ARTICLES

THE COSTS OF CONFIDENTIALITY AND THE PURPOSE OF PRIVILEGE

MELANIE B. LESLIE*

Clients want the best legal advice. Most are therefore strongly motivated to tell lawyers the truth. This is especially true of corporate clients. Legal blunders can cost millions of dollars, create unwanted attention, even threaten corporate health. When seeking legal guidance, smart corporate actors come clean.

Consequently, the contents of attorney-client communications are extraordinarily relevant and reliable evidence. If the point of litigation is to deduce the truth, why exclude attorney-client communications? Most evidentiary rules further the search for truth. Hearsay is excluded as unreliable, character evidence as unduly prejudicial. The law of privileges is a stark exception because it conceals evidence that is highly reliable and probative.

We tolerate attorney-client privilege because we suppose that without it, fear or ignorance would cause clients to omit, slant, or falsify information when consulting attorneys. Perhaps unwittingly, clients would forfeit the opportunity to obtain sound legal advice. The privilege, therefore, enables clients to function effectively in the legal system. The price is the exclusion of relevant and reliable evidence.

In a perfect world, however, the privilege would shield no evidence. Privilege generates the communication that the privilege protects. Eliminate the privilege, and the communication disappears or is rendered unreliable. In a perfect world, then, the privilege would protect only reliable statements that would not otherwise have been made.[1] In reality, however, the privilege is not a but-for cause of all attorney-client communications. Clients may gain privilege protection for statements that they would have made without the privilege, simply by minding the privilege rules. To the extent that clients claim the privilege unnecessarily, the privilege obstructs the fact-finding process. It

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* Associate Professor of Law, Benjamin N. Cardozo School of Law. The author thanks Peter Lusching, Stewart Sterk, and Charles Yablon for helpful comments and suggestions, and Sandi Grcene for her invaluable research assistance.

1. *See* John E. Sexton, *A Post-*Upjohn *Consideration of Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 480 (1982); *see also* Glen Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899, 918-19 (1980) (advocating a "but-for" analysis so that the privilege would be applied only if the statement would not have becn made absent the privilege).

excludes communications that would otherwise have been discoverable. Thus have courts and commentators ceaselessly, almost stridently, emphasized the importance of construing the privilege narrowly.[2]

In furtherance of that quest, courts have developed limitations on the privilege's application.[3] One such limit requires that the communication be made in confidence.[4] The requirement assumes that clients need no incentive to reveal to their attorneys information that they would share with the world. Professor Paul R. Rice, the author of the leading treatise on attorney-client privilege,[5] wants to abolish that requirement. In a recent article, Professor Rice expands on a theme in his treatise, arguing that the confidentiality requirement is superfluous and inordinately costly for corporate litigants.[6] Given Professor Rice's influence, and a recent smattering of decisions that disregard the confidentiality requirement's purpose, his arguments should not stand unexamined. The time is ripe to revisit this well-established feature of privilege law.

Rice's article makes three basic points: First, he asserts that the confidentiality requirement serves no compelling purpose.[7] Second, echoing a theme in his treatise,[8] he argues that the requirement has never been satisfactorily justified,[9] and that courts, implicitly realizing this, have eroded the requirement to the point where it is irrelevant to the

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2. In Wigmore's words:

> [T]he privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (John T. McNaughton rev. ed., 1961) [hereinafter WIGMORE, EVIDENCE].

3. Wigmore formulated the privilege as follows:

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

Id. § 2292, at 554 (emphasis omitted). Restrictions 1 through 5 and 8 are best understood as attempts to strictly limit the privilege's application in accordance with its overall objective—encouraging necessary attorney-client communications.

4. *See id.*

5. PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES (1993) [hereinafter RICE, ATTORNEY-CLIENT PRIVILEGE]. Professor Rice is also the author of PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE: STATE LAW (1997).

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

7. *See id.* at 856-61.

8. *See* RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 5, § 6.3, at 386-401.

9. *See* Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 859; 868-74.

privilege calculation.[10] Third, he argues that abolishing the confidentiality requirement would eliminate significant litigation costs.[11]

Rice is wrong on all three counts. Part I refutes Rice's claim that the confidentiality requirement serves no compelling purpose. He argues that the requirement is not necessary to further the objective of the attorney-client privilege—to encourage free and frank disclosure between attorney and client. Rice is correct that the confidentiality requirement does not further the goal of the attorney-client privilege. However, encouraging free and frank disclosure has never been the purpose of requiring confidentiality. While the attorney-client privilege seeks to encourage client confidences, the confidentiality requirement exists to limit the exclusion of reliable evidence by ensuring that the privilege applies to only those statements that would not have been made absent the privilege.

Part II refutes the idea that doctrinal developments have rendered the confidentiality requirement irrelevant. After demonstrating that courts and scholars, particularly Wigmore, have understood the rationale for the confidentiality requirement, the Section examines Rice's claim that modern courts have "eroded" the requirement because they implicitly view it as a meaningless "tradition." Rice asserts that doctrine that has broadened the definition of client, excused inadvertent and involuntary waiver, sanctioned disclosure with selected third parties, and allowed parties to enter into discovery stipulations that control privilege issues, has contributed to the requirement's decline. Because Rice misunderstands the requirement's purpose, he misreads the case law. Although a few cases do stretch the confidentiality requirement to the breaking point, the case law, on the whole, does not support his argument.

