The Ethical Mine Field: Corporate Internal Investigations and Individual Assertions of the Attorney-Client Privilege

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THE ETHICAL MINE FIELD: CORPORATE INTERNAL INVESTIGATIONS AND INDIVIDUAL ASSERTIONS OF THE ATTORNEY-CLIENT PRIVILEGE

Lawton P. Cummings

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I. INTRODUCTION

In the post-Enron era of aggressive government investigations into corporate misconduct, increasingly, in order to grant a corporation “cooperative” status in determining whether to charge the corporation and in sentencing, government agencies require waivers of the attorney-client privilege, resulting in the disclosure of internal investigation materials.1 This recent trend towards

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* Attorney, Wheeler Trigg Kennedy, Denver Colorado. J.D., Georgetown University Law Center 2000; B.S. Tulane University 1993. This article is dedicated to Craig P. Cummings with gratitude for his vital support and encouragement.

1 AMERICAN BAR ASSOCIATION, TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE RECOMMENDATION AND REPORT 17 n.2 (May 18, 2005), available at www.abanet.org/buslaw/attorneyclient/ [hereinafter ABA TASK FORCE REPORT] (explaining that the SEC “regards the production of attorney-client privileged information . . . as a necessary element of cooperation.”); Pricilla L. Walton, Waiving the Attorney-Client Privilege Goodbye: The Erosion of the Privilege by Federal Financial Regulatory Agencies, 10 N. C. BANKING INST. 397 (2006) (quoting Memorandum of Deputy Attorney General Larry Thompson in 2003 as stating that one of “nine factors for federal prosecutors to consider in making decisions with respect to prosecuting businesses [is] ‘the corporation’s timely and voluntary disclosure . . .
waiver of the privilege by corporations has exposed a troubling tactic practiced by attorneys conducting internal investigations.

When conducting an internal investigation into potential wrongdoing within a corporation on behalf of a corporate client, a corporate lawyer has an ethical duty to warn the employee interviewee that the lawyer represents the corporation, rather than the interviewee, and that the corporation may eventually waive the attorney-client privilege, which would allow for the disclosure of the employee’s communications with the attorney. However, attorneys often give “watered-down” warnings in an effort to extract full information from employees and zealously represent their clients, the employer corporations.

As the result of giving “watered-down” warnings, which was referred to by the Court of Appeals for the Fourth Circuit as “a legal and ethical mine field,” many individual employees have disclosed information to corporate attorneys, believing that they were communicating within a personal attorney-client relationship. The Circuits are split on whether an individual employee who had a reasonable belief that he was communicating with his counsel can assert the attorney-client privilege to block the disclosure of his communications when the corporation waives the privilege.

including, if necessary, the waiver of corporate attorney-client and work-product protection.”

U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(2) (2004) (subtracting culpability points if an organization fully cooperates with the investigation); Richard S. Gruner, Three Painful Lessons: Corporate Experience with Deferred Prosecution Agreements, 1536 PRACTISING LAW INSTITUTE, CORPORATE LAW AND PRACT. HANDBOOK SERIES 61 (2006) (discussing the disclosure requirements required by the government in deferred prosecution agreements).

See MODEL RULES OF PROF’L CONDUCT, R. 1.13(d) cmt (2003) (explaining that warnings must be given when it becomes “reasonably apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing”); Dennis P. Duffy, Selected Ethics and Professionalism Issues in Labor and Employment Law Cases, SL031 A.L.I.-A.B.A. CLE, ADVANCED EMPLOYMENT LAW AND LITIGATION 943 (2005) and accompanying notes (explaining that warnings should be given prior to any interview with corporate employees, even in the absence of apparent adverse interests).

See cases discussed infra in Part III.

In re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005) (noting that although the court stated that it did not approve of the watered-down warnings, it held that the attorney did not establish an attorney-client relationship with the individual when he said that he “can” represent the individual, rather than stating that he “does” represent the individual).

