Corporate Privilege and an Individual's Right to Defend

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Abstract

A recent memo issued by the Department of Justice has shifted federal policy to ensure that individuals responsible for corporate wrongdoing are held accountable. No longer will federal prosecutors be satisfied with sanctions against corporate entities. This shift in focus, however, creates a new challenge which has, so far, received inadequate attention: how to reconcile the employee or officer's right to present an advice-of-counsel defense and the corporation's right to assert the attorney-client privilege. Under many federal statutes designed to deter and punish corporate wrongdoing, a prosecutor or plaintiff must demonstrate that the defendant acted with the requisite mens rea. If an employee can establish that she acted on advice of counsel, she may have a defense to liability. But if the corporation can assert attorney-client privilege, precluding her from introducing the content of her attorney-client communications, the employee may be unable to mount an effective defense.

Judicial efforts to resolve the conflict between corporate and employee interests have been inadequate. In the civil context, especially, courts have recently declined to protect employee interests, holding that the employee's right to present a defense should never trump the corporation's right to maintain confidentiality. Reform is needed to better protect the interests of officers and employees. Fairness dictates that courts should condition a corporation's ability to assert privilege on an agreement to indemnify an employee deprived of the right to assert a legitimate advice-of-counsel defense. Although not perfect, this solution best balances the interests of corporations and employees.

Table of Contents

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Introduction

In response to the recent financial crisis and criticism that the government did not do enough to punish and deter Wall Street executives, federal prosecutors have committed to rooting out corporate misconduct by focusing on the individuals who commit the misconduct, rather than just the corporations. Corporations act through their agents, and unless those agents face sanctions for actions that violate federal law, federal statutes will be underenforced. In September 2015, former Deputy Attorney General Sally Yates[1] prepared a memorandum ("Yates Memo") directed to federal prosecutors shifting federal policy to ensure that individuals responsible for the corporate

1 In response to then-Acting U.S. Attorney General Sally Yates's refusal to defend a controversial executive order on immigration, President Donald Trump fired Yates, saying she "betrayed the Department of Justice by refusing to enforce a legal order." Josh Blackman, *Why Trump Had to Fire Sally Yates*, Politico (Jan. 31, 2017), http://www.politico.com/magazine/story/2017/01/why-trump-had-to-fire-sally-yates-214715; *see also* Paulina Firozi, *DNC Blasts 'Tyrannical' Trump for Firing Acting AG Yates*, The Hill (Jan. 30, 2017, 10:20 PM), http://thehill.com/homenews/administration/317023-dnc-blasts-tyrannical-trump-for-firing-acting-ag-yates (quoting the Democratic National Committee which characterized Yates as a "heroic patriot[ ]").

wrongdoing are held accountable.[2] No longer would agreements be tolerated under which the government agrees not to prosecute or to defer prosecution of high-level officers as part of a settlement agreement with the corporation itself.[3]

Under many of the federal statutes designed to deter and punish corporate misconduct, an individual officer or employee is civilly and criminally liable only if the individual's conduct is willful, or includes some other mens rea element.[4] For example, securities fraud violations brought under the catchall antifraud provision of the securities laws require proof that the defendant acted with the "intent to deceive, manipulate, or defraud."[5] To negate the element of intent, an officer or employee may seek to establish that she acted on advice of counsel.[6] That defense, however, requires the officer or employee to disclose the content of that advice to the prosecutor or plaintiff.

However, the corporation itself, acting through its officers and directors, may determine that it is not in the corporation's best interest to divulge the content of the communications with counsel. Under established law, the corporation, not the individual employee or officer, holds the privilege and can decide whether to waive the privilege and disclose the information or maintain it and keep the communication confidential.[7] A problem therefore arises whenever an individual officer or employee wishes to waive privilege and launch an advice-of-counsel defense and the corporation decides to maintain its privilege and keep the communications confidential.

The result is a clash between two fundamental rights—a corporate officer or employee's right to assert an advice-of-counsel defense and a corporation's right to maintain confidentiality. On the one hand, fairness and due process require that an individual accused of wrong-

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2 Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo], https://www.justice.gov/archives/dag/file/769036/download.

3 *See id.* In previous work, I have criticized this approach. *See, e.g.*, Susan B. Heyman, *Bottoms-Up: An Alternative Approach for Investigating Corporate Malfeasance*, 37 AM. J. CRIM. L. 163, 208–19 (2010) (proposing a bottom-up approach which would reduce the protections afforded to high-level corporate officers and better respect the legal rights of lower-level employees).

4 See *infra* Section I.A for discussion of a few federal statutes used to punish corporate misconduct.

5 *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

6 See *infra* Section I.C for discussion on the advice-of-counsel defense.

7 *See generally* Upjohn Co. v. United States, 449 U.S. 383 (1981) (discussing the attorney-client privilege in the context of a corporate client).

doing have an opportunity to every available defense.[8] In the criminal context, this right is even stronger as it is protected by the Sixth Amendment.[9] On the other hand, the attorney-client privilege is one of the oldest and most important evidentiary privileges, as it encourages free communication with counsel so clients can act on the best possible legal advice.[10] The Supreme Court cautioned against recognizing too many exceptions to the privilege because "[a]n 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."[11]

The following facts taken from *United States v. Wells Fargo Bank, N.A.*,[12] a recent case against Kurt Lofrano, a vice president at Wells Fargo Bank, illustrates the potential clash.[13] In violation of federal law, Lofrano and his group failed to report over six thousand loans the Bank had internally identified as containing material deficiencies.[14] Rather than self-report these material deficiencies, "the bank concealed its bad loans and shoddy underwriting to protect its enormous profits from the [Federal Housing Administration ("FHA")] program."[15] Over about a four-year period, Wells Fargo received hundreds of millions of dollars in FHA payments on those false claims.[16]

When the government brought claims against both Wells Fargo and Lofrano individually under the False Claims Act ("FCA")[17] and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"),[18] Lofrano asserted that he relied on advice of

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8 *See* Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007).

9 See *infra* Section III.B for discussion of the Sixth Amendment.

10 *See* Swidler & Berlin v. United States, 524 U.S. 399, 403, 408 (1998).

11 *Upjohn*, 449 U.S. at 393.

12 132 F. Supp. 3d 558 (S.D.N.Y. 2015).

13 *See id.*; *see also* Second Amended Complaint of the United States of America, *Wells Fargo*, 132 F. Supp. 3d 558 (No. 12 Civ. 7527 (JMF)(JCF)).

14 *See* Complaint of the United States of America paras. 4–5, *Wells Fargo*, 132 F. Supp. 3d 558 (No. 12 Civ. 7527 (JMF)(JCF)), 2012 WL 4788392.

15 *Id.* para. 5. Further, Lofrano falsely certified these materially deficient mortgage loans for government insurance and named the Bank as the holder of record. As the holder of record, the Bank submitted claims and received the insurance payments for nearly all of the loans that defaulted. *See* Second Amended Complaint of the United States of America, *supra* note 13, paras. 124–41, 164, 174–81.

16 *See* Complaint of the United States of America, *supra* note 14, paras. 3, 5.

17 False Claims Act (FCA), 31 U.S.C. §§ 3729–3733 (2012).

18 Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.). The government alleged that Lofrano engaged in misconduct with respect to residential mortgage loans insured by the government and sought recovery for its loss on these materially deficient mortgage loans. *See generally* Second Amended Complaint of the United States, *supra* note 13.

counsel when he engaged in the alleged misconduct.[19] Specifically, Lofrano asserted that he sought advice from at least two Wells Fargo attorneys about the Department of Housing and Urban Development's legal requirements and followed that advice when deciding not to report the loan deficiencies.[20] If the advice-of-counsel defense were successful, it would be a complete defense to the government's claims against Lofrano for tens of millions of dollars.[21] Wells Fargo, on the other hand, while vigorously disputing the government's claims, decided not to rely on an advice-of-counsel defense. Rather, Wells Fargo preferred to maintain its corporate privilege and not disclose its confidential communications with counsel.[22] To assure that Lofrano did not waive its privilege, Wells Fargo filed for a protective order asserting that all communications between Lofrano and the corporation's counsel were protected by the attorney-client privilege.[23]

To date, judicial efforts to resolve the clash between the corporate and employee interests have been inadequate. Courts have recognized that fairness dictates that officers or employees should have the "opportunity to present every available defense."[24] In criminal cases, the individual right to defend is even stronger than in civil cases as it is rooted in the Sixth Amendment right to present a defense.[25] Despite this constitutional concern, the Supreme Court has held in other contexts that the Sixth Amendment does not give defendants "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[26] Further, the Court cautioned against applying a balancing test and weighing ex post the importance of the information against the value of the client's

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19 Answer & Affirmative Defenses of Defendant Kurt Lofrano at 36, *Wells Fargo*, 132 F. Supp. 3d 558 (No. 12 Civ. 7527 (JMF)(JCF)).

20 *Wells Fargo*, 132 F. Supp. 3d at 559–60.

21 Memorandum of Law of Defendant Kurt Lofrano in Response to Defendant Wells Fargo Bank, N.A.'s Motion for a Protective Order at 11–14, 12 n.8, *Wells Fargo*, 132 F. Supp. 3d 558 (No. 12 Civ. 7527 (JMF) (JCF)) ("[T]here is no dispute that Mr. Lofrano's advice of counsel defense, if believed, would be a complete defense to the Government's claims.").

22 *Wells Fargo*, 132 F. Supp. 3d at 559–60. Wells Fargo asserted the privilege in response to the government's discovery requests and at Lofrano's deposition. *See id.* at 560.

23 *Id.* at 559.

24 *Id.* at 561 (quoting Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007)).

25 *Id.* at 561, 565.

26 Taylor v. Illinois, 484 U.S. 400, 410–11 (1988) (holding that the right to present a defense in a murder trial should not overcome well-recognized privileges); *id.* at 411 ("The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony. . . . The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence.").

interest in confidentiality.[27] The few lower courts to consider the issue with respect to an advice-of-counsel defense, however, have applied such a balancing test. Under this test, courts consider on a document-by-document basis whether an individual's right to present exculpatory privileged information should outweigh a corporation's right in maintaining its privilege.[28]

By contrast, in the civil context, a few recent decisions have relied on the Supreme Court's warning and rejected a balancing test because "[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application."[29] For example, the court in *Wells Fargo* rejected a balancing test and held that defendants like Kurt Lofrano should never be permitted to introduce privileged exculpatory evidence over a corporation's assertion of the attorney-client privilege.[30] The court recognized that the result may have been harsh because it denied Lofrano his best possible defense to claims against him for tens of millions of dollars.[31] However, the court reasoned that the potentially harsh result was necessary to preserve the sanctity of the corporate attorney-client privilege.[32] Some earlier decisions tried to avoid this harsh result by holding that fairness requires that a defendant's right to defend should sometimes trump the corporation's right to maintain privilege.[33]

This Article suggests a solution to this dilemma: condition a corporation's ability to assert privilege on an agreement to indemnify an employee deprived of the right to assert a legitimate advice-of-counsel defense. Part I discusses federal statutory prohibitions on corporate wrongdoing, considers the government's recent emphasis on individual accountability, and explains how the advice-of-counsel defense can be used by individual defendants to negate the mens rea element contained in several federal statutes. Part II describes the corporate attorney-client privilege and explains that the corporation, rather than individual officers or employees, controls the privilege. Part III dem-

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27 Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998).

28 See *infra* Section II.B for discussion of the criminal cases that have applied a balancing test.

29 *Swidler*, 524 U.S. at 409. See *infra* Section III.A for discussion of the civil cases that have rejected a balancing test.

30 *Wells Fargo*, 132 F. Supp. 3d at 559.

31 *Id.*

32 *Id.*

33 See *infra* Section III.A for discussion of civil cases that have permitted a defendant to introduce privileged exculpatory evidence over a corporation's assertion of privilege.

onstrates how the corporation's control of the privilege may limit the employee's right to assert an advice-of-counsel defense in civil or criminal actions. Finally, Part IV explores potential solutions, explaining why most of them inadequately reconcile the conflict, and then demonstrates how the indemnification alternative best balances the interests of corporations, employees, and the public.

I. Federal Prohibitions on Corporate Wrongdoing and the Advice-of-Counsel Defense

Under many federal statutes designed to deter and punish corporate misconduct, a defendant is civilly or criminally liable only if her conduct is intentional, willful, or has some other scienter or mens rea element. To negate the element of intent, a defendant may seek to establish that she acted in good-faith reliance on advice of counsel.[34] The rationale is that one who honestly sought advice of counsel could not have intended to break the law. In cases where intent is not an element of the alleged offense, such as strict liability offenses, the advice-of-counsel defense is not applicable.

A. Federal Statutory Prohibitions

Rather than attempting to summarize all of the federal statutes which seek to prevent and punish corporate wrongdoing, this Article focuses on a few statutory prohibitions—some of which require evidence of intent and others which are strict liability offenses. This Section considers the elements necessary to prove a securities law violation under various sections of the Securities Act of 1933 ("Securities Act")[35] and the Securities Exchange Act of 1934 ("Securities Exchange Act"),[36] and to prove a false claim under the FCA.[37]

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34 See *infra* Section I.C for discussion on the advice-of-counsel defense and how, rather than being a complete defense, courts have explained that advice of counsel is one element that should be considered in determining whether the defendant acted with the requisite intent.

35 Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012).

36 Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2012).

37 31 U.S.C. §§ 3729–3733 (2012). There are countless other federal statutes defining civil and criminal violations that apply to corporations and individual officers, directors, or employees, including: mail and wire fraud, 18 U.S.C. §§ 1341, 1343 (2012); tax fraud under the Internal Revenue Code, 26 U.S.C. § 7201 (2012); health care fraud under the Stark Law, 42 U.S.C. § 1395nn (2012); computer fraud under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2012); false statements, 18 U.S.C. § 1001 (2012); obstruction of justice, 18 U.S.C. 1503, 1505, 1510 (2012); patent infringement, 28 U.S.C § 1498 (2012); antitrust violations under the Sherman Act, 15 U.S.C. §§ 1–7 (2012); money laundering under the Money Laundering Control Act, 18 U.S.C. § 1956 (2012); and bribery under the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2012).