Finally, Part III examines the claim that eliminating the confidentiality requirement will decrease the costs of asserting and adjudicating attorney-client privilege issues. Rice's argument fails here as well, because he fails to consider the costs that elimination would create. Besides the costs of excluding additional relevant evidence, elimination of the confidentiality requirement would cause parties to invoke the privilege more frequently, and would increase the frequency with which courts would have to adjudicate whether the allegedly privileged communication was made to obtain legal advice. Moreover, elimination would increase the incentive to advance bad-faith assertions of the privilege, and would create new evidentiary issues. Finally, his proposal would fail to simplify waiver litigation in any meaningful way.

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10. *See id.* at 874-88.
11. *See id.* at 888-98.

I. THE LIMITING FUNCTION OF THE CONFIDENTIALITY REQUIREMENT

A. The Logic of the Requirement

Rice characterizes the confidentiality requirement as a pointless and costly impediment to obtaining the protection of the attorney-client privilege.[12] His chief complaint is that the requirement has no substantial function,[13] and fails to "further the goal of the attorney-client privilege—encouraging openness and candor in communications between an attorney and client."[14] Rice posits two types of clients. One type desires total secrecy—that is, the client wants his attorney-client communications to be kept secret, not only from the fact-finder, but from the world at large.[15] The other type cares only about keeping attorney-client communications out of evidence. If the confidentiality requirement did not require her to keep attorney-client communications confidential, she would not be concerned with whether the contents of her attorney-client communications were known to third parties more generally, as long as they could not be used against her in court.[16]

According to Rice, the confidentiality requirement plays no role in encouraging either type of client to be more forthcoming with his or her attorney.[17] The client who desires total confidentiality would maintain secrecy from the world at large even if the privilege rule did not require confidentiality as a requisite for asserting the privilege.[18] This client would make disclosure only to his attorney, and could take comfort in the knowledge that his attorney is ethically barred from revealing those confidences.[19] Rice argues that *requiring* this client to maintain confidentiality is redundant, and does not increase the client's incentive to speak frankly with his attorney.[20] To the client who is *not* concerned with whether third parties become aware of her attorney - client

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12. *See id.* at 856-68. Specifically, Rice states that "premising the application of the privilege protection on the existence of confidentiality that the client does not desire serves only to restrict arbitrarily its application and increase the cost of its use for everyone, with no corresponding benefit." *Id.* at 860 (footnotes omitted).

13. *See id.* at 857. Rice asserts that the requirement's only function is to serve as a "convenient marker for determining the beginning and end of the protection." *Id.*

14. *Id.*

15. *See id.* at 860.

16. *See id.*

17. *See id.*

18. *See id.* (noting that "[w]hile secrecy often may be desired by the client, it is ensured, in part, through the attorney by the Code of Professional Responsibility, and otherwise within the factual control of the client").

19. *See id.*

20. *See id.* (arguing that "requiring what will otherwise be insisted upon will not further the goal of the privilege").

communications, the privilege itself is sufficient motivation to confide fully in her attorney. She is not induced to communicate more openly just because the privilege requires her to keep her communications secret.[21] Both types of client communicate freely with their attorneys because they know that the attorney-client privilege will bar attorney-client communications from evidence, *not* because the privilege requires them to keep attorney-client communications confidential.[22] From this, Rice concludes that the confidentiality requirement "is not a logical imperative of the attorney-client privilege" and should be eliminated to save costs.[23]

Rice misses the point. The attorney-client privilege does not seek to encourage attorney-client communication at any price. Rather, scholars and courts adjudicating privilege issues have long struggled with the tension between the need for the privilege and the substantial cost of shielding relevant evidence from the fact finder.[24] The law of attorney-

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21. *See id.* (stating that "[i]f the client is willing to speak without secrecy, requiring it will not increase the client's candor").

22. *See id.* (arguing that "[i]t is the *exclusionary* effect of the privilege that is fundamental to the candor being sought, not the secret context of the communication being encouraged").

23. *Id.* Similarly, he argues that "premising the application of the privilcge protection on the existence of confidentiality that the client does not desire serves only to restrict arbitrarily its application and increase the cost of its use for everyone, with no corresponding benefit." *Id.* (footnote omitted). Rice devotes an entire section of his treatise on attorney-client privilege to argue that "confidentiality is not a logical imperative" of the privilege. RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 5, § 6:4, at 401-404.