Some circuits hold that individual employees may not prevent the disclosure of corporate communications with corporate counsel, even if the employees reasonably believed they were making the disclosures within the attorney-client context, and even if the attorney misled them. See In re Grand Jury Subpoena, 274 F.3d 563 (1st Cir. 2001); United States v. Int’l Bhd. of Teamsters, 119 F.3d 210 (2d Cir. 1997); In re Bevill Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 125 (3d Cir. 1986); In re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005). Other circuits hold that an individual’s assertion of the attorney-client privilege can prevent the disclosure of corporate communications with corporate counsel if the employee had a reasonable belief that he was communicating within a personal attorney-client relationship. See Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978); United States v. Kepplinger, 776 F.2d 678 (7th Cir. 1985); Wylie v. Marley Co., 891 F.2d 1463, 1471-72 (10th Cir. 1989); Grand Jury Proceedings v. United States, 156 F.3d 1038, 1041 (10th Cir. 1998).
This Article examines the differing judicial approaches to determining whether an individual can assert the attorney-client privilege to block the disclosure of his communications with corporate counsel. Specifically, the article will examine the differing judicial approaches within the framework of the major theoretical justifications for the attorney-client privilege, utilitarian justifications, and individual rights-based justifications. In doing so, the article exposes the weaknesses of the approach that errs in favor of the corporation and disclosure, and argues that the only approach justifiable by utilitarianism or rights-based justifications is the approach that errs in favor of the individual and confidentiality.

Section II of this Article will review the attorney-client privilege and examine the theoretical bases that have been used to justify the attorney-client privilege. Section III will review the two contradictory judicial approaches to ruling on individual assertions of the attorney-client privilege when the employer-corporation waives the privilege. Section IV will analyze the two judicial approaches within the framework of the theoretical justifications for the attorney-client privilege and will argue that the reasonable belief standard that errs in favor of the individual and confidentiality is the only justifiable approach. Section V will conclude the Article.

II. THEORETICAL JUSTIFICATIONS FOR THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is one of the oldest principles of evidence, dating back to at least the Sixteenth Century. The attorney-client privilege protects confidential communications from disclosure where the communication was made in the context of the client seeking professional legal advice from the attorney.

The attorney-client privilege originally belonged to the attorney and was "a privilege designed to protect a gentleman of honor from being forced to compromise his integrity." By the mid-1700s, the honor-based theory of confidentiality had been repudiated and replaced by another, according to which the privilege belonged to the client, not the lawyer.

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7 See 8 WIGMORE, supra note 6, § 2292.
8 DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 188 (Princeton University Press 1988); see also Michel Rosenfeld, The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client's SEC Disclosure Obligations, 33 HASTINGS L.J. 495, 508 (1982); 8 WIGMORE, supra note 6, § 2290, at 543.
9 However, this justification is still occasionally cited. For example, in Hickman v. Taylor, the Supreme Court discussed the "demoralizing" effect that weakening of the privilege would have on the legal profession, and in his concurring opinion, Justice Jackson stated: "I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him." 329 U.S. 495, 511-16 (1946). Some
The two main justifications for the attorney-client privilege are utilitarian justifications (which focus on furthering the good of society) and rights-based justifications (which focus on protecting the individual client's rights and human dignity). These two approaches demonstrate the tension in the American legal system between "the rights of the individual and the good of society." Courts often differ in attorney-client rulings depending upon whether they believe that the attorney-client privilege is based on utilitarian grounds or individual rights-based grounds. Conversely, individual court rulings can be justified by picking the applicable theoretical justification. The next two sections will examine each of the theoretical justifications in turn.

A. Utilitarian Justifications

Since the mid-1700s, the standard justification for the attorney-client privilege has been that justice would better be served by the "full and frank" communication that arises when clients do not need to fear that their lawyers will reveal their confidences over their objection. This is commonly referred to as the "utilitarian" justification. Utilitarian arguments focus not on whether the individual actions are morally correct, but rather on whether the consequences are good. A consequence is considered good, and therefore correct, under the utilitarian theory, if the consequence "brings greater happiness to a greater number of individuals."

Professor Wigmore, considered the foremost advocate for the utilitarian justification for the attorney-client privilege, argued that the privilege is justified if "[i]n the injury that would inure to the relation by the disclosure of [the communication would] be greater than the benefit thereby gained for the correct disposal of litigation."