1. Federal Securities Violations

Federal securities laws are codified in several statutes and regulations. Under some provisions, including the antifraud provisions codified in section 10(b)[38] and Rule 10b-5[39] of the Securities Exchange Act, the government or plaintiff must demonstrate that the defendant acted with the requisite scienter or intent.[40] However, under other provisions, such as section 11 of the Securities Act[41] and Rule 102(e) of the Securities and Exchange Commission ("SEC") Rules of Practice,[42] intent is not an element of the violation.

Section 10(b) and Rule 10b-5 provide for civil and criminal liability for securities violations and include a private right of action.[43] Section 10(b) is not self-executing as it does not explicitly prohibit any particular conduct.[44] Instead, it provides that certain conduct in contravention of an SEC rule "shall be unlawful."[45] This designation triggers criminal liability for violations of SEC rules.[46] The primary rule that implements section 10(b) is Rule 10b-5 which prohibits any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security.[47]

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38 15 U.S.C. § 78j(b) (2012).

39 17 C.F.R. § 240.10b-5 (2016).

40 *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

41 15 U.S.C. § 77k.

42 17 C.F.R. § 201.102(e).

43 Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).

44 *See generally* 15 U.S.C. § 78j.

45 *Id.* (providing that "[i]t shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors").

46 *See* 15 U.S.C. § 78ff(a) ("Any person who willfully violates any provision of this chapter . . . shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment . . . if he proves that he had no knowledge of such rule or regulation.").

47 17 C.F.R. § 240.10b-5 (providing that "[i]t shall be unlawful for any person . . . (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security"). To set forth a violation of Rule 10b-5, a private party or the government must establish the following elements: (1) manipulation or deception, through a material misrepresentation or omission, (2) in connection with the purchase or sale of a security, (3) scienter, (4) reliance upon the misrepresentation or omission, (5) loss causation, and (6) damages. *See* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014).

In *Ernst & Ernst v. Hochfelder*,[48] the Supreme Court defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud."[49] The Court, however, explicitly declined to address whether reckless behavior would satisfy the scienter requirement, but noted that "[i]n certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability."[50] Since the *Hochfelder* decision, several circuit courts have concluded that recklessness does satisfy the scienter requirement of section 10(b) and Rule 10b-5.[51] Rule 10b-5 has become one of the most important rules for targeting and prosecuting securities fraud, including insider trading.[52] A recent study found that the Supreme Court issued more precedential opinions on Rule 10b-5 between 2009 and 2011 than in the previous eighteen years.[53]

Unlike section 10(b) and Rule 10b-5, section 11 does not require a plaintiff to prove scienter.[54] Section 11 gives plaintiffs a private remedy for any false or misleading statement made in a corporation's registration statement.[55] Liability under section 11 only attaches to a defined class of defendants—the issuer, each individual who signed the registration statement, directors of the corporation, experts who prepared certified sections of the registration statement, and underwriters.[56] Since the financial crisis, private litigants have increasingly

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48 425 U.S. 185 (1976).

49 *Id.* at 193–94, 193 n.12 (holding that accountants who engaged in negligent nonfeasance were not liable under section 10 and Rule 10b-5).

50 *Id.*

51 *See, e.g.*, Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023 (6th Cir. 1979); Hoffman v. Estabrook & Co., 587 F.2d 509, 516 (1st Cir. 1978); Nelson v. Serwold, 576 F.2d 1332, 1337–38 (9th Cir. 1978); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 44–47 (2d Cir. 1978); Coleco Indus. v. Berman, 567 F.2d 569, 574 (3d Cir. 1977); First Va. Bankshares v. Benson, 559 F.2d 1307, 1314 (5th Cir. 1977); Wright v. Heizer Corp., 560 F.2d 236, 251–52 (7th Cir. 1977).

52 *See* 17 C.F.R. § 240.10b5-1.

53 Robert F. Carangelo et al., *The 10b-5 Guide: A Survey of 2010–2011 Securities Fraud Litigation*, WEIL, GOTSHAL & MANGES LLP (Sept. 2012), http://www.weil.com/~/media/files/pdfs/10b_5_Guide.pdf.

54 *See* 15 U.S.C. § 77k (2012). Although proof of scienter is not required, a defendant may be able to assert a due diligence defense if the defendant can demonstrate that she conducted reasonable investigations over the portions of the registration statement that she prepared. *Id.* § 77k(b). "[T]he standard of reasonableness shall be that required of a prudent man in the management of his own property." *Id.* § 77k(c).

55 *Id.* § 77k(a) (providing that "[i]n case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue [certain enumerated individuals]").

56 *Id.* To assert a claim, a plaintiff must establish the following: (1) that she purchased

relied on section 11 as a means of reforming the behavior of officers and directors of public companies.[57] The absence of scienter makes the advice-of-counsel defense unavailable with respect to section 11 claims.

Similarly, Rule 102(e) does not require proof of intent,[58] again making advice of counsel irrelevant. The rule allows the SEC to discipline professionals who have engaged in "improper professional conduct."[59] The provision, however, does not define improper professional conduct, and the criteria used by the SEC are far from clear.[60] Further, the rule "does not mandate a particular mental state" and the SEC has explained that "negligent actions by a professional may, under certain circumstances" be actionable.[61] Under Rule 102(e), the SEC has authority to "deny, temporarily or permanently, the privilege of appearing or practicing before [the Commission] in any way to any person who is found by the Commission . . . to have engaged in unethical or improper professional conduct."[62] This rule was adopted to protect the integrity of the financial reporting process.[63] Any individual who appears or practices as an accountant, lawyer, or other professional before the SEC after receiving a Rule 102(e) order may be found to have violated the rule, regardless of the individual's intent.[64]

2. False Claims Act

The FCA generally prohibits any person from knowingly submitting a false claim to the government.[65] Congress enacted the FCA in

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securities pursuant to the allegedly deficient registration statement, (2) the registration statement contained a material misstatement or omission, and (3) the defendant is covered by the statute. *See id.*

57 RICHARD A. SPEHR ET AL., SECURITIES ACT SECTION 11: A PRIMER AND UPDATE OF RECENT TRENDS 1 (2006), http://www.wlf.org/upload/0106CLNSpehr.pdf.

58 SEC v. Prince, 942 F. Supp. 2d 108, 145–46 (D.D.C. 2013).

59 17 C.F.R. § 201.102(e)(ii) (2016).

60 Dixie L. Johnson et al., *Report of the Task Force on Rule 102(e) Proceedings: Rule 102(e) Sanctions Against Accountants*, 52 BUS. LAW. 965, 966 (1997).

61 Checkosky, Exchange Act Release No. 34-38,183, 63 SEC Docket 1691, 1700 (Jan. 21, 1997).

62 17 C.F.R. § 201.102(e).

63 Marrie v. SEC, 374 F.3d 1196, 1200 (D.C. Cir. 2004).

64 SEC v. Prince, 942 F. Supp. 2d 108, 146–51 (D.D.C. 2013) (holding that former Vice President and Chief Financial Officer of a corporation violated Rule 102(e) by drafting, reviewing, and commenting on the company's public filings, even though he did not have final authority over the information included).

65 31 U.S.C. § 3729 (2012).

the Civil War era to prosecute fraud in defense contracts.[66] In the wake of the savings and loan crises of the 1980s, Congress enacted the FIRREA to allow courts to impose civil penalties whenever a defendant violates the FCA or other enumerated statutes.[67] The FCA is used both criminally[68] and civilly[69] to protect the government's funds and property from false claims.[70] The mere submission of a false claim is not sufficient to impose liability. Rather, the prosecution must prove the following elements: (1) the defendant presented a claim to the United States, including agencies and departments, (2) the claim was "false, fictitious, or fraudulent," and (3) the defendant knew the falsity of the claim when it was submitted.[71] Some courts also include materiality as an element to the offense.[72] Accordingly, like section 10(b) and Rule 10b-5, defendants cannot be liable under the FCA for merely negligent behavior. Hence, a defendant who establishes that she acted on advice of counsel may be able to avoid liability under the statute.

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66 S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

67 12 U.S.C. § 1833a (2012). The government relied on FIRREA in its case against Kurt Lofrano, a vice president at Wells Fargo, in order to recover substantial penalties for his submissions of false claims to the FHA. *See generally* United States v. Wells Fargo Bank, N.A., 132 F. Supp. 3d 558 (S.D.N.Y. 2015). In addition to providing for civil penalties, FIRREA established the Resolution Trust Corporation to close hundreds of insolvent banks and provided funds to pay insurance to their depositors. *See* Lee Davison, *Politics and Policy: The Creation of the Resolution Trust Corporation*, 17 FDIC BANKING REV., no. 2, 2005, at 17, 18. It also gave regulatory authority over these savings and loan institutions to the Office of Thrift Supervision. *See* Robert Cooper, *The Office of Thrift Supervision*, 59 FORDHAM L. REV. S363, S363 (1991).

68 18 U.S.C. § 287 (2012) (imposing criminal liability on "[w]hoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent").

69 31 U.S.C. § 3729 (2012) (imposing civil liability on "any person who—(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; . . . (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government").

70 *See* United States v. Gilliland, 312 U.S. 86, 93 (1941) (explaining that Congress intended the FCA "to protect the authorized functions of governmental departments and agencies from the perversion which might result from . . . deceptive practices").

71 18 U.S.C. § 287; *see also* United States *ex rel.* Godfrey v. KBR, Inc., 360 F. App'x 407, 410 (4th Cir. 2010).

72 *See, e.g.*, United States v. Adler, 623 F.2d 1287, 1291 (8th Cir. 1980).

B. Enforcement Policy: The Yates Memo and Individual Accountability

Although the federal securities laws and many other federal statutes can be enforced against corporations and individuals, the government has been criticized by Congress and consumer advocates for pursuing only corporations, rather than the responsible individuals within the corporation.[73] For example, the government obtained billions of dollars in fines from leading banks, including JPMorgan Chase and Citigroup, for their involvement in the financial meltdown of 2008.[74] The government brought civil claims against the banks under the federal securities laws, including section 10(b) and Rule 10b-5.[75] In many cases, the government alleged that the banks' offering materials for securities tied to subprime mortgages contained material misstatements or omissions.[76] Rather than risk trial, several of the banks entered into settlement agreements with the government.[77] However, not one individual from those banks was required to admit wrongdoing or go to prison because of the role they played in the malfeasance.[78]

Former Deputy Attorney General Yates recognized that the individuals responsible for the financial crisis should be held accountable.[79] As she explained, corporations as artificial entities can only commit crimes through their officers, directors, and employees, and

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73 *See Wall Street Reform: Assessing and Enhancing the Financial Regulatory System: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs*, 113th Cong. (2014) [hereinafter *Wall Street Reform Hearing*], http://www.c-span.org/video/?321377-1/hearing-federal-financial-regulatory-system (statements of Sen. Elizabeth Warren and Sen. Richard Shelby).

74 Nick Summers, *Banks Finally Pay for Their Sins, Five Years After the Crisis*, BLOOMBERG (Oct. 31, 2013, 9:41 PM), http://www.bloomberg.com/news/articles/2013-10-31/banks-finally-pay-for-their-sins-five-years-after-the-crisis. The other banks to pay significant fines were Bank of America, Morgan Stanley, Goldman Sachs & Co., and Wells Fargo. *Id.*

75 Complaint at 3, SEC v. Goldman Sachs & Co., No 10-CV-3229 (BSJ), slip op. at 1 (S.D.N.Y. July 20, 2010).

76 For example, the SEC brought securities fraud charges against Goldman Sachs for making material misstatements and omissions with respect to the sale of synthetic collateralized debt obligations ("CDOs"). *See id.* at 1. The success of the CDO was connected to the subprime residential mortgage-backed securities. *See id.* Although at the time of the marketing, the housing market was showing signs of distress, the risk was not included in the offering materials. *See id.* Further, Goldman Sachs failed to disclose that one of its hedge fund managers had an adverse interest to the success of the securities. *See id.* at 2.

77 *See, e.g.*, SEC v. Goldman, Sachs & Co., Litigation Release No. 21592, 98 SEC Docket 3135, 2010 WL 2799362 (July 15, 2010) (reporting acknowledgment by Goldman Sachs that the marketing material contained incomplete information and agreement to settle the charges for $550 million).

78 *Wall Street Reform Hearing*, *supra* note 73 (statement of Sen. Elizabeth Warren).

79 Yates Memo, *supra* note 2.

those individuals should be punished for their wrongdoing.[80] Yates stressed the importance of the public having "confidence that there is one system of justice and it applies equally regardless of whether that crime occurs on a street corner or in a boardroom."[81]

The problem in pursuing individuals for corporate misconduct, however, is that it is often difficult to unravel the web of corporate wrongdoing to identify the culpable individuals. High-level officers are particularly difficult to pursue because they often insulate themselves from direct involvement in the misconduct.[82] Further, under earlier versions of the Department of Justice ("DOJ") guidelines, these individual officers were able to avoid personal liability or prosecution by including themselves in settlement agreements that the government entered into with corporations.

In response to these substantial challenges and the public's criticism, the DOJ issued the Yates Memo in September of 2015.[83] This memo includes new guidelines to assist federal prosecutors in identifying and pursuing individual wrongdoers.[84] Although initially adopted to improve the integrity of the banking sector,[85] the memo applies to all domestic corporations.[86] The government's stated policy objectives in issuing the memo include: deterring future misconduct, creating incentives for corporations to change their behavior, ensuring that the appropriate parties are held accountable for their misconduct, and promoting the public's confidence in the justice system.[87] This heightened focus on individual wrongdoing will make it more likely that the government will not be satisfied with merely obtaining high monetary awards from corporations, but will aggressively pursue actions against the individuals involved in the misconduct.[88]

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80 Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html?_r=0.

81 *Id.*

82 *See* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/.

83 Yates Memo, *supra* note 2.

84 *Id.* at 2–3.

85 *See* Britt Eilhardt & Beata Aldridge, *The Yates Memo's Impact on D&O Liability*, 20160511A NYCBAR 16 (2016).

86 *See generally* Yates Memo, *supra* note 2.

87 *Id.* at 1.

88 Eilhardt & Aldridge, *supra* note 85 (noting that since the government ramped up enforcement against individuals last year, it is likely that the same will occur this year).