24. In Wigmore's words:

> [T]he privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and conerete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

WIGMORE, EVIDENCE, *supra* note 2, § 2292, at 554. Jercmy Bentham's opposition to the privilege as protecting only the guilty is well known. *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE bk. 9, at 304 (Garland ed., Hunt & Clarke 1978) (1827); *see also* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1085-86 (1978) (noting that when British law evolved to allow parties to become competent witnesses both in equity and at law, the conflict between "betrayal of confidence or suppression of truth" became unavoidable); Sexton, *supra* note 1, at 446 (asserting that "[n]otwithstanding the interests that the attorney-client privilege purports to serve, even its staunchest proponents concede that, whenever the privilege is invoked, otherwise relevant and admissible evidence may be suppressed. Inherently, the attorney-client privilege, like all privileges, potentially hinders the administration of justice"); Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1424 (3d Cir. 1991) (emphasizing the importance of narrowly construing the privilege because it obstructs the truth-finding process); Atwood v. Burlington Indus. Equity, Inc., 908 F. Supp. 319, 322 (M.D.N.C. 1995) (noting the importance of the purpose of the privilege, but emphasizing that the privilege "is not favored by the federal courts" because it impedes the "full and

client privilege therefore contains a number of restrictions designed to narrow the privilege's application to exclude as little evidence as possible without deterring open communication between attorney and client.[25] The confidentiality requirement, as one such restriction, seeks to ensure that the privilege protects *only those* attorney-client communications that would not have been made absent the privilege.[26] It acts in opposition to the privilege by serving an important limiting function. Rice's mistake is that he assumes that the rationale for the rule should be the same as the rationale for the exception.

But does the confidentiality requirement achieve its aims? Implicit in the requirement is the assumption that clients need no inducement to divulge information to attorneys that they would readily share with others. Rice takes issue with this assumption, branding it "unsubstantiated."[27] Although he acknowledges that "if the client speaks to his attorney in the presence of third parties, knowing that he is not protected by the privilege, the privilege protection is not necessary to encourage that speech,"[28] he concludes that "it does not follow as simply that the privilege protection is justified *only* if the client communicated with the expectation of secrecy."[29] Some clients who do not desire secrecy generally need the incentive the privilege provides to speak freely to their attorneys.[30] To Rice, it follows that eliminating the confidentiality requirement is consistent with the evidentiary goal of construing privileges as narrowly as possible because the privilege would still protect attorney-client communications (confidential or not) that would not have been made absent the privilege.[31]

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free discovery of the truth" (citing *In re* Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984))); Fleet Nat'l Bank v. Tonneson & Co., 150 F.R.D. 10, 13 (D. Mass. 1993) (stating that the privilege can conceal "even the most important factual issues in a case" but noting that it serves "a vital collateral interest; it assures attorneys and clients that whatever they discuss about their case in confidence will remain confidential").

25. For Wigmore's formulation of the privilege, see *supra* note 3.

26. *See* WIGMORE, EVIDENCE, *supra* note 2, § 2311, at 602-603 (noting that the presence of a third party vitiates the privilege because the privilege "goes no further than is necessary to secure the client's subjective freedom of consultation").

27. Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 859 (stating that "[t]he sole justification for the confidentiality requirement is the unsubstantiated belief that the privilege protection is unnecessary if the client has demonstrated a willingness to communicate in the presence of third parties").

28. *Id.* at 860.

29. *Id.*

30. *See id.*

31. *See id.* at 860-61 (stating that "extending the privilege protection to [non-confidential] communications would not be inconsistent with the philosophy of construing the privilege narrowly to suppress only those communications that need the privilege's encouragement").

In fact, the generally accepted wisdom about client behavior has a certain logic to it. As a general matter, a client who wants to ensure that damaging information is barred from evidence is unlikely to reveal that information to third parties (unless conversations with those third parties are protected by some other privilege).[32] Those third parties can be deposed and/or required to testify. Thus, revealing information to segments of the public creates a real risk that the information will ultimately be used as evidence. Clients who are willing to risk that exposure would be likely to reveal the disclosed information to their attorneys, even if the attorney-client communication were not privileged. After all, they have more of a reason to confide in their attorney, upon whom they rely for accurate legal advice and the best possible representation, than to the world at large. They do not need the encouragement of the privilege because they have already opened up the possibility that the information will be used against them. On the other hand, clients who hesitate to reveal compromising information to their lawyers will generally be just as reluctant to share it with others, who could be subpoenaed or come forward voluntarily. The privilege encourages those clients to volunteer information to their attorneys that they would not otherwise reveal.[33]

Perhaps there are some clients who fit Rice's model—individual (as opposed to corporate) clients who would reveal damaging information to close confidantes, but who would withhold the same information from lawyers unless assured that the law would seal the lawyer's lips. Such a client might trust that her confidantes would not volunteer information to adversaries, and might expect that opposition lawyers, particularly prosecutors, would not have the resources or suspicions that would lead them to engage in fishing expeditions with all of the client's close acquaintances. But the confidentiality requirement has no discernible impact on these clients. If an adversary seeks to depose the client's lawyer, the client asserts the privilege. At that point, the adversary has no basis for challenging the confidentiality of the communication, because the adversary, by hypothesis, has no reason to know that the client has disclosed the communication to her confidantes.