As an outgrowth of Wigmore's writings, "arguments about what rule will yield the largest number of correct verdicts are 'utilitarian' arguments."

commentators have gone so far as to say that the only benefit of the attorney-client privilege is job security for lawyers. See Daniel R. Fischel, Lawyers and Confidentiality, 65 U. Chi. L. Rev. 1 (1998).

10 Id. (citing Lord Grey's Trial 9 How. St. Tr. 127, 131 (1682)).
11 Rosenfeld, supra note 8, at 495.
12 See, e.g., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 175 (Edward W. Cleary ed., West 2d ed. 1982) (1972); Rosenfeld, supra note 8, at 508; LUBAN, supra, note 8, at 190.
13 Rosenfeld, supra note 8, at 507-08.
14 Id. at 507.
15 Id.
16 Id. at 507-08.
17 Id.; WIGMORE, supra note 6, § 2285, at 527.
18 LUBAN, supra note 8, at 191.
Even arguments against the privilege have most often been posed in terms of the privilege’s lack of social utility. For example, in 1827, Jeremy Bentham argued that the attorney-client privilege should be abolished as it only benefits the guilty. He argued that the revelation of guilty facts would only help bring the guilty to justice, that the withholding of guilty facts from an attorney would also help bring the guilty to justice, and that the innocent have nothing to fear from revelation of confidences. This argument has been expanded upon in recent years by Daniel Fischel who argues that not only does the privilege only help the guilty, but that it actually hurts the innocent because “the privilege makes it more difficult for the innocent credibly to communicate that they have nothing to hide.” These arguments focus on whether the privilege actually results in the most number of correct verdicts. In other words, the arguments focus on social utility and are inherently utilitarian arguments.

The Supreme Court’s justification for the attorney-client privilege is most often based on utilitarian principles. In Upjohn Co. v. United States, the Court explained that the purpose of the privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” The Upjohn Court went on to explain that the “privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” This justification has been consistently enunciated by the Court.

B. Individual Rights-Based Justifications

In recent years, commentators have argued that the proper justification for the attorney-client privilege should focus on the individual rights of the client. Monroe Freedman, the foremost proponent of the rights-based justification

20 See id.
21 Fischel, supra note 9.
23 Id.
24 See, e.g., Trammel v. United States, 445 U.S. 40, 51 (1980) (“The lawyer-client privilege rests 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.”); Fisher v. United States, 425 U.S. 391, 403 (1976) (stating that the purpose of the privilege is “to encourage clients to make full disclosure to their attorneys”); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (“The rule which places the seal of secrecy upon communications between client and attorney 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 of the apprehension of disclosure.”).
for the attorney-client privilege, explained that the concern for an individual’s human dignity requires that no defendant, whether he be guilty or innocent, be “required to stand alone against the awesome power of the [government]. Rather, every criminal defendant is guaranteed an advocate . . . . The lawyer can serve effectively as advocate, however, only if he knows what his client knows concerning the facts of the case.”

David Luban explains that it would violate an individual’s human dignity to allow disclosure of attorney-client confidences in the criminal context because “[t]he right to counsel and the right against self-incrimination are both grounded in respect for human dignity . . . [U]nless the defendant can compel her lawyer’s silence, she is put in the position of trading one right off against the other.” Luban points out two moral imperatives that are generally accepted truths in American law: 1) because it is moral torture and an affront to human dignity to say to a person that he must “take part in his own destruction,” he may not be compelled to incriminate himself; 2) because a person should not be penalized by the law based upon his lack of experience, ability, or knowledge of the law, he is entitled to a lawyer to act as his “mouthpiece.” Therefore, Luban argues, it would be wrong to force a “trade-off” between one’s right to self-incrimination and his right to a zealous advocate.

Luban acknowledges that the traditional individual rights arguments are most persuasive in the criminal context and do not completely carry-over into the civil context. However, Luban points out that the individual rights arguments, which are based upon an individual encountering the power of the state, do apply when an individual is faced in the civil context with a “powerful private adversar[y].”

Theoretical justifications for the attorney-client privilege are not necessarily mirrored by the prevailing jurisprudence. A survey of the case law reveals that courts have taken different approaches to applying and justifying the privilege. In the corporate context in particular, application of attorney-client privilege has created two contradictory bodies of precedent.