The memo sets forth key guidelines that prosecutors should follow to strengthen the department's pursuit of individual wrongdoers.[89] Probably the most impactful change is a requirement that to qualify for cooperation credit, a corporation must provide the department all relevant facts relating to the individuals involved in the misconduct.[90] Under this all-or-nothing approach, a corporation is only eligible for cooperation credit if it seeks out facts and theories aimed at exposing individual misconduct and discloses all "relevant facts" to the government.[91] Although the DOJ had long emphasized the importance of identifying culpable individuals, prior to the Yates Memo corporations were still eligible to receive some credit for limited disclosures.[92] The Yates Memo disallows the former practice of partial credit and only gives credit when a corporation "give[s] up the individuals, no matter where they sit within the company."[93] As the DOJ is no longer willing to give partial credit for cooperation, corporations may decide that they are better off asserting privilege and not cooperating with the DOJ investigation.

Although the Yates Memo emphasizes the disclosure of all relevant facts, it also explains that the DOJ attorneys should not simply

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89 Yates Memo, *supra* note 2, at 2–3 (setting forth guidelines that include (1) a requirement that to qualify for cooperation credit, corporations must provide the department all relevant facts relating to the individuals involved in the misconduct; (2) investigations should focus on the individual wrongdoers; (3) routine communication between civil and criminal attorneys handling the investigation; (4) absent extraordinary circumstances, not releasing culpable individuals from civil or criminal liability as part of a settlement with the corporation; (5) cases should not be resolved with the corporation without a clear plan for resolving related individual cases; and (6) civil attorneys should focus on individuals as well as the corporation and base their decision on whether to bring suit against the individual on more than just their ability to pay a potential judgment).

90 *Id.*

91 *Id.*

92 *See Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing*, U.S. DEP'T JUST. (Sept. 10, 2015), http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school; *see also Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the American Bar Association's 25th Annual National Institute on Health Care Fraud*, U.S. DEP'T JUST. (May 14, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-american-bar-association-s; *Remarks by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller at the Global Investigation Review Program*, U.S. DEP'T JUST. (Sept. 17, 2014), http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller.

93 *Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing*, *supra* note 92 ("No more partial credit for cooperation that doesn't include information about individuals.").

wait for a corporation to deliver "information about individual wrongdoers and then merely accept" it.[94] Rather, they should proactively investigate "individuals at every step of the process—before, during, and after any corporate cooperation," thereby pursuing the individuals and corporation in tandem to ensure that the corporation has not downplayed individual responsibility for wrongdoing.[95]

The memo explains that focusing investigations on the individual wrongdoers maximizes the ability to unravel the "full extent of corporate misconduct."[96] As a corporation can only act through its officers and employees, investigating their conduct is the more efficient way to unravel the web of corporate fraud.[97] Additionally, by focusing on individuals, it will increase the chances that a lower-level employee will cooperate against higher-level employees, officers, or directors.[98] This recommendation also ensures that both corporations and individuals will be charged for any misconduct.

Further, the memo precludes government prosecutors from entering into any settlement agreement with a corporation which provides immunity for any officers or employees "absent extraordinary circumstances."[99] In fact, any corporate settlement agreement should require the corporation to provide information about individuals, with penalties for failing to do so.[100] In addition, the memo provides that the government should not resolve a case with the corporation without simultaneously settling individual liability or having a clear plan for resolving individual cases.[101] To the extent that the department decides not to proceed against individuals, it must memorialize the decision and obtain approval from the United States Attorney General or Assistant Attorney General overseeing the investigation.[102]

Prior to the enactment of these new guidelines, corporations routinely cooperated with the government and waived privilege in exchange for leniency in the treatment of the corporation and high-level officers.[103] The government would often enter into deferred prosecution agreements ("DPAs") or non-prosecution agreements ("NPAs")

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94 Yates Memo, *supra* note 2, at 4.

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at 5.

100 *Id.* at 4.

101 *Id.* at 5–6.

102 *Id.* at 5.

103 *See* Heyman, *supra* note 3, at 166.

with corporations under which they would agree not to prosecute or to defer prosecution of the corporation and certain named high-level officials.[104]

However, the lower-level employees who often cooperated with counsel were not included in these settlement agreements and were not given credit for such cooperation.[105] Rather, the information they provided to counsel that was turned over to the government often created a roadmap for the government to use in prosecuting them individually.[106] The statements that employees made to counsel often formed the basis of civil or criminal actions brought against them individually regardless of whether they understood the limits of corporate privilege.[107] In previous work, I have criticized this system and the inherent problems it creates.[108]

Under the Yates Memo, the practice of including high-level officers in settlement agreements and giving them credit for corporate cooperation is forbidden outside of extenuating circumstances.[109] Without such credit and protection from prosecution, high-level officers may have less incentive to advise the corporation to waive privilege and turn over potentially incriminating evidence to the government. Such incriminating information could potentially form the basis for prosecution against the officer in his personal capacity. Given this new landscape, it will be more likely that a corporation may choose not to waive privilege because the individuals making the waiver decision may fear personal liability or prosecution.[110]

The Yates Memo therefore makes it more likely that in addition to pursuing corporations for wrongdoing, the government will pursue the officers or employees involved in the misconduct in their individual capacities. Also, given the strong incentives for the department to identify the individuals responsible for the misconduct, the conflict between the corporate interest and individual interest in disclosure may be heightened. The Yates Memo's emphasis on pursuing individual

104 *See id.* at 173 n.50 (discussing DPAs and NPAs).

105 *See id.* at 185, 205.

106 *See id.* at 205.

107 *See id.* at 203–05.

108 *See id.* (proposing a bottom-up approach which would reduce the protections afforded to high-level corporate officers and better respect the legal rights of lower-level employees).

109 Yates Memo, *supra* note 2, at 5.

110 The waiver decision may be different, however, where the individual officer or director making the decision relied on advice of counsel and intends to rely on privileged evidence as part of her defense. In that case, the individual would have a personal interest in waiver. Fiduciary duties require officers or directors to set aside their personal interests and only consider the best interest of the shareholders in making business decisions.

wrongdoers and not providing them any leniency for corporate cooperation, regardless of their position, may make it less likely that high-level corporate officers would recommend waiving privilege to cooperate with the government.[111] Although its full impact has yet to be realized, the Yates Memo could have a significant effect on corporations, their officers, and their employees. Accordingly, it is important to develop a balance between the rights of the individual employee or officer to defend and the corporation to maintain privilege.

C. The Advice-of-Counsel Defense

The advice-of-counsel defense has been recognized in various contexts for well over a century.[112] The defense is primarily used to demonstrate that a defendant lacked the intent to engage in the alleged unlawful conduct because she acted in good faith or with due care.[113] The notion is that one who honestly sought advice on how to comply with the law could not have intended to break the law.[114] Where intent is not an element of the alleged offense, such as in strict liability cases, reliance on advice of counsel is irrelevant.[115] Further, even where intent is an element of an offense, the advice-of-counsel defense "is not a complete defense, but is merely one factor a jury may consider" in determining whether the defendant had the requisite intent.[116] The fact that a defendant obtained "legal advice does not under all circumstances constitute an impregnable wall of defense" against all violations which include an intent element.[117]

In order to establish an advice-of-counsel defense, a defendant must prove among other things that she (1) sought the advice of counsel in good faith, (2) made complete disclosure to counsel of all rele-

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111 See *infra* Section II.B for discussion on why an officer who intends to rely on privileged evidence as part of her defense may prefer waiver even if she does not receive any credit for the cooperation.

112 *See, e.g.*, Commonwealth v. Bradford, 50 Mass. (9 Met.) 268, 272–73 (1845).

113 *See* Williamson v. United States, 207 U.S. 425, 452–53 (1908) (holding that a defendant who seeks and reasonably relies in good faith upon the advice of counsel may not be convicted of a crime involving willful and unlawful intent); *see also* Bisno v. United States, 299 F.2d 711, 719 (9th Cir. 1961) (stating that advice of counsel is not a distinct defense to any crime, but is instead an indicator of good faith that may be considered by the trier of fact in deciding the issue of intent).

114 *See* United States v. Lindo, 18 F.3d 353, 356–57 (6th Cir. 1994).

115 *See, e.g.*, Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974) (defendant found liable under the Federal Truth in Lending Act); S. Cal. Home Builders v. Young, 188 P. 586 (Cal. Dist. Ct. App. 1920) (defendant liable for wrongful declaration of dividends).

116 United States v. Wenger, 427 F.3d 840, 853–54 (10th Cir. 2005) (citing United States v. Custer Channel Wing Corp., 376 F.2d 675, 683 (4th Cir. 1967)).

117 Linden v. United States, 254 F.2d 560, 568 (4th Cir. 1958).

vant facts, and (3) reasonably relied upon and followed counsel's advice.[118] As the party attempting to assert the defense bears the burden of establishing each of these elements, the defense will often fail.[119] It can be extremely difficult to demonstrate that there was complete disclosure of all material facts or that the advice counsel provided was precisely followed.[120] Further, in order to assert the defense, a defendant would be required to waive privilege and disclose all attorney-client communications relating to the subject matter of the advice.

When properly asserted, the defense can be used to dispute the government or plaintiff's evidence of intent.[121] For example, under the FCA, the government or plaintiff has the burden of proving that the defendant acted knowingly in submitting false claims to the government.[122] Courts have held that the proof of knowledge may be contra-

118 *See* Liss v. United States, 915 F.2d 287, 291 (7th Cir. 1990). The advice-of-counsel defense is not available to one who was seeking the advice in order to insulate himself from liability for committing an unlawful act. *See* United States v. Traitz, 871 F.2d 368, 382 (3d Cir. 1989). The defense is only available to one who fully and honestly discloses all "material facts surrounding a possible course of action" and seeks advice of counsel on the legality of his action. *Id.*

119 *See, e.g.*, United States v. Pettigrew, 77 F.3d 1500, 1520 (5th Cir. 1996); *see also* United States v. Ibarra-Alcarez, 830 F.2d 968, 973 (9th Cir. 1987) (explaining that to warrant an instruction on advice of counsel, a defendant must show that he presented all material facts to his attorney and acted in good faith in accordance with the advice received).

120 *See, e.g.*, *Wenger*, 427 F.3d at 853 (holding in a criminal securities fraud case that a reasonable jury could have rejected defendant's advice-of-counsel defense because defendant did not establish that he disclosed all relevant facts to his counsel); United States *ex rel.* Drakeford v. Tuomey, 976 F. Supp. 2d 776, 783, 786–89 (D.S.C. 2013) (denying defendant's request to set aside the judgment as against the weight of the evidence in a qui tam action where the jury determined that the defendant health care provider had violated the FCA because credible evidence was presented at trial from which the jury could properly reject defendant's advice-of-counsel defense, including evidence that the attorney had expressed concerns to the defendant that the contracts were problematic and could raise a "red flag" and expose defendant to liability because physicians were making referrals in violation of the Stark Law); SEC v. Prince, 942 F. Supp. 2d 108, 151–52 (D.D.C. 2013) (holding in a civil securities fraud case that because the defendant impeded counsel from making a fully informed decision, defendant could not claim that he relied in good faith on advice-of-counsel defense).

121 *See* Jennifer Moses, *False Claims*, 40 AM. CRIM. L. REV. 495, 507 (2003); *see also* Brian Ferguson, Seagate *Equals Sea Change: The Federal Circuit Establishes a New Test for Proving Willful Infringement and Preserves the Sanctity of the Attorney-Client Privilege*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 167, 170 (2007) (noting that advice-of-counsel defenses are commonly relied on in patent infringement cases). Although patent infringement is a strict liability offense, a defendant who engaged in willful infringement would be subject to enhanced damages. *See In re* Seagate Tech., LLC, 497 F.3d 1360, 1368 (Fed. Cir. 2007); *see also* 35 U.S.C. § 284 (2012) (providing for enhanced damages at the court's discretion). To defend against a claim of willful infringement, defendants would often assert an advice-of-counsel defense as counsel was often consulted for advice regarding the patent. *See In re Seagate Tech.*, 497 F.3d at 1369.

122 31 U.S.C. § 3729 (2012).

dicted by evidence that the defendant relied in good faith on the advice of counsel.[123] However, a defendant may be precluded from asserting the defense without a waiver of privilege with respect to the communications relating to the subject matter of the advice.[124]

Similarly, because many provisions of the Securities Act and Securities Exchange Act, including section 10(b) and Rule 10b-5, require a showing of scienter,[125] good-faith reliance on advice of counsel can be used as a defense.[126] For example, in *SEC v. Prince*,[127] the SEC brought civil actions against the former Vice President and Chief Financial Officer of a corporation for failing to disclose that he was an officer of the corporation.[128] The court explained that in reaching its decision that the defendant did not violate section 10(b) and Rule 10b-5, it considered the defendant's good-faith reliance on counsel's advice that disclosure was not required.[129] The court held, however, that the defendant violated Rule 102(e) of the Securities Exchange Act.[130] As the court explained, there is no caselaw requiring scienter for a Rule 102(e) violation, and therefore, the advice that the defendant obtained could not be used as a defense.[131]

The advice-of-counsel defense is particularly important to corporations and corporate employees because of the extensive role attorneys play in all aspects of a corporation's activities.[132] It is almost inconceivable that a corporation would make a major business decision without consulting with counsel.[133] Individual officers or employees not only seek legal advice on major corporate transactions such as mergers or securities offerings, but also on more mundane types of activities such as reporting or filing requirements.[134] Legal advice is a

123 *See, e.g.*, United States v. Wells Fargo Bank, N.A., 132 F. Supp. 3d 558, 560 (S.D.N.Y. 2015) (stating that an advice-of-counsel defense would be a complete defense to the alleged intent-based violations).

124 *See, e.g.*, *id.* at 559.

125 *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

126 *See* FRANCIS C. AMENDOLA ET AL., 69 AM. JUR. 2D *Securities Regulation—Federal* § 1202, Westlaw (database updated Sept. 2016).

127 942 F. Supp. 2d 108 (D.D.C. 2013).

128 *Id.* at 130.

129 *Id.* at 140 (explaining that, during the bench trial, the court considered evidence that defendant submitted which established full and complete disclosure of all material facts to counsel and good-faith reliance on counsel's advice).

130 *Id.* at 151.

131 *Id.*

132 *See* Douglas W. Hawes & Thomas J. Sherrard, *Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases*, 62 VA. L. REV. 1, 5 (1976).