Corporate clients, by contrast, do not fit Rice's model at all. Rice envisions a corporate client that disseminates compromising information

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32. That there is no empirical evidence to support this supposition is not fatal. Rarely, if ever, do courts have the benefit of empirical evidence when fashioning common-law rules. Moreover, Rice's guesses about client behavior are equally unsubstantiated.

33. In addition, there is less need to encourage clients who communicate with third parties to confide in their attorneys because the attorneys may have other avenues for accessing the information. *See* Sexton, *supra* note 1, at 481.

because it is not adverse to "public embarrassment"[34] but might nonetheless hesitate to reveal this same information to its attorneys (absent the privilege) for fear of being "legally compromised."[35] He implicitly assumes that the corporation trusts that members of the public to whom it reveals information will not come forward to offer evidence in litigation, or will not testify truthfully if deposed. But what savvy corporate manager would make that assumption? Members of the public at large generally have no reason to lie under oath. Moreover, corporate employees who cannot be defined as the "client" for privilege purposes might also testify truthfully, or come forward to blow the whistle. After all, the corporation's relationships with its employees are arms-length business arrangements. What reason would a corporation have to disseminate potentially compromising information to employees who do not need to know it and who might end up as witnesses? The corporation must realize that it spreads damaging information at its own peril.[36]

In addition, it is difficult to imagine facts that might simply "embarrass" the corporation but do not raise the specter of possible legal trouble.[37] Even information that simply damages the corporation's reputation might impact on the corporation's value and lead to financial difficulties and, possibly, shareholder claims. The corporate client is extremely unlikely to reveal information to the world at large if there is the slightest chance that the information will damage its reputation or expose it to liability. Most of the time, then, potentially embarrassing information is exactly the type of information that a corporation would reveal only on a need-to-know basis. In general, corporations would be

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34. Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 859-60.

35. *Id.* at 860.

36. This argument has even more force in jurisdictions where the subject matter or *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981), tests apply to determine who can act on behalf of the corporate client for privilege purposes. See *infra* text accompanying notes 40-44. Under these tests, there is simply no legal reason to disseminate confidential attorney-client communications to corporate actors who cannot be considered the client for privilege purposes. By contrast, in some states where the control group test still has force, corporate employees who need to receive legal advice to implement it on the corporation's behalf might not constitute the client. In such cases, a corporation might have a legitimate legal purpose in divulging confidential communications to such an employee. The fact that it might do so should not serve as evidence that it did not need the privilege's encouragement. The Supreme Court pointed out this flaw in the control group test in *Upjohn*, 449 U.S. at 392.

37. One exception is when limited disclosure of potentially inculpatory evidence to a government agency might help the corporation receive more lenient treatment. For example, the corporation might wish to reveal the results of an internal investigation to the Securities Exchange Commission, but might wish later to assert the privilege over the same information in litigation with a third party. *See, e.g.*, Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981) (holding that corporation's disclosure of documents relating to internal investigation waived attorney-client privilege in subsequent proceeding); *see also infra* Part II.B.2.b.i.

far more likely to reveal embarrassing or compromising information to its attorneys than to third parties. Moreover, some doubt that the attorney-client privilege is necessary to encourage corporation-attorney dialog. They argue that the realities of corporate life, which include compliance with a multitude of regulations, pressing business needs, and the risk of potentially substantial liability sufficiently encourage open attorney-client communication.[38] Even if one concedes a role for the attorney-client privilege in the corporate context, however, there is little reason to believe that the corporation needs the privilege to encourage communications to corporate lawyers of information that the corporation has already disclosed to outsiders.

B. The Requirement at Work

Most courts view the attorney-client privilege as having one fundamental objective: to encourage clients to confide freely in their attorneys. "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."[39] If the client would reveal information to her attorney even without the privilege, privileging the communication compromises fact-finding without serving any competing goal. Contrary to Rice's assertions, the confidentiality requirement plays an important role in limiting the privilege to disclosures that would not have been made but for the privilege. Indeed, even with the confidentiality requirement, clients may, under current law, obtain protection for communications they would have made absent the privilege by taking steps to shroud those communications in secrecy.[40] Rice's proposal would cast the net wider by allowing clients to shield even greater numbers of communications that did not need the privilege's encouragement.

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38. *See, e.g.*, Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 1 (1942); Note, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 276-77 (1981); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 427-29 (1970). For thorough examination of the instrumental justification of the privilege in the corporate context, and a more general critique of privilege law's anthropomorphic conceptualization of the corporation, see 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5476, at 134 (1986). Sexton has taken issue with these commentators, noting their arguments do not take into consideration that there has been a general assumption among corporate clients and attorneys that the privilege was available to corporations and that it protected at least the control group, and that it is impossible to determine the extent to which corporate attorney-client communications have been inhibited. *See* Sexton, *supra* note 1, at 464.

39. *Upjohn*, 449 U.S. at 389.

40. Daniel Fischel makes this point in criticizing the merits of the attorney-client privilege. *See* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 8 (1998).