III. JUDICIAL APPROACHES TO INDIVIDUAL EMPLOYEE ASSERTIONS OF THE PRIVILEGE

Corporations, as legal entities, may avail themselves of legal counsel. Therefore, the privilege that exists between an attorney and an individual client applies equally to a corporate client. However, because of the frequent conflict

\[26\] Luban, supra note 8, at 195.
\[27\] Id. at 193-97.
\[28\] Id. at 197.
\[29\] Id. at 203-04.
\[30\] Id. at 204.
between the individual employee's interest and corporate interests, the application of the attorney client privilege in internal corporate investigations often proves difficult. In the Supreme Court's seminal case reaffirming the corporate attorney-client privilege, *Upjohn Co. v. United States*, the Court left open the question of whether the attorney-client relationship can ever be established with an employee interviewee where the lawyer also represents the corporation, and if so, what standard should be used to determine whether the relationship and, therefore, the attorney-client privilege arose. The circuits are now split on whether an individual who believed that he was communicating confidences within the context of the attorney-client privilege may prevent a corporation from later waiving the privilege as it relates to those communications. One group of circuits errs in favor of the corporation and disclosure, while a second group of circuits errs in favor of the individual and confidentiality.

A. Approach Favoring the Corporation

The Second, Third, and Fourth Circuits have held that individual employees may not prevent the disclosure of corporate communications with corporate counsel, even if the employees reasonably believed they were making the disclosures within the attorney-client context, and even if the attorney actually misled them into believing they were speaking within the attorney-client context. For example, in *United States v. International Brotherhood of Teamsters*, the Second Circuit held that an election campaign manager could not claim the attorney-client privilege to protect his communications from disclosure once the campaign waived the privilege, even though the individual had asked repeatedly if the conversations were privileged and was told by the campaign's counsel that they were. The law firm even consulted with outside counsel regarding whether the individual would be able to eventually assert an

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31 449 U.S. 383 (1981). Prior to the Supreme Court's decision in *Upjohn*, courts were divided over whether the attorney-client privilege extended only to communications between an attorney and a corporation's "control group" or whether the privilege also covered communications with employees outside the control group if they were made at the direction of the corporation's superiors and were relating to subject matters dealing with the employee's duties within the corporation. In *Upjohn*, the Court invalidated the narrower control group test and "declined to lay down a broad rule" regarding what communications are privileged. 449 U.S. at 386. However, the Court's decision on the facts was based on rationale that looked very much like the subject matter test. See id.

32 See *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210 (2d Cir. 1997).

33 See *In re Bevill Bresler & Schulman Asset Mgmt. Corp.*., 805 F.2d 120, 125 (3d Cir. 1986) (holding that a corporate employee may never assert a personal attorney-client privilege with regards to corporate communications with corporate counsel).


35 119 F.3d 210.

36 Id. at 213.
individual attorney-client privilege under the circumstances.\textsuperscript{37} The Second Circuit specifically stated that the individual's "reasonable belief" regarding representation was not relevant, notwithstanding its acknowledgement that the attorney may have violated the spirit of the ethical rules in misleading the individual to believe that he was represented by the attorney.\textsuperscript{38}

Similarly, in \textit{In re Grand Jury Subpoena: Under Seal},\textsuperscript{39} the Fourth Circuit held that employees could not assert the attorney-client privilege to block disclosure of communications made to corporate counsel, even though the attorneys told the employees that they "can represent [you] until such time as there appears to be a conflict of interest," and that "we will advise you at the time that a conflict appears," and that they "did not recommend" that the employees retain their own counsel.\textsuperscript{40} The Fourth Circuit stated that it did not approve of the attorney's "watered-down" warnings, which it described as a "legal and ethical mine field," yet it concluded that even if the employees believed that the attorneys represented them, that such a belief could not be objectively reasonable because the statement "'we can represent you' is distinct from 'we do represent you.'"\textsuperscript{41}

This approach taken by the Second, Third, and Fourth Circuits disregards the individual employee's belief, and instead errs in favor of the corporation, the attorney, and disclosure.