133 *See id.*

134 *See id.*

crucial element of business decisions because of the complexity of the laws governing corporations and the increasing exposure of management to potential liability for making uninformed decisions.[135] If the legal advice turns out to be imprudent, the natural and appropriate response is that "we relied on the advice of counsel." In fact, the DOJ recently recognized that in many cases, corporations will have an advice-of-counsel defense available to them based upon advice provided by in-house or outside transactional lawyers with respect to the alleged misconduct.[136] In this new era, the advice-of-counsel defense, which has been recognized by courts for well over a century, may emerge as a robust defense.[137]

The advice-of-counsel defense, which is premised on full and honest disclosure, raises the issue of the communications between the attorney and the client seeking advice.[138] Accordingly, in order to assert this defense, the defendant must waive privilege and disclose all communications involving the subject matter of the advice.[139] An assertion of an advice-of-counsel defense by a corporation may put the privileged communications "into issue" and may draw into the limelight what may otherwise be confidential information.[140] Courts have consistently held that where a corporation asserts an advice-of-counsel defense, such corporation waives the attorney-client privilege with respect to all communications, whether written or oral, to or from counsel, concerning the transactions for which the counsel's advice was

135 *See id.*; *see also* Smith v. Van Gorkom, 488 A.2d 858, 881 n.22 (Del. 1985).

136 U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.720(b) (2015).

137 *See* State v. Patterson, 71 P. 860, 864 (Kan. 1903) (recognizing but rejecting the advice-of-counsel defense because the defendant sought the legal advice after committing the wrongful act); People v. Long, 15 N.W. 105, 105 (Mich. 1883) (recognizing but rejecting the defense because the defendant did not follow the legal advice).

138 *See* Garfinkle v. Arcata Nat'l Corp., 64 F.R.D. 688, 688–90 (S.D.N.Y. 1974) (discussing the attorney-client privilege).

139 *Id.* at 689 (stating that the plaintiff is entitled to know the communications surrounding the advice of counsel).

140 *See* Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1326 (9th Cir. 1995) (developing a three part "into issue" test: "(1) the party asserts the privilege as a result of some affirmative act . . . ; (2) through this affirmative act, the asserting party puts the privileged information at issue; and (3) allowing the privilege would deny the opposing party access to information vital to its defense").

sought.[141] In these situations, there is little that corporate counsel can do to avoid waiver.[142]

However, where a third party such as an officer or employee of a corporation attempts to assert the defense, the matter is more complicated. Where the interests of the individual officer or employee are aligned with the corporation and the corporation agrees to allow waiver, the individual can assert the defense.[143] Difficulties arise, however, where the interests of the corporation and the individual diverge and the individual prefers to assert the defense, even if it means waiving the privilege, while the corporation prefers to maintain confidentiality over the communications.

II. The Corporate Attorney-Client Privilege

The attorney-client privilege is one of the oldest and most important evidentiary privileges in the United States. The privilege allows the client to prevent disclosure to third parties of confidential communications between an attorney and client made for the purpose of seeking primarily legal advice.[144] The privilege developed upon two fundamental assumptions: good legal advice requires full disclosure of clients' problems, and clients will only disclose such details if they can be assured confidentiality.[145] Although historically the privilege only applied in the individual context, the Supreme Court translated the privilege to apply in the corporate context as well.[146] The Court reasoned that corporations, like individuals, need a zone of protection and privacy within which to obtain the best possible legal advice and advocacy.[147] Although the corporation, as an artificial entity, can only

141 *See Garfinkle*, 64 F.R.D. at 689. An exception to this waiver requirement has been recognized where defendants merely assert they "sought legal advice" before acting in order to demonstrate that they made an informed decision. *See In re* Comverge, Inc. S'holders Litig., No. 7368-VCP, 2013 WL 1455827, at *4–5 (Del. Ch. Apr. 10, 2013) (explaining that the defense was limited to only asserting that the board "sought, obtained, received, or considered" the advice of legal counsel before engaging in the transaction).

142 Richard T. White & Susan Hackett, *The Attorney-Client Privilege: Dos and Don'ts, and Progress Against Erosion*, Mich. B.J., Jan. 2007, at 18, 21.

143 *See* FEC v. Friends of Jane Harman, 59 F. Supp. 2d 1046, 1058 (C.D. Cal. 1999) (quoting Hawes & Sherrard, *supra* note 132, at 28).

144 Jerold S. Solovy et al., *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work-Product Doctrine*, *in* Insurance Coverage 2009: Claim Trends & Litigation 225, 307 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-797, 2009) ("The final requirement to establish the privilege is that the protected communication was made for the purpose of securing legal advice or assistance.").

145 *Id.* at 235.

146 *See* Upjohn Co. v. United States, 449 U.S. 383, 389–90 (1981).

147 *See id.*

communicate with counsel through its officers, directors, and employees, the Court held that the corporation itself holds the privilege and decides whether to assert or waive it.[148]

A. Rationale and Scope

The attorney-client privilege is deeply rooted in Anglo-American jurisprudence where it was unquestioned that a lawyer could not be a witness against his client.[149] The privilege has been developed under state and federal common law and has been codified by statute in several states.[150] Rather than codifying the attorney-client privilege for federal courts, Congress has directed the courts to develop evidentiary privileges "in the light of reason and experience."[151] Under this direction, federal courts have created common law relating to the attorney-client privilege which controls federal question cases, but does not control in diversity proceedings or in state courts.[152] This Article focuses on the development and application of the privilege under federal common law.

Although there is no single authority defining the attorney-client privilege, there are four basic elements necessary to establish its existence: (1) a communication, (2) made between an attorney and his client, (3) in confidence, and (4) primarily for the purpose of seeking legal advice.[153] The main policy justification for the privilege is that clients should be encouraged to speak candidly and openly with counsel, without concern that their secrets will be revealed.[154] Without complete candor, attorneys would be limited in their ability to provide sound legal advice and zealous advocacy for their clients.[155] Courts

148 *See id.*

149 *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (John T. McNaughton ed., 1961).

150 *See id.* § 2292, at 555–59 n.2 (citing state statutes codifying the attorney-client privilege).

151 FED. R. EVID. 501 (providing that the privilege is governed by federal common law, unless the courts are dealing with a state law claim and then the privilege should be determined in accordance with state law).

152 FED. R. EVID. 501 conference committee's note ("[I]n civil actions and proceedings [where state law supplies the substantive rule of decision] the privilege of a witness . . . is determined in accordance with State law . . . ."); 2B WILLLIAM W. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE & PROCEDURE WITH FORMS § 967, at 243–44 (Charles Alan Wright ed., 1961).

153 WIGMORE, *supra* note 149, § 2292, at 554.

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

155 *See* Trammel v. United States, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests

have recognized that the purpose of the privilege can only be achieved if the privilege is absolute, meaning that it cannot be overcome by an adversary's showing of substantial need.[156] The client, as the holder of the privilege, is the only one who can assert the privilege to avoid disclosure or waive the privilege to share information.[157] However, there are a few public policy exceptions to the privilege which permit waiver without client consent, including the crime-fraud[158] and fiduciary duty exceptions.[159]

Historically, the attorney-client privilege only applied to protect individual clients.[160] The first federal case to directly hold that the privilege applies to corporations was *Radiant Burners, Inc. v. American Gas Ass'n*.[161] That court, however, expressly declined to define the application or scope of the privilege in the corporate context.[162] For two decades, federal courts had difficulty deciding how to apply the

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on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.").

156 *See, e.g.*, Admiral Ins. v. U.S. Dist. Court, 881 F.2d 1486, 1495 (9th Cir. 1989). Interestingly, the work-product doctrine—which protects documents or information prepared in anticipation of litigation from disclosure—is not an absolute privilege. *See id.* at 1494. Unlike the attorney-client privilege, the work-product protection can be vitiated by a showing that there is substantial need for the information and it cannot be obtained from another source without undue hardship. *See id.* at 1495 (holding that the attorney-client privilege cannot be overcome by a showing that the information sought was not otherwise discoverable because the former employee intended to invoke his Fifth Amendment self-incrimination privilege at deposition).

157 *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5487, at 407–08 (1986) (explaining that the privilege belongs to the client and may be waived intentionally because the client decides that it is in her best interest to disclose the communication or inadvertently because the client failed to keep the communication confidential).

158 The crime-fraud exception permits an opposing party to gain access to otherwise confidential communications that took place for the purpose of furthering or concealing a crime or fraud. *See* Clark v. United States, 289 U.S. 1, 15 (1933). The exception also applies in the corporate context. *See* United States v. Zolin, 491 U.S. 554, 556–57 (1989).

159 The fiduciary duty exception gives shareholder-plaintiffs the right to obtain access to confidential communications. *See, e.g.*, Garner v. Wolfinbarger, 430 F.2d 1093, 1104 (5th Cir. 1970) (stating that where shareholders allege the corporation acted inimically to shareholder interest, protection of those interests and the public interest require that the privilege sometimes yield to the shareholders' need for the information).

160 *See* WRIGHT & GRAHAM, *supra* note 157, § 5476, at 134–35 (noting that one of the most perplexing issues in the law of privilege is determining whether and to what extent an artificial entity needs and deserves the protection of privilege).

161 320 F.2d 314, 322 (7th Cir. 1963) (reversing the district court's holding that the corporation was not entitled to claim the attorney-client privilege to bar the discovery of documents in a private antitrust action because "the privilege is that of a 'client' without regard to the non-corporate or corporate character of the client").

162 *Id.* at 323 ("[W]e must decline the invitation to decide, in a vacuum, the limitations to be imposed in the application of the privilege by a corporation.").

attorney-client privilege to corporate clients as it was initially developed to apply to individual clients.

In 1981, in the seminal case of *Upjohn Co. v. United States*,[163] the Supreme Court decided several difficult and novel questions to determine how the privilege should apply in the corporate context as a matter of federal law.[164] As *Upjohn* is grounded in the federal common law, it only controls federal question cases that apply federal common law to decide privilege issues.[165] The *Upjohn* decision does not bind state courts.[166] In fact, according to a survey conducted about two decades after *Upjohn* was decided, only fourteen states had adopted *Upjohn*'s rule on corporate privilege, eight states had adopted a different approach, and the majority of states had not adopted any particular approach.[167]

The *Upjohn* Court explained that artificial entities need and deserve the protections of the attorney-client privilege and work-product doctrine.[168] The Court reasoned that corporate entities, like individuals, need a zone of protection and privacy within which to investigate and develop the entity's legal rights, options, and strategies.[169] Recognizing the privilege in the corporate context promotes "broader public interests in the observance of law and administration of justice."[170] Further, the privilege

> allows corporations to monitor employee conduct and investigate potential misconduct without fear that the fruits of their efforts will be used against them criminally, administratively, or by civil plaintiffs. Clearly, the inverse—that a cor-

163 449 U.S. 383 (1981).

164 *Id.* at 386 (holding that communications made by employees to corporate attorneys, and written reports of interviews, were protected by the attorney-client privilege and work-product doctrine).

165 *See* Thomas R. Mulroy & Eric J. Muñoz, *The Internal Corporate Investigation*, 1 DePaul Bus. & Com. L.J. 49, 53–54 (2002). The *Upjohn* decision does not apply in diversity proceedings where the federal court is obligated to apply state privilege law. *See id.* at 54.

166 *See id.* at 54 n.33.

167 *Id.* at 54. As discussed *supra* Section II.A, according to *Upjohn*, the privilege attaches to communications between counsel and any officer, director, or employee of the corporation, regardless of rank. However, eight states follow the "control group" approach and find that the privilege only attaches to communications between counsel and officers or employees that control the corporation. *See id.*

168 *See Upjohn*, 449 U.S. at 389–90, 399–400.

169 *See id.* at 389–91.

170 *Id.* at 389.

> poration turns a blind eye to wrongdoing for fear it will come back to haunt them—is unacceptable.[171]

The corporate attorney-client privilege is particularly important in the contemporary global business world where corporations often face novel and complex legal and regulatory requirements that are difficult for nonlawyers to understand.[172]

In determining which communications would be entitled to the protection, the Court rejected the "control group" theory and abandoned a hierarchical approach.[173] Under the control group approach, the privilege's applicability depended on the company employee's level and responsibility in the corporate hierarchy.[174] Only communications made by employees in a position of control over the corporation were entitled to the privilege as only those types of employees were believed to personify the corporation.[175] The Supreme Court explained that one of the inherent dangers of the control group test is that it would make it more difficult to cover full and candid legal advice to lower-level employees who often put into effect the corporation's policies even though they do not control the corporation.[176] Finding the control group test too narrow and restrictive, the Court adopted a much looser functionality test.[177] Under this approach, the privilege's applicability depends on the nature, purpose, and context

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171 Robert J. Anello, *Preserving the Corporate Attorney-Client Privilege: Here and Abroad*, 27 PENN ST. INT'L L. REV. 291, 309 (2008).

172 U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.710 (2008); *see also* Ass'n of Corp. Counsel, Executive Summary: Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack? 7 (April 6, 2005), http://www.acc.com/legalresources/resource.cfm?show=16315 (click "Download PDF") ("For every instance where privilege may restrict the flow of information that would appropriately help weed out the 'bad guys,' there are many more numerous instances in which the advice of counsel enables individuals and corporate entities to avoid problems, remedy them early, and keep them from getting worse.").

173 *See Upjohn*, 449 U.S. at 392–93, 396–97. Before the Supreme Court decided this issue, the circuit courts were split between the "control group" test and a much looser "subject matter" test. *Id.* at 386.

174 *See* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).

175 *See id.* at 485 ("[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. . . . [I]t is implicit in the foregoing that the authority of the person speaking with the lawyer to participate in contemplated decisions must be actual authority."); *see also* Mulroy & Muñoz, *supra* note 165, at 52.

176 *See Upjohn*, 449 U.S. at 384.

177 *See generally id.*

within which the communication occurs, rather than on the employee's position within the corporation.

The Court held that a corporation may assert the privilege over communications between its lawyers and corporate employees so long as the following conditions are met: (1) the employee communicates with counsel at the direction of his supervisor; (2) the employee made the communication to secure legal advice for the corporation, or to provide facts that the lawyer needs to give the corporation legal advice; (3) the employee is aware that he is being questioned so the corporation may obtain legal advice; (4) the communication concerns matters within the scope of the employee's duties; and (5) the communication was confidential.[178]

To assure that the privilege attaches to communications between the company's lawyers and its employees, the lawyer should provide the employee an *Upjohn* warning.[179] This warning should explain that the lawyer represents the corporation, that the lawyer is providing legal advice to the corporation as the client, that the employee may possess information that the lawyer needs, that such information is not readily available elsewhere, and that the employee should keep all of their communications confidential.[180] If an attorney fails to provide an *Upjohn* warning, an employee may be able to assert that a personal, rather than a corporate, attorney-client privilege attached to the communication.[181]

Although courts have consistently held that officers or employees of a corporation do not have a personal privilege with respect to communications with corporate counsel, an individual may assert such a privilege under limited circumstances.[182] Several circuits have fol-

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178 *See id.* at 394.