To explore one example, suppose a dying cancer victim brings an action for fraud against a tobacco company.[41] The victim alleges that, at the time she started smoking, the tobacco company had scientific evidence showing that smoking was addictive and a cancer risk. The victim further alleges that the company failed to disclose that information, and in fact flatly denied that it existed, in violation of promises the company had made previously in a widely published document entitled *Frank Statement to Cigarette Smokers*. In the *Frank Statement*, the company publicly had proclaimed its commitment to the health of its customers, pledged resources to research the health issues raised by tobacco use, and promised to share all information obtained through research with its customers.[42]

Suppose the plaintiff seeks to reach a memo from an in-house research scientist and the company president to corporate counsel, with copies to the corporation's public relations department and the vice-president for marketing. The memo, written prior to the time the plaintiff had started smoking, relates new scientific findings regarding the addictive characteristics of nicotine, and requests that the attorney render legal advice concerning the implications of those findings. Suppose further that the corporation claimed that the memo was protected by the attorney-client privilege.

Under current law, the memorandum would most likely not qualify as privileged. If the corporation asserted the privilege, it would have to show that the memorandum was a communication between attorney and

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41. This hypothetical is loosely based on a number of cases brought against various tobacco companies in the late 1980s and early 1990s. For an overview of tobacco litigation from the 1950s to the present, including an examination of the privilege issues involved, see Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999).

42. In January, 1954, leading cigarette companies formed the Tobacco Industry Research Committee (TIRC) to promote public awareness that there was no scientific proof that cigarette smoking is a cause of lung cancer. *See* Michael J. Goodman, *Tobacco's PR Campaign; The Cigarette Papers*, L.A. TIMES, Sept. 18, 1994, (Magazine), at 34. That same month, the TIRC published *A Frank Statement to Cigarette Smokers* in 488 newspapers with a cumulative circulation of 43 million. In the *Frank Statement*, the companies stated, "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business. We believe the products we make are not injurious to health. We always have and always will cooperate closely with those whose task it is to safeguard the public health." *See A Brief History of Tobacco Statements*, WASH. POST, May 11, 1997, at C02. The tobacco companies promised to devote resources to scientific research regarding the health effects of smoking. *See* Donald Janson, *Suit Against Cigarette Makers Goes to Jersey Jury*, N.Y. TIMES, June 8, 1988, at B2. The industry then embarked on a massive public relations campaign designed to saturate the media with stories casting doubt on scientific studies linking cigarettes with health problems. *See* Goodman, *supra*. Ultimately, the industry's own documents revealed a concerted campaign to discredit all scientific research showing a link between cancer and smoking. *See id.*

client, that it was made for the purpose of obtaining legal advice, that the client intended the communication to be confidential, and that the communication was not made in furtherance of a crime or fraud.[43] Accordingly, the corporation would first have to establish that the research scientist, marketing vice-president, and public relations employee personify "the client" for privilege purposes. If the scientist is not "the client," then his communications with in-house counsel are not attorney-client communications, and the privilege does not attach. If neither the marketing vice-president nor public relations employees are "the client," then distribution of the memo to them destroys confidentiality, and again, the privilege will not attach.

If federal law applies, then *Upjohn v. United States*[44] controls the issue of who personifies the client. In *Upjohn,* the Supreme Court determined that communications by lower- and middle-level corporate employees to the corporation's general counsel pursuant to a management directive were privileged because (1) they were "made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel";[45] (2) the subject matter of the communications was within the scope of each communicant's responsibilities; and (3) management had stressed that the communications were to be kept highly confidential.[46] In upholding the privilege claim, the Court emphasized that the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[47] Therefore, the privilege can extend to communications between counsel and lower- or middle-level employees if those employees "would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties."[48]

Under *Upjohn,* who would personify the corporate client in the tobacco company hypothetical? It seems likely that a court applying

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43. *See* WIGMORE, EVIDENCE, *supra* note 2, § 2292, at 554.

44. 449 U.S. 383 (1981).

45. *Id.* at 394 (footnote omitted).

46. *See id.* The employees made the comments during an internal investigation that counsel commenced to determine whether employees had made illegal payments to foreign governments. *See id.* The Court of Appeals for the Sixth Circuit had determined that the communications were not privileged because the employees were not part of the corporation's "control group" and thus could not, in the court's view, be said to personify the corporation. *See id.* at 395. The Supreme Court reversed, rejecting the control group test as "frustrat[ing] the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392.

47. *Id.* at 390.

48. *Id.* at 391.

Upjohn would view the hypothetical research scientist as the client, so long as the corporation could show that the scientist drafted the memo with the president, at the president's request, to enable the corporation to obtain legal advice regarding implications raised by the researcher's study. Corporate counsel cannot render adequate legal advice regarding research results without hearing from those uniquely qualified to explain those results. Does distribution of the memo to the vice-president for marketing or the public relations employees have any impact on the privilege claim? The reasoning employed by the *Upjohn* court suggests that neither the vice-president for marketing nor the public relations employees would be considered "the client" for privilege purposes.[49] Neither employee drafted the memo or provided information contained therein. Nor did the memo render legal advice to either of the two employees who were copied. Nor could either employee make a legal deeision on behalf of the corporation. In short, communication of the memo to the persons copied was not necessary for the corporation to secure and act on legal advice.[50] Because the memo was distributed to third parties who do not constitute "the client" for privilege purposes, the communication was not confidential, the privilege does not attach, and the corporation would have to produce the memo.

