformity, but uniformity is not necessary as long as attorneys and clients are able to predict with reasonable confidence (at the time of their communication) the state privilege law that would govern their communications. Congress has an obvious interest in addressing cross-border issues, and regulating the implications of conflicting state laws on interstate economic activity may not face the same political obstacles as preemption.¹⁸⁰ Such a choice-of-law rule should offer predictable outcomes and results consistent with the interests the privilege seeks to serve. The territorial rule originally proposed by Professor Bradford, applying the law of the jurisdiction in which the attorney involved in the communication practices, may meet these criteria, although there may be other appropriate alternatives.¹⁸¹ This reform, combined with the others described above, would go a long way toward establishing a regime that maximizes the benefits of the privilege while limiting its costs.

III. CONCLUSION

The attorney-client privilege is supposed to strike a difficult balance between the social benefits and social costs which, for the most part, cannot be quantified. The ongoing debate then, is not simply over what the balance should be, which will always remain controversial, but also who should decide what the balance should be. To this point, courts have been allowed to make most of the decisions regarding privilege doctrine, at least in the federal system and many states. But the existing mess, which inflicts significant transaction costs and threatens to undermine the social benefits of the privilege, demonstrates that this is the wrong approach. Recent developments, including the Sarbanes-Oxley experience and changes in the nature of dispute resolution and law enforcement techniques, only strengthen this conclusion.

180. Congress has, at times, chosen to establish choice-of-law principals in a given area of regulation, rather than preempt the entire field. *See, e.g., Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (indicating that when Congress enacted the Clean Water Act in 1972, it did not intend to preempt common-law nuisance, but rather, established a choice-of-law principle in favor of the common law of the source state rather than another state where the effects of the pollution were felt).

181. *See Bradford, supra* note 179, at 948-49.

It is therefore time to codify the privilege, at least at the federal level. Federal codification poses risks, but it provides the opportunity to resolve lingering conflicts, clarify amorphous standards, and provide leadership that will promote convergence. It also allows consideration of the broader implications of privilege and its relationship to other areas of substantive legislation, which ought to be part of the balancing of costs and benefits. A codified federal privilege may embody a broader conception that allows regulation of extra-judicial pressures on the privilege and extension of the doctrine beyond the federal courts to non-judicial settings in which federal claims are involved, if not to all adversarial proceedings.