179 MODEL RULES OF PROF'L CONDUCT r. 1.13(f) (AM. BAR ASS'N 2015). Judge Lacey suggested that corporations provide more detailed warnings to employees which he referred to as "Adnarim" warnings—"Miranda" spelled backwards. *See* Dennis J. Block & Nancy E. Barton, *Implications of the Attorney-Client Privilege and Work-Product Doctrine*, *in* INTERNAL CORPORATE INVESTIGATIONS 17, 40 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2003) (quoting Frederick B. Lacey, former U.S. District Judge for the District of New Jersey). He suggested that prior to conducting an interview with an individual employee, counsel should not provide the traditional *Upjohn* warning, but should also inform the employee that she does not hold the privilege and will not be able to assert the privilege to prevent disclosure over a corporation's decision to waive privilege. *See id.*

180 *See* United States *ex rel.* Parikh v. Premera Blue Cross, No. C01-476P, 2006 WL 3733783, at *7–8 (W.D. Wash. Dec. 15, 2006).

181 Todd Presnell, *Litigation:* Upjohn *Warnings and External Consultants*, INSIDE COUNSEL (Apr. 18, 2013), http://www.insidecounsel.com/2013/04/18/litigation-upjohn-warnings-and-external-consultant.

182 *In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 125 (3d Cir. 1986)

lowed the approach set forth by the Third Circuit in *In re Bevill, Bresler & Schulman Asset Management Corp.*[183] These courts have held that to establish a personal attorney-client relationship, an officer or employee must affirmatively prove the following five factors: (1) she approached counsel for the purpose of seeking legal advice; (2) when she approached counsel, she made it clear she was seeking legal advice in her individual rather than in her representative capacity; (3) counsel thought it appropriate to communicate with her in her individual capacity, knowing that a possible conflict could arise; (4) her conversations with counsel were confidential; and (5) the substance of her conversations with counsel did not concern matters within the company or the general affairs of the company.[184] Courts have interpreted the final prong in the *Bevill* test narrowly.[185] The personal privilege extends only to those communications involving the individual's "rights and responsibilities arising out of their actions as officers [or employees] of the corporation."[186]

Applying the *Bevill* factors to the advice received by Kurt Lofrano, the Vice President of Wells Fargo, demonstrates the difficulty of establishing a personal privilege in the corporate context.[187] Interestingly, Lofrano never asserted a personal claim of privilege with respect to the advice he received from counsel regarding his obligations to disclose loan deficiencies under federal law. In all likelihood Lofrano did not make this argument because it would have been difficult, if not impossible, to establish all of the required factors. Even assuming that Lofrano approached counsel for the purpose of seeking legal advice and made it clear that he was seeking legal advice in his individual capacity, it would be difficult to establish that the substance

(holding that a personal privilege did not attach to an employee's communications with counsel and the employee could not maintain confidentiality over a corporation's decision to waive privilege).

183 805 F.2d 120 (3d Cir. 1986). The First, Second, Ninth, and Tenth Circuits have all adopted the *Bevill* test for determining whether a personal attorney-client relationship exists. *See* United States v. Graf, 610 F.3d 1148, 1161 (9th Cir. 2010); *In re* Grand Jury Subpoena (Custodian of Records, Newparent, Inc.), 274 F.3d 563, 571–72 (1st Cir. 2001); Grand Jury Proceedings v. United States, 156 F.3d 1038, 1040–41 (10th Cir. 1998); United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 215–16 (2d Cir. 1997). The Sixth Circuit has not adopted the *Bevill* test, but it did agree that the second factor—that the individual be seeking legal advice in her individual, rather than representative, capacity—is required. *See* Ross v. City of Memphis, 423 F.3d 596, 605 (6th Cir. 2005).

184 *Bevill*, 805 F.2d at 123.

185 *See, e.g.*, *Grand Jury Proceedings*, 156 F.3d at 1041.

186 *In re Grand Jury Subpoena*, 274 F.3d at 572.

187 See *supra* text accompanying notes 13–23 for discussion of the facts surrounding the proceedings against Kurt Lofrano in his personal capacity.

of his conversation with counsel did not concern matters within the company or general affairs of the company. Any legal advice that Lofrano sought with respect to federal reporting requirements would be matters that concern Wells Fargo, rather than Lofrano personally. Accordingly, a personal privilege would not attach to those communications.

B. Who Can Assert the Privilege

Another difficulty in applying the attorney-client privilege in the corporate context is determining who holds and controls the privilege. Again, the Supreme Court resolved this issue as a matter of federal law in *Upjohn*, holding that the entity itself is the holder of the privilege.[188] Accordingly, the decision to assert or waive privilege rests with the entity alone, acting through its empowered officials.[189] By endowing the entity with the sole right to assert or waive privilege, the Court effectively stripped the individual making the communications of any control over its dissemination to others.[190] The Court recognized that this deprivation of power undercuts the justification of the privilege in the individual context, where the individual control over dissemination was thought to encourage the full and candid disclosure necessary for effective legal advice.[191] However, the Court nonetheless decided to make the corporation the holder of the privilege because it would be unmanageable and potentially inconsistent with the entity's interests to grant each employee control over the privilege of her communications.[192]

As the corporation is an artificial entity, the decision to maintain or waive privilege must be made by the individuals authorized to act on behalf of the corporation.[193] Ordinarily, this authority rests with

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188 *See* Upjohn Co. v. United States, 449 U.S. 383, 389–90 (1981).

189 *See id.* at 390.

190 *See* Liesa L. Richter, *The Power of Privilege and the Attorney-Client Privilege Protection Act: How Corporate America Has Everyone Excited About the Emperor's New Clothes*, 43 WAKE FOREST L. REV. 979, 987–88 (2008).

191 *See id.* at 988.

192 *See id.* (citing WRIGHT & GRAHAM, *supra* note 157, § 5476, at 177 (noting that "corporations would not be very happy with a rule that all of the persons who can make confidential communications for the corporation are also capable of waiving the privilege")). Another rationale for making the entity the holder of the privilege is that, unlike in the individual context, employees of corporations do not need to hold the privilege to encourage communication with counsel because they have an incentive to disclose information to satisfy employment obligations.

193 *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348–49 (1985) (holding that when corporate control passes to new management, the authority to decide privi-

the corporation's management and may be exercised by its officers and directors.[194] Lower-level employees or shareholders would not be permitted to exercise the power to control the privilege as they would not be considered "management."[195]

Officers or directors must exercise the privilege in a manner consistent with their fiduciary duties to act in the best interest of the corporation.[196] An individual officer or director may not make the decision to waive or assert the privilege based on her personal interest.[197] Rather, the officer or director should make the decision based on the best interest of the corporation or its shareholders. Although the fact that an officer or director is a defendant does not divest her of authority to control the privilege, it would be prudent for the officer or director to disclose the potential conflict to the remainder of the officers or directors and possibly recuse herself from voting on the waiver issue in order to sanitize the decision.[198]

Despite the limited protection the corporate privilege offers individual officers or employees, the privilege serves an important func-

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lege issues also passes such that the former officer or director of a corporation retains no control over the privilege).

194 *See id.* at 348; *see also* JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 2:37 (3d ed. 2016) (noting that in order to control a corporation's privilege, an executive must be considered management and "must also act on behalf of the corporation when exercising this power").

195 *See* United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997) (holding that an employee typically may not prevent a corporation from waiving privilege); *see also* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 n.5 (8th Cir. 1978) (en banc) ("Ordinarily, the privilege belongs to the corporation and an employee cannot himself claim the attorney-client privilege and prevent disclosure of communications between himself and the corporation's counsel if the corporation has waived the privilege.").

196 *See Weintraub*, 471 U.S. at 348–49.

197 *See id.* For example, an officer testifying at trial in his individual capacity may not waive privilege and disclose information, especially where the corporation continues to assert privilege. *In re* Grand Jury Proceedings, 219 F.3d 175, 183–85 (2d Cir. 2000) (stating that an executive disclosing information in his personal capacity, rather than in his representative capacity, suggests there is no waiver, especially where the corporation continues to assert the privilege, and that waiver should be determined on a case by case basis by examining the surrounding circumstances, including the executive's intent at the time of the disclosure). The reverse is also true—an officer or director may not assert the privilege with respect to her communications with counsel where the corporation decides to waive the privilege. United States v. Piccini, 412 F.2d 591, 593 (2d Cir. 1969) ("The instruction claimed to be privileged, however, was given by [the defendant] as an officer of the corporation, so that the privilege, if any, was that of the corporation, and may not be availed of by [the defendant].").

198 *See* DEL. CODE ANN. tit. 8, § 144 (2016) (providing that a transaction is not void because an officer or director had a self-interest in the transaction so long as the transaction is: authorized by a majority of disinterested directors after disclosure of the interest, approved by the shareholders, or inherently fair to the corporation).

tion in our legal system and should be respected. However, fairness and due process concerns may require the privilege to yield, in limited circumstances, to an individual officer or employee's right to assert an advice-of-counsel defense.

III. The Privilege as a Limit on the Employee's Right to Defend

The caselaw is sparse and unsettled on whether an individual defendant should be entitled to assert an advice-of-counsel defense if it would force the corporation to waive privilege. This creates a conundrum because officers and employees of corporations often rely on the advice of legal counsel in matters that could expose them to personal liability. Under the Yates Memo, federal prosecutors were recently instructed to focus on the individuals responsible for the corporate wrongdoing and ensure that they are held accountable.[199] As the stakes for officers and employees have been raised significantly, it is important to ensure that these individuals have adequate protection from unwarranted liability.

In the criminal context, several courts have held that a balancing test should be applied to determine when a defendant's right to present exculpatory evidence should outweigh a corporation's right to maintain the attorney-client privilege.[200] Most courts, however, including the Sixth Circuit, reject the balancing test in civil cases.[201] These cases reason that the individual right to defend should never trump the corporation's right to maintain the privilege because it would undermine the privilege and introduce too much uncertainty.[202]

A. Civil Cases and a Defendant's Right to Defend

Before the turn of the twenty-first century, only a few cases had confronted whether an individual civil defendant should be permitted to present an advice-of-counsel defense despite a corporation's assertion of privilege. These earlier cases came down on the side of protecting the defendant's right to raise the defense. Courts reasoned that it would be perverse to hold that a corporate entity could use the privilege to conceal communications that could establish the innocence of an officer or employee. For example, in *In re National Smelting of*

199 Yates Memo, *supra* note 2.

200 *See, e.g.*, United States v. W.R. Grace, 439 F. Supp. 2d 1125, 1142 (D. Mont. 2006).

201 *See* Ross v. City of Memphis, 423 F.3d 596, 603 (6th Cir. 2005).

202 *See, e.g.*, *id.* at 604.

New Jersey, Inc. Bondholders' Litigation,[203] an officer-director who was sued over a bond transaction attempted to rely on an advice-of-counsel defense.[204] The corporation's board of directors refused to waive the attorney-client privilege and permit disclosure of the communications between the officer and the corporation's counsel.[205] The court held that the corporation should be estopped from claiming the attorney-client privilege because the corporation's right to assert the privilege was "overcome by the demands for fairness."[206]

Similarly, in *Moskowitz v. Lopp*,[207] an investor sued a corporation and its officers alleging fraud in the marketing of the corporation's securities.[208] Without much discussion, the court allowed the officers to raise the advice-of-counsel defense without obtaining the corporation's consent.[209] It appears that the officers were asserting the advice-of-counsel defense on behalf of themselves as individuals, but were not agreeing to waive privilege on behalf of the corporation.[210] Although the court recognized that in theory the privilege belongs to the corporation, it held that fairness dictates that it be waived where a corporate officer asserts an advice-of-counsel defense.[211]

Since the turn of the twenty-first century, courts seem to have shifted the balance, starting to come down decisively on the side of the

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203 No. 84-3199, 1989 U.S. Dist. LEXIS 16962 (D.N.J. June 29, 1989).

204 *Id.* at *39–40.

205 *See id.*

206 *Id.*; *see also In re* Grand Jury Proceedings, 219 F.3d 175, 186 (2d Cir. 2000) (allowing corporate officer to waive privilege based on a weighing of circumstances). In reconciling *National Smelting* with later cases that have denied the right to assert the defense, some courts have explained that this case may have come out on the side of waiver because the officer was not only defending himself, but was also defending the corporation. *See, e.g.*, United States v. Wells Fargo Bank N.A., No. 12-CV-7527 (JMF), 2015 WL 3999074, at *3 (S.D.N.Y. June 30, 2015).

207 128 F.R.D. 624, 627 (E.D. Pa. 1989).

208 *Id.* at 627. The court rejected plaintiffs' argument that they have a right to see the communications as shareholders of the corporation because the plaintiffs were not shareholders at the time of the communications and therefore were not fiduciaries for purposes of the fiduciary duty exception to the privilege. *Id.* at 637.

209 *See id.* at 637–38. Some commentators have reasoned that the court's finding of a waiver may have been influenced by the fact that the action was initiated by a shareholder of the corporation, and the shareholder may have had the right to see the communications under the fiduciary duty exception, regardless of whether the advice-of-counsel defense was raised. *See, e.g.*, PAUL R. RICE ET AL., ATTORNEY CLIENT PRIVILEGE IN THE UNITED STATES § 9:48 (2015).

210 *See Moskowitz*, 128 F.R.D. at 637–38.