\section*{B. Approach Favoring the Individual}

While the approach taken by the Second, Third, and Fourth Circuits disregards the individual employee's belief by allowing the corporation to waive any privilege and disclose what the employee said during the course of an internal investigation, other circuits have reached a different conclusion. The Seventh\textsuperscript{42} and Tenth\textsuperscript{43} Circuits have held that an individual's assertion of the attor-

\textsuperscript{37} See id.

\textsuperscript{38} Id. at 216-17.

\textsuperscript{39} 415 F.3d 333.

\textsuperscript{40} Id. at 336.

\textsuperscript{41} Id. at 340. Note that the Fourth Circuit stated in dicta that one reason that the individual employees' belief that they were represented by counsel was not reasonable was that an attorney-client privilege cannot arise between an attorney and the employee interviewee where the corporation controls the privilege. Id. at 339-40. However, this reasoning is patently circular. In fact, the court went on to state that had the attorney stated that he "does" represent the individuals, rather than that he "can" represent the individuals, that an attorney-client relationship would be formed and that the attorney would be obligated under the ethics rules to withdraw as counsel for both the individual and the corporate clients. Id. at 340.

\textsuperscript{42} See Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978); United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985).

\textsuperscript{43} See Grand Jury Proceedings v. United States, 156 F.3d 1038, 1041-42 (10th Cir. 1998) ("[A] corporate officer's discussion with his corporation's counsel may still be protected by a
ney-client privilege can prevent the disclosure of corporate communications with corporate counsel when the corporation waives the privilege if the employee had a "reasonable belief" that she was communicating with the attorney within a personal attorney-client relationship.

In Westinghouse Elec. Corp. v. Kerr-McGee Corp., the Seventh Circuit held that the attorney-client relationship did arise, and therefore, the individual employees could block disclosure of the contents of their communications on corporate subject matter where the individual employees had a "reasonable belief" that the corporate attorneys conducting the internal investigation represented them. The court explained that "[t]he deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought." In United States v. Keplinger, the Seventh Circuit clarified the "reasonable belief" standard that it enunciated in Westinghouse, stating that the standard is met if the "potential client's subjective belief is minimally reasonable."

The Tenth Circuit followed the Seventh Circuit's approach and held that "a corporate officer's discussion with his corporation's counsel may still be protected by a personal, individual attorney-client privilege when the conversation specifically concerns the officer's personal liability" and that the individual's claim of attorney-client privilege could block the corporation's disclosure of the employee's communications with corporate counsel if the employee "could have believed" that the attorney represented him.

This approach taken by the Seventh and Tenth Circuits focuses on the individual employee's belief when making his disclosures to the corporate counsel and errs in favor of the individual employee and confidentiality.

44 580 F.2d 1311.
45 Id. at 1321.
46 Id. at 1319 & n.14 (quoting Raymond L. Wise, Legal Ethics 284 (1970)).
47 776 F.2d 678.
48 Id. at 701 (stating no attorney-client relationship where relationship actually adversarial and controversial, statements made in the presence of third parties, no legal advice sought, and no ambiguous statements made by attorneys).
49 Lower courts in other circuits have also followed this approach. See, e.g., United States v. Hart, No. 92-219, 1992 WL 348425, at *1-2 (E.D. La. Nov. 16, 1992) (holding that individual employees may assert the attorney-client privilege with regards to their communications with corporate counsel, because they had a "reasonable belief" that the corporate counsel represented them).
50 Wylie v. Marley Co., 891 F.2d 1463, 1471 (10th Cir. 1989); see also Grand Jury Proceedings v. United States, 156 F.3d 1038, 1041 (10th Cir. 1998) (noting an individual attorney-client privilege could arise even when the subject matter related to corporate affairs, as long as the communications concerned the individual's personal liability, such as jail time for the individual employee).
IV. UTILITARIAN OR RIGHTS-BASED JUSTIFICATIONS FOR THE APPROACHES?

A. Utilitarian Justifications

The approach of the Second, Third, and Fourth Circuits, which favors the corporation and disclosure, to allow the disclosure of an individual’s communications with corporate counsel, even when that employee reasonably believed that the communications were made within the attorney-client relationship, is not justifiable by utilitarian principles. The Second Circuit attempted to justify its decision in *International Brotherhood of Teamsters* using utilitarian principles, arguing that the “reasonable belief” standard would “provide employees seeking to frustrate internal investigations with an exceedingly powerful weapon.”51 However, this analysis is not sound.