If there were no confidentiality requirement, however, the corporation would have a strong argument that the memo is privileged. Because the president is undoubtedly "the client," and because he was an author of the memo to corporate counsel requesting legal advice, the identity of the other distributees would not be an issue. The plaintiff might argue that the distribution to other employees shows that the purpose of the memo was not to give information necessary to obtain legal advice, but because the predominant purpose of the memo was legal, she would lose on that claim.[51] But in most civil litigation, where

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49. *Upjohn* is not on point regarding whether the vice president for marketing and the public relations employees are "clients," because the *Upjohn* court expressly confined its holding to the facts of the case, and the communications at issue were from middle and lower level employees directly to counsel. *See id.* at 396.

50. *See* Sexton, *supra* note 1, at 504:

> [D]isclosure to a corporate actor who has no role to play in the process of legal decision making, even disclosure to a corporate officer who might 'need to know' the information for some purpose unrelated to the legal matter at issue, should destroy confidentiality (and hence abrogate protection) in most cases.

This is because "[t]he corporate privilege is designed to enhance that class of communications relevant to the rendering of legal services, not to promote these nonlegal matters." *Id.*

51. *See In re* Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994) (noting that "when a matter is committed to a professional legal advisor, it is 'prima facie committed for the sake of legal advice and [is], therefore, within the privilege absent a clear showing to the contrary'" (quoting Diversified Indus. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1978));

fraud is not the basis of the complaint, that course is unlikely to help the plaintiff reach relevant evidence.

In the tobacco company example and in similar cases, eliminating the confidentiality requirement would increase the amount of evidence that qualifies for the privilege's protection.[52] Is such a result desirable? On one hand, it is important that the corporation be able to communicate freely with counsel about matters giving rise to legal liability. As a general matter, eliminating the confidentiality requirement would no doubt make attorney-client communications cheaper and less worrisome—no longer would corporate clients have to take care to keep attorney-client correspondence confidential, and the sometimes difficult question about who constitutes "the client" for privilege purposes would

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see also Sedco Int'l v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982) (stating that "legal advice concerning commercial transactions is often intimately intertwined with and difficult to distinguish from business advice" and holding the privilege applicable to attorney-client communications that mix business and legal advice), *cert. denied*, 459 U.S. 1017 (1982).

The plaintiff also might attack the memo as fitting the crime/fraud exception, which might work if there are additional facts to establish fraud. The privilege, even if otherwise applicable, will not attach if the party seeking discovery can show that (1) the party invoking the privilege was engaged in or was planning a crime or fraud at the time the attorney-client communication was made, and (2) that the communication was made in furtherance of such activity. *See, e.g.*, Haines v. Liggett Group, 975 F.2d 81, 95-96 (3d Cir. 1992).

52. Some other examples (besides those explored in the text of this article) of relevant evidence that is not currently protected by the attorney-client privilege but would be if the confidentiality requirement were eliminated are opinion letters written by counsel to corporations that may eventually be transmitted to third parties (as in a public offering), information disclosed to counsel to assist in the preparation of tax documents to be submitted to the Internal Revenue Service, and any other information disclosed to counsel without the subjective intention of confidentiality. *See* Int'l Honeycomb Corp. v. Transtech Serv. Network, No. 90CV-3737, 1992 U.S. Dist. LEXIS 15999, at *3-4 (E.D.N.Y. Oct. 16, 1992) (holding that attorney-client communications contained in opinion letters were not confidential, and hence not privileged, because the corporation intended that counsel would include the information in correspondence with third parties); *In re* Grand Jury Proceedings, 727 F.2d 1352, 1358 (4th Cir. 1984) (holding that attorney-client communications regarding a prospectus were not protected because the prospectus would be published and thus the communication lacked the element of confidentiality); United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983) (holding that information disclosed to an attorney for transmission to a third party is not subject to the attorney-client privilege); United States v. Bump, 605 F.2d 548, 550-51 (10th Cir. 1979) (finding that if a client communicates information to an attorney knowing such information will be communicated to a third party, here the government, such communication is not protected); United States v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976) (finding no attorney-client privilege to attach because the client did not intend for his style of handwriting to be a confidential communication to his attorney), *cert. denied*, 426 U.S. 952 (1976); United States v. Cote, 456 F.2d 142, 145 n.3 (8th Cir. 1972) (holding information supplied to attorney in preparation of client's tax return and stock partnership offering prospectus was not privileged or protected because the client knew such information would be communicated to third parties).

be less relevant.[53] And where documentary evidence is concerned, adversaries could still depose corporate actors regarding the underlying facts—in our example, the plaintiff could depose both the president and the scientist regarding the communications that prompted the memo.[54] Loss of the memo itself as evidence, therefore, might seem insignificant.