211 *See id.*

corporate privilege.[212] In light of these decisions, corporate officers may take less comfort in following the advice of counsel.[213]

For example, the court in *Wells Fargo* squarely confronted the opening issue to this Article: whether an employee (Kurt Lofrano) can pursue an advice-of-counsel defense that requires disclosure of his employer's privileged communications when the employer (Wells Fargo) will not waive its corporate attorney-client privilege.[214] The court noted that this issue requires resolution of the conflict between two indisputably weighty principles:

> On the one hand, fundamental fairness and due process generally require that a person accused of wrongdoing—whether criminally or civilly—have "an opportunity to present every available defense." On the other hand, the attorney-client privilege is "one of the oldest recognized privileges for confidential communications," and "promote[s] broader public interests . . . ."[215]

The court began its analysis by recognizing that the right to present a defense is not absolute.[216] Before the turn of the century, the Supreme Court held that a defendant's right to present a defense should not displace traditional privileges or standard rules of evidence.[217]

After noting that Lofrano did not have an unfettered right to present the defense, the court considered whether a balancing approach should be adopted, as is often done in the criminal context.[218] Under this approach the court would balance the "probative and exculpatory value" of the evidence to the defense against the need to keep the

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212 *See, e.g.*, United States v. Wells Fargo Bank, N.A., 132 F. Supp. 3d 558 (S.D.N.Y. 2015) (finding in favor of corporate privilege); *see also, e.g.*, SEC v. Present, No. 14-14692-LTS, 2015 WL 9294164 (D. Mass. Dec. 21, 2015) (same).

213 A treatise on the attorney-client privilege provided an update in light of *Wells Fargo* indicating that an employee who intends to assert an advice-of-counsel defense would not put the privileged communications at issue if the corporation intends to retain the privilege. *See* GERGACZ, *supra* note 194, § 2:37.

214 *See generally Wells Fargo*, 132 F. Supp. 3d 558.

215 *Id.* at 561 (alteration in original) (citation omitted) (quoting Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007); and Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998)).

216 *Id.*

217 *See* Taylor v. Illinois, 484 U.S. 400, 406, 418 (1988) (holding in an attempted murder case that a defendant's Sixth Amendment right to present a defense did not prevent the court from precluding testimony of a witness as a sanction for violating a discovery rule); *see also* United States v. Serrano, 406 F.3d 1208, 1215 (10th Cir. 2005) ("The right to present a defense . . . does not displace traditional testimonial privileges.").

218 *Wells Fargo*, 132 F. Supp. 3d at 562. See *infra* Section III.B for discussion on the balancing approach in criminal cases.

information confidential.[219] The court rejected this balancing test,[220] reasoning that it was foreclosed by the Supreme Court's decision in *Swidler & Berlin v. United States*.[221]

Swidler, however, did not involve a defendant's introduction of exculpatory evidence.[222] Instead, the Court held that a prosecutor could not introduce incriminating privileged information regardless of the importance of the communication to the case.[223] In rejecting a balancing test, the Court reasoned that "[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application," and therefore must be rejected.[224]

Despite the substantial difference in context, the *Wells Fargo* court found *Swidler* dispositive, and held that the corporation's privilege should always trump the individual's right to defend.[225] The court also expressed doubt on the validity of criminal cases holding that the advice-of-counsel defense can trump the attorney-client privilege in that context.[226] Although the court recognized that the result in the particular case might be harsh, it reasoned that it was the price that must be paid for society's commitment to the values underlying the attorney-client privilege.[227]

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219 *Wells Fargo*, 132 F. Supp. 3d at 562.

220 *Id.*

221 524 U.S. 399 (1998).

222 *See generally id.*

223 *Id.* at 408–09, 411. *Swidler* involved a prosecutor's discovery request for handwritten notes of a meeting between an attorney and Vincent Foster, the Deputy White House Counsel. *Id.* at 402. Foster had sought legal advice from the lawyer in connection with a criminal investigation into whether individuals obstructed justice during prior investigations into the dismissal of employees from the White House. *Id.* at 401. A few days after the meeting, Foster committed suicide. *Id.* at 402. Two years later, a federal grand jury subpoenaed the lawyer's handwritten notes. *Id.* The Supreme Court held that the notes were not discoverable. *Id.* at 411. The Court rejected the argument that there should be a limited exception to the privilege for information of substantial importance to a criminal case and rejected a balancing test. *Id.* at 408–09.

224 *Id.* at 409 (explaining that the client may not know at the time of the communication its potential relevance to future matters).

225 *See Wells Fargo*, 132 F. Supp. 3d at 562–63.

226 *See id.* at 563 (explaining that a court in a criminal matter that had applied a balancing test to determine whether an employee can assert an advice-of-counsel defense over a corporation's privilege objection had erred in failing to consider the Supreme Court's rejection of a balancing test).

227 *Id.* at 566. This decision departed from an earlier decision on the same matter where the court recognized that the defendant's right to present a defense could "conceivably overcome" the corporation's right to assert privilege. United States v. Wells Fargo Bank N.A., No. 12-CV-7527 (JMF), 2015 WL 3999074, at *3 (S.D.N.Y. June 30, 2015) (deferring ruling on the privilege issue until further briefing).

Similarly, the court in *SEC v. Present*[228] rejected a balancing test to determine whether the corporation, F-Squared, should have to waive its privilege to allow the former founder and CEO, Howard Present, to raise an advice-of-counsel defense after the corporation declared bankruptcy.[229] When the SEC initially investigated the corporation, Present refused to waive privilege on behalf of F-Squared.[230] After the corporation declared bankruptcy and the SEC sued Present in his personal capacity, Present asserted an advice-of-counsel defense and subpoenaed privileged documents from F-Squared.[231] The bankruptcy trustee sought to maintain the corporate privilege and moved to quash the subpoena.[232] The court granted the motion, reasoning that the corporation, through the bankruptcy trustee, had the right to control the privilege, rather than the former CEO in his individual capacity.[233]

The *Wells Fargo* and *Present* decisions are consistent with the Sixth Circuit, the only appellate court to consider a similar issue, albeit in a different context.[234] In *Ross v. City of Memphis*,[235] the court held that a police officer's need for documents should not trump the City's privilege to maintain confidentiality.[236] In reversing the district court, the Sixth Circuit rejected a balancing test and held that equitable notions of fairness and due process do not dictate that the City's privilege should be waived so that a former police director could defend against a discrimination claim.[237]

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228 No. 14-14692-LTS, 2015 WL 9294164 (D. Mass. Dec. 21, 2015).

229 *Id.* at *1–3.

230 Thomas E. Spahn, *Can a Company's Founder and CEO Use Company Documents to Support His "Advice of Counsel" Defense After the Company Declares Bankruptcy?*, LEXOLOGY (Feb. 17, 2016), http://www.lexology.com/library/detail.aspx?g=6952b07e-7f53-4d04-995a-f11089dca3b8.

231 *Id.*

232 *Present*, 2015 WL 9294164, at *1.

233 *Id.* at *2.

234 *See* Ross v. City of Memphis, 423 F.3d 596 (6th Cir. 2005). These cases are also consistent with some other lower court decisions which, without much discussion, deny individual defendants the ability to raise an advice-of-counsel defense because they do not hold the keys to the attorney-client privilege. *See, e.g.*, Rojicek v. River Trails Sch. Dist. 26, No. 01 C 0723, 2003 WL 1903987, at *2 (N.D. Ill. Apr. 17, 2003) (finding that former superintendent sued for retaliation does not have the authority to waive the attorney-client privilege with respect to communications she had with legal counsel with respect to her role as superintendent).

235 423 F.3d 596 (6th Cir. 2005).

236 *Id.* at 603 (holding that the City's interest in maintaining privilege trumped police officer's interest in asserting an advice-of-counsel defense in an employment dispute).

237 *Id.* at 603–04 (noting that the decision in this case was not unfair to the defendant as the defendant police officer still had the ability to raise a qualified immunity defense).

The courts that deny defendants the right to raise an advice-of-counsel defense are concerned that a balancing approach would make the privilege dependent on ex post litigation choices made by its officers or employees. A balancing test would add too much uncertainty into the privilege, undermining its purpose: to encourage open and honest communication with counsel so that the corporation acts on the best possible legal advice. As the *Ross* court cautioned, "[a]n 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."[238] Such an approach would convert the attorney-client privilege into a qualified privilege that could be overcome given a sufficient showing. Further, there would be a risk that the government or private party plaintiffs would assert claims against individual officers or employees in an effort to obtain a waiver of the corporation's privilege.[239]

B. Criminal Cases and a Defendant's Right to Defend

In criminal cases, the individual right to defend is even more critical because of the sanctions involved. Moreover, in criminal cases, the right to defend is rooted in the Sixth Amendment right to present a defense. The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; . . . be confronted with the witnesses against him; . . . [and] have compulsory process for obtaining witnesses in his favor."[240] Though not expressly stated in the text of the Sixth Amendment, criminal defendants have the right to present to the jury any "evidence that might influence the determination of guilt."[241]

Although the Supreme Court recognizes the right to present evidence in the criminal context, the Court has never directly addressed

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238 *Id.* at 604 (alteration in original) (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

239 United States v. Wells Fargo Bank N.A., No. 12-CV-7527 (JMF), 2015 WL 3999074, at *2 (S.D.N.Y. June 30, 2015) ("Allowing any employee to waive the privilege by asserting an advice-of-counsel defense could also create an incentive for plaintiffs to pursue claims against individual employees in the hopes of forcing a waiver of the corporation's privilege.").

240 U.S. CONST. amend. VI.

241 Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987); *see also* Rock v. Arkansas, 483 U.S. 44, 51–52, 61 (1987) (holding that Arkansas's per se rule excluding all hypnotically refreshed testimony violated the criminal defendants right to testify under the Fifth, Sixth, and Fourteenth Amendments); Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citations omitted) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'").

whether, or under what circumstances, the right to present a defense can trump the attorney-client privilege.[242] However, in analogous cases involving conflicts between evidentiary rules and the Sixth Amendment, the Court has adopted a type of balancing test. The Court has explained that a defendant's right to present potentially exculpatory evidence is not absolute, but is subject to reasonable restrictions to accommodate other legitimate interests in the criminal trial process.[243] The Court cautioned that the justice system would be "a shambles" if defendants had "an unfettered right" to present a defense without regard to evidentiary rules.[244]

An evidentiary rule restricting the admission of evidence is not unconstitutional per se unless the rule is "arbitrary or disproportionate to the purposes [it is] designed to serve."[245] However, rules that are facially constitutional may be deemed unconstitutional as applied because the rule would significantly undermine the ability of a defendant to cross-examine a witness or present a defense.[246] In those situations, the Court applies a balancing test whereby the exculpatory value of the testimony or evidence sought to be introduced is weighed against the policy of the rule requiring exclusion.[247] The outcome seems to depend on the likely impact of the excluded evidence.[248] As the Supreme Court stated, the evidentiary rules should yield to the Sixth Amendment rights where the rule would "significantly undermine[] fundamental elements of the defendant's defense."[249]

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242 *See* United States v. W.R. Grace, 439 F. Supp. 2d 1125, 1137–38 (D. Mont. 2006).

243 *See Rock*, 483 U.S. at 55.

244 Taylor v. Illinois, 484 U.S. 400, 410–11 (1988).

245 *Rock*, 483 U.S. at 55–56 (holding that per se rule excluding all hypnotically refreshed testimony violated defendant's Sixth Amendment right to testify on her own behalf in a criminal trial); *see also* United States v. Scheffer, 523 U.S. 303, 309, 315 (1998) (holding that a per se rule excluding polygraph evidence in court martial proceedings did not violate the defendant's Sixth Amendment right to present a defense because such tests are inherently unreliable).

246 *See* Davis v. Alaska, 415 U.S. 308, 319 (1974).

247 *See Scheffer*, 523 U.S. at 315–17.

248 In holding that the State's legitimate interest in maintaining confidentiality over juvenile adjudications must give way to the defendant's right to cross-examine an adverse witness, the Supreme Court explained:

> Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

Davis, 415 U.S. at 319.

249 *Scheffer*, 523 U.S. at 315.

Despite the similarities between standard evidentiary rules and those implementing privilege, the Court has not yet made clear whether its Sixth Amendment treatment of other evidentiary rules also applies to privilege rules.[250] The Court has made it clear that a *prosecutor's* need for privileged information does not justify judicial balancing of interests.[251] In *Swidler*, the Court held that a prosecutor could not introduce incriminating privileged information because "balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application."[252] Accordingly, the Court rejected a balancing test to define the contours of the privilege.[253]

Whether a *defendant's* Sixth Amendment right should be balanced against the right to assert privilege remains an open question. Language in *Swidler*'s majority opinion indicates that the opinion should be construed narrowly as rejecting a balancing test when constitutional rights are not at stake.[254] However, the dissent construed the majority's opinion more broadly to be an unequivocal rejection of a balancing test even in situations implicating the Sixth Amendment.[255] As Justice O'Connor explained in her dissent:

> I do not agree with the Court that [the attorney-client privilege] inevitably precludes disclosure of a deceased client's communications in criminal proceedings. In my view, a criminal defendant's right to exculpatory evidence . . . may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality.[256]

The few courts to consider the issue of the right to present an advice-of-counsel defense over a corporation's privilege objection have not read *Swidler* to apply to a defendant's assertion of privilege, and have held that a balancing approach should be applied.[257] These

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250 *See* Washington v. Texas, 388 U.S. 14, 23 & n.21 (1967) (holding that defendant had a constitutional right to present as a witness a principal, accomplice, or accessory to the crime despite a state statute excluding the introduction of such a witness, but stating that "[n]othing in this opinion should be construed as disapproving testimonial privileges, such as the . . . lawyer-client . . . privilege[], which are based on entirely different considerations from those underlying the common-law disqualifications for interest").

251 *See* Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998).

252 *Id.*

253 *Id.*

254 *Id.* at 408 n.3 ("Petitioners . . . concede that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege.").

255 *See id.* at 411 (O'Connor, J., dissenting).

256 *Id.*

257 *See* United States v. Mix, No. 12-171, 2012 WL 2420016, at *2 (E.D. La. June 26, 2012);

courts have found that the attorney-client privilege, like other evidentiary issues, is not absolute and may be "trumped by constitutional rights."[258] Under a balancing approach, courts weigh the value of the exculpatory evidence sought to be introduced by the defendant against the weight of the policy behind the attorney-client privilege which requires its exclusion.[259] To make this determination, courts review the privileged evidence *in camera* and consider whether the evidence would be of such exculpatory value that its exclusion amounts to a denial of a defendant's right to present a defense.[260] After conducting this review, the court determines whether any of the evidence is of such value that it requires the attorney-client privilege to yield to the defendant's constitutional right to present the evidence.[261]

For example, in *United States v. W.R. Grace*,[262] the district court reviewed the privileged evidence and, after applying the balancing test, held that depending on the proof at trial, some of the documents submitted may "be of such probative and exculpatory value as to compel admission of the evidence over [the corporation's] objection as the attorney-client privilege holder."[263] The court concluded that the determination of which documents would be admissible would "be made on a document-by-document basis at trial."[264] During the trial, the court would determine the probative value of each bit of evidence in the context of the government's case, and would "likely" sacrifice privilege in "limited instances."[265] In further recognition of the corporation's privilege, the court explained that it would "make clear that the privilege is abrogated over [the corporation's] objection and that

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United States v. W.R. Grace, 439 F. Supp. 2d 1125, 1141–42 (D. Mont. 2006); *see also* United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994) (recognizing that even the attorney-client privilege might have to yield in a particular case if the right of confrontation would be violated by enforcing the privilege).