The Second Circuit’s justification glosses over the fact that the case addressed an instance where an employee was actually led by counsel to believe that the disclosures were made within the personal attorney-client context.52 The question in this line of cases is actually what harm would inure if attorneys were required to give individuals proper warnings. The utilitarian justification is based on the assumption that the attorney-client privilege is needed to encourage full and frank communication with one’s attorney, without fear of disclosure.53 Accurate warnings would not frustrate this goal, but would, in fact, further this goal because individual employees would retain their own counsel if they understood the nature of the relationship.

A rule that allows an individual to be duped into disclosing information places uncertainty into all attorney-client relationships, and as the Supreme Court has recognized, “[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.”54 Under the utilitarian theory, this uncertain privilege would “inhibit communications because clients will fear the eventual public disclosure of their conversations. ... [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.” 55 This “chilling effect,” which restricts individual-attorney communication, in turn restricts corporation-attorney communication, because a corporation can only communicate with its attorney through its individual employees. Therefore, utilitarian principles cannot support this approach.

51 119 F.3d at 216 & n.2.
52 *Id.* at 217 (noting the court admitted that the attorney in the case violated his ethical duty to inform the individual that he was not their client).
53 *Upjohn*, 449 U.S. at 391.
54 *Id.* at 393.
In contrast, the approach taken by the Seventh and Tenth Circuits that allows an individual's assertion of the attorney-client privilege to prevent the disclosure of his communications with corporate counsel if the employee had a reasonable belief that the he was communicating within a personal attorney client relationship can be justified by utilitarian principles.

Under this approach, an individual seeking legal advice can be assured that his disclosures will be kept in confidence and that he will not unwittingly give information to a person whom he believes to be his attorney but who may ultimately disclose those communications over the individual's objections. This approach is sound under the utilitarian theory, because it will encourage full and frank conversations between individuals and attorneys, which is the utilitarian justification for the attorney-client privilege.

Therefore, the only approach that can be justified by utilitarianism is the approach that favors confidentiality in ambiguous circumstances. This is the only approach that will provide individuals with the certainty that is required to foster full and frank communication with attorneys.

B. Rights-Based Justifications

A corporation is not human and therefore has no human dignity to protect. This was recognized by the Supreme Court when it ruled that the Fifth Amendment privilege against self-incrimination does not apply to corporations. Therefore, there are no rights-based arguments that could justify erring in favor of corporations.

However, the individual employees being interviewed pursuant to an internal investigation do have their human dignity at stake. This is especially true when the individual employees could be subject to personal criminal sanctions, as is often the case with internal investigations. The individual's human dig-

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57 See Grand Jury Proceedings v. United States, 156 F.3d 1038, 1041-42 (10th Cir. 1998) ("[A] corporate officer's discussion with his corporation's counsel may still be protected by a personal, individual attorney-client privilege when the conversation specifically concerns the officer's personal liability . . . based on conduct interrelated with corporate affairs.").
58 Some might argue, based on Bentham's utilitarian analysis, discussed supra Part II.A, that the result argued here is evidence that the attorney-client privilege should be abolished, because it only benefits the guilty. This Article is not arguing in favor of the attorney-client privilege based upon utilitarian grounds. Rather, this article argues that the only approach that can be supported using utilitarian arguments in its favor is the approach that favors the individual and confidentiality.
60 This has led some commentators to argue effectively that the attorney-client privilege should be abolished as it applies to corporations. See, e.g., LUBAN, supra note 8, at 232-33.
61 This is due to the very nature of internal investigations, because such investigations are undertaken in response to purported wrongdoing by employees.
nity continues to be a concern when the communications are eventually provided to civil plaintiffs, as the civil suits that ensue are often brought as large shareholder derivative suits which provide the “powerful adversary” referred to by Luban.

The individual’s human dignity is compromised through the approach that favors the corporation, because the individual has been tricked into taking part in her own demise. A person giving information to a corporate attorney whom she believes is her personal attorney is tantamount to an individual under interrogation giving incriminating information to a police officer who leads the suspect to believe that he is the suspect’s attorney. A person’s human dignity is affronted when she takes part in her own destruction, whether she does so as the result of force or of trickery.