That argument, however, assumes that witness testimony is a fair substitute for documentary evidence. In reality, witness memories are cloudy, and recollections of conversations might be sketchy or non-existent.[55] At worst, witnesses lie.[56] In such cases, documents are crucial as substantive evidence and for evaluating the credibility of the witnesses.[57] Documents drafted by clients to their attorneys tend to be

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53. As long as one communicant was an officer or director, or was directed to communicate with counsel by management to enable the corporation to obtain legal advice, the identity of other participants in the communication often would be irrelevant. The client issue might, however, continue to have some relevance on the question whether the allegedly protected attorney-client communication was made for the purpose of obtaining legal advice.

54. As the *Upjohn* court emphasized:

> "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."

449 U.S. at 395-96 (quoting City of Phila. v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

55. For example, the retired chairman of American Brands, Inc., a leading cigarette manufacturer, testified in a deposition that he could not recall the board of directors of American Brands ever discussing the issue of smoking and health. *See* Morton Mintz, *Smoker's Suit Nearing Trial; Retired American Brands CEO Testifies That Board Didn't Discuss Health Issue*, WASH. POST, Jan. 25, 1987, at K2.

56. In 1994, tobacco company executives testified before Congress that nicotine was not addictive. *See* Barry Meier, *Cigarette Makers' Strategy of '94 Is Echoed Today*, N.Y. TIMES, May 2, 1998, at A8. Numerous industry documents, including a 1963 letter written by Brown & Williamson's company counsel to a company executive, later revealed that tobacco executives believed scientific studies showing that nicotine was addictive. *See A Brief History of Tobacco Statements*, *supra* note 42, at C02.; *see also* David Phelps, *Tobacco Loses Evidence Ruling; Judge Orders the Release of 39,000 Secret Documents*, STAR TRIB., Mar. 8, 1998, at 1A (reporting that the special master in Minnesota's case against tobacco companies found that the plaintiffs had "demonstrated to a degree of unrebutted probability that Defendants were aware of the addictive or habit-forming nature of nicotine, that the Defendants experimented with 'dosages' of nicotine, and that the Defendants did not reveal to consumers the extent of their knowledge"); Mark Curriden, *THE HEAT IS ON: Facing High-Powered Plaintiffs' Lawyers and Damaging Revelations, the Once Invincible Tobacco Industry May No Longer Be Able to Snuff out Its Opponents*, A.B.A. J., Sept. 1994, at 58, 61 (reporting that internal documents from the files of Brown & Williamson's former attorneys "indicate that tobacco officials have known for 25 to 30 years how addictive and dangerous smoking can be, but decided to hide the information").

57. As Sexton argued:

especially reliable because clients have an incentive to tell the truth in communication with counsel.

Moreover, holding communications like these privileged serves no legitimate purpose. Disclosure to the sales force and public relations employees was not necessary for the purpose of seeking legal advice; disclosure served only the company's business purposes. Suppression of the statement, therefore, is not necessary to serve the purpose of the privilege, because the president and the researcher could have sought legal advice without spreading the research results further.

Finally, privileging the memo opens the door for every corporation to insulate damaging data simply by making a lawyer party to the communications (as long as the corporation can show that the client was in some sense seeking legal advice).[58] For example, suppose the hypothetical tobacco company held a meeting to discuss the implications of the study with employees, in-house counsel, and an outside lobbying firm that represents the tobacco company to Congress. Absent the confidentiality requirement, the corporation could simply bill the meeting as legal in nature, and claim that the primary purpose of the meeting was to enable in-house counsel to formulate and render legal advice.[59] Even

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> Information about corporate behavior can be widely dispersed; it can be held by many individuals in various parts of the world. Consequently, "[t]he greater portion of evidence of wrongdoing by an organization or its representatives is . . . found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around those impersonal records and documents, effective enforcement of many federal and state laws would be impossible." The "impersonal records and documents" referred to are the corporation's "paper trail." If that trail is somehow shielded from discovery by the corporation's adversary, there simply may not be an effective alternative source of proof. The primary negative result of this loss is that, in the absence of alternative means of obtaining the information, adversaries of the corporation in litigation may lose more often than they should simply because of lack of information.

Sexton, *supra* note 1, at 477 (footnotes omitted).

58. As Sexton noted, "a corporation can structure even its routine transactions so that information is not rendered in any discoverable form until it is transmitted to the corporation's attorney. In this way, the information can be given the character of a privileged communication by funneling it through the corporate counsel's office." *Id.* at 478. Eliminating the confidentiality requirement would exacerbate the problem.

59. As James Fischer noted:

> While the distinction [between legal and business advice] is easy to state, it is maddeningly difficult to apply because (1) the core concept of "legal advice" is not defined and (2) the line between "lawyer" and "non-lawyer" activities is difficult to find, much less police. Classification is also complicated by the additional principle that the presence of nonlegal advice does not vitiate the privilege when the advice given is predominantly legal.