258 *See Rainone*, 32 F.3d at 1206. *Rainone* did not involve the corporate privilege or the advice-of-counsel defense as the communications involved legal advice to an individual in their personal capacity that a former co-defendant wanted to use for cross-examination purposes. *See id.*

259 *See W.R. Grace*, 439 F. Supp. 2d at 1139–40; *see also Mix*, 2012 WL 2420016, at *2.

260 *W.R. Grace*, 439 F. Supp. 2d at 1136; *see also* United States v. Renzi, No. CR 08-212 TUC DCB (BPV), 2010 WL 582100, at *11 (D. Ariz. Feb 18, 2010) (holding that an attorney defendant had an attorney-client relationship with his co-defendant, and that at least some of the proffered evidence is of sufficient exculpatory value that its exclusion would amount to a denial of the attorney's right to a defense, and must be admitted over the client/co-defendant's objection).

261 *W.R. Grace*, 439 F. Supp. 2d at 1136.

262 439 F. Supp. 2d 1125 (D. Mont. 2006).

263 *Id.* at 1142.

264 *Id.*

265 *Id.* at 1142–43.

the compelled trial disclosure does not constitute a blanket waiver of" the corporation's privilege.[266]

Similarly, the court in *United States v. Mix*[267] adopted the balancing test applied in *W.R. Grace* and held that it would consider the defendant's request to admit exculpatory evidence on a document-by-document basis at trial.[268] Despite the defendant's request, the court explained that it was impossible to determine the admissibility of the evidence pre-indictment because the court needed to understand the potential value of the exculpatory evidence to the defendant in the context of a proceeding.[269] Further, the court held that to the extent it did admit privileged information, the government was only permitted to use the evidence for the current litigation and not for any subsequent investigation or litigation against the corporation.[270]

Interestingly, neither the *W.R. Grace* court nor its progeny included any discussion of *Swidler* or considered its emphatic rejection of the use of a balancing test to define the contours of the attorney-client privilege.[271] In fact, the *W.R. Grace* court explained that the Supreme Court never suggested that privilege claims should always trump the defendant's right to present a defense.[272] These courts likely interpreted the opinion as only applying to a prosecutor's ability to admit incriminating evidence and not to apply to cases involving constitutional rights.

C. Current Law Leaves Interests Unprotected

The balancing approach applied by the courts in the criminal context raises normative concerns because it does not fully protect the interests of individual defendants or corporations. With respect to individual officers or employees who may be sued in their personal capacities, a balancing approach is less than optimal. While a balancing approach is preferable to finding that the corporation's privilege claim

266 *Id.* at 1145 (citing Transamerica Comput. Co. v. Int'l Bus. Machs. Corp., 573 F.2d 646, 651 (9th Cir. 1978)).

267 No. 12-171, 2012 WL 2420016 (E.D. La. June 26, 2012).

268 *Mix*, 2012 WL 2420016, at *2–3. In *Rainone*, Judge Posner applied the balancing test set forth in *W.R. Grace* and reviewed the privileged communications *in camera* to assess how fundamentally it affected the defendant's Sixth Amendment right to cross-examine a witness. United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994). The court concluded that the notes the client had written to the lawyer should be excluded because they "would have added too little to the picture" that it did not "warrant abrogating the attorney-client privilege." *Id.* at 1207.

269 *Mix*, 2012 WL 2420016, at *2.

270 *Id.*

271 *See generally W.R. Grace*, 439 F. Supp. 2d 1125.

272 *See id.* at 1138–40.

always trumps the defendant's need for the exculpatory information, it does not allow a criminal defendant to introduce all exculpatory evidence. Rather, a defendant needs to demonstrate the value of each piece of evidence on a document-by-document basis and the trial court has broad discretion to find the evidence inadmissible.

Further, the test is only applied during court proceedings and does not offer any protection at the pre-indictment stage of the criminal process. The mere issuance of an indictment can have serious consequences for corporate officers or employees as it would likely affect their reputations and possibly their employment. Also, it is costly and time consuming to defend against a criminal action and go through the criminal trial process.

Finally, in many jurisdictions, the balancing approach does not protect officers or employees who are sued civilly, as several courts have rejected such an approach and found the interests of the corporation in maintaining the privilege should always prevail.[273] That result seems unjust as it allows corporations to benefit from an employee or officer acting under the advice of counsel and then stand in the way of the employee using that communication to defend against her alleged misconduct. As one practitioner put it, "It stands the attorney-client privilege on its head—giving protection to those who cannot use it, and denying its control to those with the greatest need."[274] Employees have a significant interest in defending against civil actions which can have serious consequences, such as large monetary judgments, loss of careers, and reputational harms.

In addition to not fully protecting the interests of individual defendants, the balancing test also does not fully protect corporations who may be required to disclose confidential privileged information despite their assertion of the attorney-client privilege. Again, some courts have tried to respond to this concern by issuing protective orders limiting the use of the information and finding that the disclosure should not be deemed a waiver of privilege. Even with those protections, however, the information is still available and the corporations are exposed to some additional risk. Without assurance that communications will remain confidential, regardless of the ex post litigation choices of employees or officers, corporations might not confide in counsel, thus undermining the very purpose of the privilege.

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273 *See supra* notes 212–17 and accompanying text.

274 RICE ET AL., *supra* note 209, § 4:26, at 413.

IV. Potential Solutions

One approach to the dilemma raised by the corporate attorney-client privilege in actions against corporate employees is to rely on the parties themselves to resolve the difficulty by their ex ante behavior. For instance, employees could obtain legal advice from personal counsel rather than corporate counsel, or could contract with employers regarding who will be entitled to assert or waive the privilege and when they will be able to do so. However, as discussed below, none of the ex ante "solutions" are practical.

That leaves the solution squarely in the hands of courts, legislatures, and agencies. Courts, for instance, may adopt a balancing approach in civil cases similar to the approach used in criminal cases. Ultimately, however, the best alternative is to require corporations to indemnify employees who suffer financially as a result of the corporation's refusal to waive the attorney-client privilege.

A. Ex Ante Approaches

1. Consulting Separate Counsel

At first glance, it would appear that the conflict between the corporate privilege and individual employee interests would disappear if individual employees sought advice from separate counsel.[275] By consulting with personal counsel, officers or employees would have greater confidence that they would control the privilege.[276] Accordingly, the individual officer or employee would be able to disclose the advice if necessary to defend against a potential civil claim.[277] This solution, however, presents two significant obstacles. First, individual employees or officers would have to endure the effort and possibly the expense of seeking personal counsel. Although some corporations may have agreements or provisions in their bylaws providing high-level officers or directors reimbursement or advancement for legal fees, it is unlikely that lower-level employees would have such rights. Further, most corporations do not reimburse or advance legal fees until the officer is formally sued or prosecuted, or at least formally subpoenaed to appear in a court or administrative proceeding.[278]

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275 *See* Steven A. Shaw & Luke W. Meier, *It May Not Always Be Safe to Follow Advice of Counsel*, Law360 (Oct. 2, 2015, 1:32 PM), www.law360.com/articles/708111/it-may-not-always-be-safe-to-follow-advice-of-counsel.com.

276 *See id.*

277 *See id.*

278 *See* James D. Wing, *Corporate Internal Investigations and the Fifth Amendment*, Bus. L. Today, Sept. 2014, at 1, 2.

Accordingly, legal fees associated with obtaining legal advice with respect to potential exposure would likely not be recoverable, even for high-ranking officers of the corporation.

The second obstacle is that the individual officer may violate confidentiality obligations owed to the corporation if she consults with personal counsel about matters within the corporation. In many cases, the individual officer would be consulting with counsel on what actions to take or refrain from taking with respect to the business of the corporation. In order to obtain prudent advice, the officer or employee would have to disclose all relevant information to the lawyer. However, the officer or employee may be restricted by confidentiality agreements or general fiduciary obligations not to disclose confidential information about the corporation. The duties of loyalty and care require, among other things, that officers protect all confidential nonpublic information obtained in their role as officers, absent permission from the corporation to disclose the information.[279] This restriction may inhibit an officer or employee's ability to seek legal advice from personal counsel. For example, it would have been difficult for Kurt Lofrano to obtain advice from personal counsel about his potential exposure for failing to report mortgage deficiencies without disclosing specific confidential information about the particular loans.[280] It is unlikely that Wells Fargo would have consented to this type of disclosure, so Lofrano's disclosure may therefore have been a breach of his duty of confidentiality.[281]

2. Contracting About Privilege Rights

Some scholars have proposed a contractual solution to the problem of waiver.[282] Corporate employees or officers can require terms in their employment contracts which would require corporations to

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279 The issue here would be whether disclosure to counsel to obtain legal advice would be considered disclosure to the public. *See* ALAN S. GUTTERMAN, BUSINESS COUNSELOR'S LAW AND COMPLIANCE PRACTICE MANUAL § 14:6, Westlaw (database updated Apr. 2014) ("Directors have a 'duty of confidentiality' that requires that they refrain from public disclosure of all matters involving the corporation.").

280 See *supra* notes 13–23 and accompanying text for discussion on Kurt Lofrano.

281 *See supra* note 280.

282 *See* Mark A. Kressel, *Making the Advice of Counsel Defense Available for Corporate Directors*, 116 YALE L.J. POCKET PART 258 (2007), http://www.yalelawjournal.org/forum/making-the-advice-of-counsel-defense-available-for-corporate-directors. *But see* Victor J. Rocco, *Executives Do Not Need Waivers and Companies Should Not Offer Them: A Response to Mark Kressel*, 116 YALE L.J. POCKET PART 262 (2007), http://www.yalelawjournal.org/forum/executives-do-not-need-waivers-and-companies-should-not-offer-them-a-response-to-mark-kressel.

waive privilege if necessary for an advice-of-counsel defense.[283] Such conditional waivers of privilege have been enforced in other contexts so long as the agreement was entered knowingly and voluntarily.[284] One of the main shortcomings of this solution is that most employees will not have the ability or incentive to negotiate the terms of their employment contracts. Although some high-level corporate officers may negotiate the terms of their employment contracts at arm's length, most employees agree to contracts drafted by employers and offered on a take-it-or-leave-it basis, with no opportunity to negotiate the terms.[285] Even if employers were willing to negotiate the terms of their form employment agreements, employees are not likely to have the incentive to pay counsel to negotiate the terms. Without legal advice, these employees will probably not understand the implications or importance of a waiver clause.

B. Other Inadequate Solutions

Considering the impracticability of ex ante solutions for seeking personal counsel and including waiver rights in employment contracts, judicial, legislative, or agency solutions are the only alternatives. These other solutions include treating the privilege as a joint privilege, applying a balancing test in civil cases, and conditioning the corporation's assertion of privilege on an agreement to indemnify.

1. Joint Privilege

Since *Upjohn*, federal courts treat the privilege as a corporate privilege and only allow the corporation, through its managing officers or directors, to decide whether to assert or waive the privilege.[286] Individual officers or employees who may have consulted with counsel do not control the privilege.[287] Courts have made it virtually impossible for employees or officers to make a claim for joint privilege because

283 *See* Kressel, *supra* note 282.

284 *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 203–04, 210–11 (1995) (holding that a defendant's agreement to waive the exclusionary plea statement rule was valid and enforceable, such that the government could introduce the defendant's guilty plea for impeachment purposes because the "[r]ules were enacted against a background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties").

285 *See* Erin O'Hara O'Connor et al., *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 180 (2012).

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

287 *See* Richter, *supra* note 190, at 987–88 ("[I]t would be unworkable and inconsistent with the legal interests of the entity to give each individual employee control over the corporate privilege.").

"[t]he default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption."[288] To overcome this presumption, the individual officer or employee would have to prove the factors set forth in *Bevill*—the same test used to determine whether there is a personal privilege.[289]

Rather than requiring officers to prove a personal privilege to overcome the presumption of a corporation privilege, courts could treat the corporate privilege as a joint privilege. Under this approach, the individual communicating with counsel and the corporation would both be deemed clients and would each be able to control the privilege.[290] This approach is problematic as it would divest the corporation of sole control over the privilege. Giving employees or officers of a corporation joint control over the privilege would undermine the policy of the privilege in the corporate context. As the Supreme Court cautioned in *Upjohn*, it would be unmanageable and potentially inconsistent with the corporation's interests to give officers or employees control over the privilege of her communications.[291]

2. Balancing

Considering that a joint privilege would be unworkable, another judicial solution would be for courts to adopt a balancing approach for civil cases, similar to that used in criminal cases. The benefit of this approach is that it would provide consistency between civil and criminal cases and resolve the apparent conflict in the treatment of civil cases. Under the current law, in some jurisdictions, an individual employee or officer may never introduce privileged evidence to assert an advice-of-counsel defense in civil matters, regardless of the exculpatory value of the information.[292] The same officer or employee, however, may be permitted to introduce the privileged evidence to assert an advice-of-counsel defense in a criminal matter if the court determines that the exculpatory value of the communication outweighs the corporation's interest in confidentiality.[293]

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288 *In re* Grand Jury Subpoena (Custodian of Records, Newparent, Inc.), 274 F.3d 563, 571 (1st Cir. 2001).

289 *See id.* (citing *In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986)). See also *supra* text accompanying note 184 for discussion of the five factors set forth in *Bevill*.

290 RICE ET AL., *supra* note 209, § 4:21, at 373.

291 *See* Upjohn Co. v. United States, 449 U.S. 383, 390, 393 (1981).

292 See *supra* Section III.A for discussion of the advice-of-counsel defense in civil cases.

293 See *supra* Section III.B for discussion of the advice-of-counsel defense in criminal cases.

No court has considered the issue of whether a criminal defendant who successfully introduces privileged information in a criminal case can introduce that same evidence in a parallel or subsequent civil case. It would lead to anomalous results if the defendant were permitted to introduce such evidence. The law would then be treating a defendant who was involved in criminal misconduct less harshly than a defendant who engaged in less culpable misconduct and was only sued civilly. This situation is likely to arise as parallel investigations and proceedings are not only acceptable, but encouraged under the Yates Memo.[294] If courts applied a balancing test in both civil and criminal cases, it would avoid this potentially anomalous result.