Moreover, a rights-based justification that allows an employee to prevent corporate waiver of information obtained from him in the course of an internal investigation will reinforce the current ethics rules. Ethics rules exist to protect the rights of individual clients. Yet, protecting clients’ rights is not always easy when conducting an interview pursuant to an internal investigation because the attorney is subject to two conflicting ethics rules. On the one hand, the lawyer has the duty to inform the interviewee if a conflict arises and that the interviewee should consult other counsel. However, on the other hand, the lawyer has the duty to zealously represent his client, the corporation. The approach that does not allow individuals to assert the attorney-client privilege to block disclosure of their communications favors zealous representation and disfavors the duty to inform. The reasonable belief standard that resolves ambiguities in favor of the individual and confidentiality reinforces the balance imposed by the rules, because it encourages attorneys to engage in zealous representation of their corporate clients within the boundary requirement of fully and honestly informing each individual employee.

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62 A circuit split exists regarding whether this disclosure to the government comprises a waiver of the attorney-client privilege with regards to third parties, but in many instances, a corporation’s cooperation with the government results in the attorney-client communications being used by future civil plaintiffs. See Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424-25 (3d Cir. 1991); Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977); In re Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984). For discussion of this issue, see Zach Dostart, Comment, Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine, 33 PEPP. L. REV. 723 (2006).

63 See Luban, supra note 8, at 204.

64 Note that this approach is also reminiscent of the time when the privilege belonged to the attorney, as discussed supra, as the courts that adhere to this approach are very lenient with misbehaving attorneys. This approach ensures that the unscrupulous corporate attorneys do not need to withdraw as counsel, as they would need to do if the courts ruled that attorney-client relationships had arisen.


Under the rights-based justification, in an ambiguous situation, the individual’s human dignity should be protected and the individual’s communications from his own mouth should not be stolen through unscrupulous attorneys.\textsuperscript{67} Therefore, under the rights-based approach, the only approach that can be justified is that which errs on the side of the individual.

V. CONCLUSION

In an effort to zealously represent their corporate clients and gain information from employees, corporate attorneys conducting internal investigations into potential employee wrongdoing often give “watered-down” warnings to employee interviewees. These “watered-down” warnings fail to inform employees that the corporation owns the attorney-client privilege and may later waive the privilege for the ensuing conversations. This leads many individual employees to believe that they are communicating with counsel within a personal attorney-client relationship.

The circuits are split on whether an individual who believed that he was communicating confidences within the context of the attorney-client privilege may prevent a corporation from later waiving the privilege as it relates to those communications. One group of circuits errs in favor of the corporation and disclosure, and a second group of circuits errs in favor of the individual and confidentiality, holding that an individual can prevent the disclosure of her communications with corporate counsel when the corporation waives the privilege if the employee had a “reasonable belief” that she was communicating with the attorney within a personal attorney-client relationship.

After analyzing the two contradictory judicial approaches within the framework of the two major theoretical justifications for the attorney-client privilege, utilitarian justifications (which focus on furthering the good of society) and rights-based justifications (which focus on protecting the individual client’s rights and human dignity), this Article concludes that the reasonable belief standard that errs in favor of the individual and confidentiality is the only justifiable approach. The approach that favors the corporation and disclosure cannot be justified by the utilitarian approach, because the uncertainty caused by the approach has a chilling effect on attorney-client communications. The approach favoring the corporation and disclosure cannot be justified by the rights-based approach, because a corporation has no rights to protect.

In contrast, the reasonable belief approach that favors the individual and confidentiality can be justified by the utilitarian approach, because it encourages

\textsuperscript{67} Some have argued that an attorney should never engage in joint representation of a client and a corporation. However, this Article deals with the situation where an attorney has already given the appearance that he does represent the individual. It would not be helpful in this situation to state after the fact that the attorney should not engage in joint representation. To deny that the relationship was established simply because it should not be established is tantamount to saying that a remedy should not exist because the tort should not have occurred.
full and frank attorney-client communication. It can further be justified by the rights-based approach, because it protects each individual’s human dignity by ensuring that each person is not tricked into taking part in his own demise. Therefore, this Article concludes that the approach favoring the individual and confidentiality should be uniformly adopted.