Although a balancing approach would create consistency between the treatment of civil and criminal cases, it would not adequately protect the interests of corporations or employees. Courts have cautioned that rules resulting in waiver of privilege should be drafted with caution so as not to discourage full and frank communications with counsel.[295] It has long been understood that an uncertain privilege with varying applications "is little better than no privilege at all."[296] The Supreme Court has cautioned against "[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, [as it] introduces substantial uncertainty into the privilege's application."[297] Making the privilege dependent on ex post litigation choices of officers or employees would significantly undermine the sanctity of the privilege and would defeat its purpose. Further, there would be a risk that the government or private parties would assert claims against individual officers or employees in an effort to obtain a waiver of the corporation's privilege. A balancing test also does not adequately protect the interests of employees. Under a balancing test, an employee is not entitled to present all exculpatory evidence in order to raise an advice-of-counsel defense. Rather, an employee would need to demonstrate the value of each piece of evidence on a document-by-document basis at trial. The court would then have broad discretion to find that the corporation's privilege trumps the exculpatory value of any piece of evidence and find it inadmissible.

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294 *See* Yates Memo, *supra* note 2, at 5 (stressing the importance of parallel developments of civil and criminal proceedings).

295 *See* United States v. Wells Fargo Bank, N.A., 132 F. Supp. 3d 558, 561 (S.D.N.Y. 2015).

296 *See Upjohn*, 449 U.S. at 393.

297 Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998) (holding that the prosecution's interest in presenting incriminating evidence should not trump a client's interest in maintaining confidentiality, despite the importance of the information to the criminal case).

C. *Conditioning Exercise of the Privilege on Indemnification of the Employee*

Given the weaknesses of the ex ante solutions and the other judicial solutions, this Article proposes that courts in civil cases condition a corporation's exercise of the privilege on the corporation's agreement to indemnify the employee for any losses.[298] Under this approach, courts would review *in camera* the privileged evidence to determine the merits of the advice-of-counsel defense. If the defense is not well founded, then the court should allow the corporation to maintain its privilege without requiring any indemnification. If the defense is well founded, then the court should give the corporation a choice: either agree to a limited waiver of privilege and allow the disclosure, or agree to indemnify the officer or employee against any judgment that could have been avoided if she were allowed to raise the defense.[299]

The court in *Wells Fargo* recognized the possibility of the Bank indemnifying Kurt Lofrano against his judgment for tens of millions of dollars.[300] After holding that the Bank's interest in confidentiality would always trump Lofrano's interest in presenting privileged exculpatory evidence, the court acknowledged that the result may have been harsh as it denied Lofrano his best possible defense.[301] The court, however, explained that the potentially harsh result could be mitigated because many corporations in Wells Fargo's position "may choose to either waive the privilege or, if they choose not to do so for broader institutional reasons, indemnify their employees and pay the price themselves."[302] As the court explained, corporations have an incentive to protect their employees in civil cases because of the fear of

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298 *See* Samuel P. Strantz, *In-House Bout: Company Privilege Overshadows Advice-of-Counsel Defense*, BAKER DONELSON (June 8, 2016), http://www.bakerdonelson.com/in-house-bout-company-privilege-overshadows-advice-of-counsel-defense. This indemnification solution would not work in criminal cases as individual defendants often face incarceration in addition to the imposition of fines.

299 The decision to waive privilege or indemnify individual officers or employees should be made by the board of directors or officers vested with management authority. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). As with any other corporate decision, the decision to waive privilege must be consistent with the director or officer's fiduciary duties to act in the best interest of the corporation and not themselves as individuals. *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). To the extent that a director or officer has a potential conflict of interest, the director or officer should disclose the conflict to the rest of the board and refrain from voting.

300 *See Wells Fargo*, 132 F. Supp. 3d at 559.

301 *Id.*

302 *Id.*

negative publicity or difficulty recruiting or retaining high-quality employees.[303] While this incentive likely exists with respect to high-level employees or officers, who are often covered by a corporations' directors' and officers' ("D&O") liability insurance policies, it may not exist with respect to lower-level employees.[304] It seems unjust that these lower-level employees, who are denied the ability to assert an advice-of-counsel defense, should be required to pay adverse judgments out of their own pockets, while high-level officers receive indemnification.

Accordingly, courts should condition the corporation's exercise of privilege on its agreement to indemnify any officer or employee who is denied the opportunity to assert a well-founded advice-of-counsel defense. Rather than expressing the hope that a corporation might indemnify officers or certain high-level employees in order to mitigate some of their financial harm, courts should condition exercise of the privilege on indemnification regardless of the employee's rank or position. In imposing the condition, however, courts should attempt to strike a balance between promoting corporate interests and encouraging responsible conduct.[305] Generally, courts should not shift the costs of misconduct from the individual wrongdoer to the corporation by way of indemnification. In order to deter corporate malfeasance, individuals should be financially responsible for their own misconduct. Only where an employee or officer makes a showing that she relied in good faith on the advice of counsel should a court condition exercise of the privilege on indemnification. In that case, the employee is not, under a statute requiring mens rea, a wrongdoer.

Federal courts have the authority to impose conditions on the exercise of privilege under their authority to interpret the federal common law, federal statutes, and the Federal Rules of Evidence, including the rule governing the attorney-client privilege. Clarification to the Federal Rules of Evidence or federal statutes to specifically allow federal courts to condition the assertion of privilege on an agreement to indemnify, or to directly order indemnification, would be optimal.[306] However, because the shape of the corporate attorney-cli-

303 *Id.* at 566.

304 *See* Julie J. Bisceglia, Comment, *Practical Aspects of Directors' and Officers' Liability Insurance—Allocating and Advancing Legal Fees and the Duty to Defend*, 32 UCLA L. REV. 690, 690–91 (1985) (explaining that D&O liability insurance policies, which were once uncommon, have become expected, even required, before individuals will accept high-ranking positions or serve on a board of directors).

305 *See* Robert L. Jennings & Kenneth A. Horky, *Indemnification of Corporate Officers and Directors*, 15 NOVA L. REV. 1357, 1359 (1991).

306 Federal courts do not currently have the authority to order indemnification under the

ent privilege has itself been determined by caselaw from the Supreme Court and other federal courts, such express statutory authority is not necessary.

In any event, state law authorizes the vast majority of corporations to indemnify employees for liability incurred when they act in good faith. Federal courts may apply state law to order indemnification for violations of the federal securities laws and many other federal statutes.[307] Within the last few decades,[308] all states have enacted indemnification statutes that provide when a corporation may, or must, indemnify corporate directors or officers.[309] Most indemnification statutes include a mandatory part explaining when a corporation must indemnify and a permissive part explaining when a corporation may indemnify.[310] Under most statutes, a court may order indemnification not only where a director or officer meets the applicable standards for mandatory or permissive indemnification, but also where the court deems it proper under the circumstances.[311]

For example, under the Delaware General Corporation Law,[312] corporations have the authority to indemnify officers, directors, employees, and agents, so long as such party acted in good faith and in a

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federal securities laws or federal common law. *See, e.g.*, King v. Gibbs, 876 F.2d 1275, 1281 (7th Cir. 1989) (explaining that section 10(b) and Rule 10b-5 do not expressly include an indemnification provision and there is no basis for inferring an indemnification provision because there is no indication of any intent to protect alleged wrongdoers by providing indemnification).

307 *See* Delay v. Rosenthal Collins Grp., LLC, 585 F.3d 1003 (6th Cir. 2009) (citing extensively to cases interpreting indemnification rights for securities actions, and holding that since the Commodities Exchange Act was silent with respect to indemnification, Congress did not intend to displace indemnification rights under state law); *see also King*, 876 F.2d at 1283 (holding that the defendant waived any reliance on state law because he failed to rely on state law as a basis for his indemnification claim before the district court).

308 Corporate indemnification was traditionally a matter of contract and common law. *See* Robert P. McKinney, Special Project Note, *Protecting Corporate Directors and Officers: Indemnification*, 40 VAND. L. REV. 737, 738 (1987) (proposing additional methods for indemnification protection for corporate directors and officers, such as provisions in articles of incorporation, bylaws, or individual contracts).

309 *See* Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 IND. L. REV. 279, 282 & n.11 (1991); *see, e.g.*, 1987 Cal. Stat. 4274–77 (codified as amended at CAL. CORP. CODE § 317 (West 2016)); 56 Del. Laws 170–72 (1968) (codified as amended at DEL. CODE ANN. tit. 8, § 145 (2016)); 1987 Nev. Stat. 83–85 (codified as amended at NEV. REV. STAT. § 78.751 (2015)); 1964 N.Y. Laws 2246–49 (codified as amended at N.Y. BUS. CORP. LAW §§ 721–25 (McKinney 2016)).

310 *Compare* DEL. CODE ANN. tit. 8, § 145(a)–(b) (permissive), *with id.* § 145(c) (mandatory).

311 *See, e.g.*, *id.* § 145(b) ("[D]espite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.").

312 *Id.* ch. 1.

manner not believed to be against the corporation's best interest.[313] Further, the statute grants the Court of Chancery plenary authority as to indemnification matters involving any person within the corporation.[314]

Although indemnification raises no conflict with state indemnification law, it does, at first glance, appear to be in conflict with the SEC's position that indemnification undermines the policy of deterrence of the federal securities laws.[315] As the SEC stated in a regulation under the Securities Act: "Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted . . . [,] in the opinion of the [SEC] such indemnification is against public policy as expressed in the Act and is therefore unenforceable."[316] Courts, however, have generally interpreted the SEC's stated policy to be deterrence of wrongdoers, and have therefore permitted indemnification under state law where there has not been a willful or knowing violation of law.[317] Accordingly, if courts condition the assertion of privilege on indemnification only where an officer, director, or employee does not have the requisite mens rea to be a wrongdoer, indemnification would not undermine the stated SEC policy.[318]

One potential criticism of an indemnification solution is that the corporation may be required to pay for the same wrong twice. The

313 *Id.* § 145(a)–(b).

314 *Id.* § 145(k) ("The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for . . . indemnification brought under this section or under any bylaw, agreement, . . . or otherwise."). The Supreme Court of Delaware held that the phrase "unless ordered by a court" in the indemnification provision covering officers, directors, employees, and agents "clearly allows for the possibility that the Court of Chancery will order indemnification." Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 560 (Del. 2002) (interpreting the language in § 145(d)).

315 *See* David B. Schulz, Comment, *Indemnification of Directors and Officers Against Liabilities Imposed Under Federal Securities Laws*, 78 MARQ. L. REV. 1043, 1052 n.66, 1059 (1995).

316 17 C.F.R. § 229.510 (2016). In Item 512, the SEC recognizes that in some cases the issue of indemnification may be submitted to a court to determine "whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue." *Id.* § 229.512. Although the SEC's position is only stated in the Securities Act, some courts have interpreted it to also apply to the Securities Exchange Act. *See, e.g.*, Heizer Corp. v. Ross, 601 F.2d 330, 334 (7th Cir. 1979) (interpreting SEC policy to apply to provisions of the Securities Exchange Act).

317 *See, e.g.*, Bernstein v. Crazy Eddie, Inc., 702 F. Supp. 962, 984 (E.D.N.Y. 1988) (holding that defendant who settled securities claim against him may be entitled to indemnification under state law depending on facts to be determined at trial); Goldstein v. Alodex Corp., 409 F. Supp. 1201, 1205–06 (E.D. Pa. 1976) (holding that an outside director sued for securities violations was entitled to indemnification from corporation for reasonable expenses, including attorneys' fees, since he acted in good faith in signing the registration statement, notwithstanding the public policy expressed in the Securities Act).

318 *See* Schulz, *supra* note 315, at 1068.

corporation may have already determined the amount it was willing to pay to settle claims for the alleged wrongdoing and should not be required to pay again. The response to this argument is that the corporation is not required to pay for the same wrongdoing twice. Rather, the corporation will engage in a cost-benefit analysis to determine whether it should exercise the privilege. Where the corporation decides to assert privilege, it expects a financial benefit—it anticipates that its total cost will be lower if it exercises, rather than waives, the privilege. Indemnification would merely require the corporation to devote some of that cost savings to the employee. If the corporation decides that indemnification will be too costly, the corporation will waive privilege. Further, corporations may not suffer the financial harm of indemnification for officers or directors who would likely be covered by their D&O liability insurance policies. With respect to lower-level employees who may not already be covered by liability insurance, corporations might consider purchasing additional insurance to guard against this risk as well.

Another potential argument is that indemnification only avoids the financial harm of an adverse judgment, but does not protect an employee from the ancillary effects such as reputational or professional harm. While this is true, a court could limit the reputational damage by emphasizing in its opinion conditioning assertion of the privilege on indemnification that the corporation prevented the individual from asserting a well-founded advice-of-counsel defense that may have demonstrated the employee's good faith. This Article recognizes that no solution is perfect, but suggests that the indemnification alternative best balances the interests of corporations and employees.

Conclusion

The DOJ's recent focus on individual accountability makes it more likely that corporate officers, directors, and employees will be sued in their individual capacities for various federal violations. Unless these individual agents of the corporation are held accountable, the federal statutes will be underenforced. Under many of these federal statutes, including securities fraud under section 10(b) and Rule 10b-5 of the Securities Exchange Act, a defendant is only liable if the individual intended the wrongdoing.[319] To negate the element of intent, a defendant may attempt to introduce evidence that she acted in good-faith reliance on the advice of counsel. However, if the defen-

319 *See supra* Section I.A.

dant is an officer or employee of a corporation, she may not be able to introduce such evidence over a corporation's assertion of the attorney-client privilege.

The result is a clash between two fundamental rights—an employee or officer's right to present an advice-of-counsel defense and a corporation's right to maintain confidentiality. To date, judicial efforts to resolve the clash have been inadequate, especially in the civil context where courts have recently held that the right to present the defense should never trump the right to maintain confidentiality.[320] This Article suggests resolving the conflict by courts conditioning a corporation's ability to assert privilege on an agreement to provide indemnification to an employee deprived the right to assert a legitimate advice-of-counsel defense. Although not perfect, this solution best balances the interests of corporations and employees.

320 *See supra* Section III.A.