James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 644 n.39 (1997).

if participants discussed the details of the report, whether and how to reveal the report to the public, how employees should respond to questions about the report and how the report should be "spun" to members of Congress, all of those issues have legal implications. The testimony and written records of the meeting would likely be privileged, even though the meeting was designed primarily to avoid sales losses.[60] Case law contains many examples of corporations that have been all too willing to contort the privilege to shield evidence.[61] Abolishing the confidentiality requirement would hand those corporations so inclined a potent tool that would strengthen claims of privilege and make overbroad assertions harder to detect.

Thus, the confidentiality requirement restricts clients' ability to protect communications that would have been made even absent the privilege, and by extension, to invoke the privilege wrongfully to hide smoking guns. To support his position, Rice must acknowledge the most significant cost of his proposal—the increase in the amount of relevant evidence that could be kept from the fact-finder—and convince us that the cost of asserting the privilege is so serious a problem that it justifies rendering judicial determinations less accurate. He makes no attempt to do so, and therefore ignores the central dilemma of privilege law.

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60. *See* Sedco Int'l v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982) (stating that "legal advice concerning commercial transactions is often intimately intertwined with and difficult to distinguish from business advice" and holding the privilege applicable to attorney-client communications that mix business and legal advice). At the very least, the costs of litigating and adjudicating a privilege claim in this context could be substantial. *See infra* Part III.

61. *See, e.g.*, Burton v. R.J. Reynolds Tobacco Co., 170 F.R.D. 481, 484 (D. Kan. 1997) (noting that "RJR seems to believe and argues that when an attorney is somehow referenced within a document or generates a document, attorney-client privilege or work product immunity must protect disclosure of the subject document"); McCaugherty v. Siffermann, 132 F.R.D. 234, 238 (N.D. Cal. 1990) (ordering proponent of privilege to submit additional evidence in support of claim "[b]ecause there is reason to suspect that some of the communications in the category under consideration here were made primarily for business purposes and/or would have been made even if no one had had any interest in legal advice"); Liggett Group v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 209-10 (M.D.N.C. 1986) (rejecting, on confidentiality grounds, defendant's claim that attorney-client privilege applied to meeting between defendants, independent design group hired by defendants, and defendants' in-house counsel, even though defendants claimed that presence of designers was necessary to explain to counsel the relevant facts about a design project contemplated by defendants and designers); Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 896 n.115, and cases cited therein; *see also* Myron Levin, *Years of Immunity and Arrogance Up in Smoke; Tobacco Companies Face 'Death of a Thousand Paper Cuts' from 40 Years' Worth of Incriminating Documents*, L.A. TIMES, May 10, 1998, at D1 (quoting a tobacco industry document directing that all scientific reports had to come to the firm through the legal department so that they could be shielded by the privilege).

II. SCHOLARSHIP AND CASE LAW

Rice is not content to argue that courts *should* privilege non-confidential attorney-client communications. He also argues that courts have substantially eroded the requirement already. He contends that the confidentiality requirement has withered away because neither courts nor commentators have ever advanced a compelling justification for requiring confidentiality.

Rice *is* correct that neither courts nor commentators have adequately articulated a justification for the requirement. But an examination of the privilege's evolution reveals that Wigmore and courts implicitly have understood its purpose. Moreover, a review of modern case law shows that courts continue to adjudicate attorney-client privilege issues with an understanding of both the underlying objectives of the privilege and the limiting function of the secrecy requirement.

A. The Evolution of the Confidentiality Requirement

As he does in his treatise,[62] Rice gives an account of the confidentiality requirement's evolution that supports his conclusion that the requirement lacks justification.[63] At early common law, communication between attorney and client was privileged notwithstanding the presence of a third party.[64] But because the third party could be compelled to reveal the contents of the communication,[65] clients had incentive to ensure that third parties were not present during attorney-client conferences. By the end of the nineteenth century, however, the law *required* confidentiality as a predicate for asserting the privilege. Rice portrays the emergence of the requirement as a mystery, noting that what propelled this evolution is "not clear."[66] Combined with his assertion that no court or commentator has ever offered a compelling

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62. *See* RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 5, § 6.3, at 386-401.

63. *See* Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 868-74.

64. *See, e.g.*, Hoy v. Morris, 79 Mass. (13 Gray) 519, 521 (1859) (holding that third party who overheard communication can testify, but stating in dictum that attorney "could not lawfully have revealed it"); Jackson v. French, 3 Wend. 337, 339 (N.Y. Sup. Ct. 1829) (holding that third party must disclose attorney-client communications, and stating in dictum that attorney is still bound by privilege).

65. *See, e.g.*, Goddard v. Gardner, 28 Conn. 172, 175 (1859) (holding lower court erred in excluding testimony of attorney's son, who overheard communication between father and client); *Hoy*, 79 Mass. (13 Gray) at 21 (holding that third party who overheard attorney-client communication is obligated to reveal its contents); *Jackson*, 3 Wend. at 339; State v. Falsetta, 86 P. 168, 169 (Wash. 1906) (holding that third party must disclose attorney-client communications, and stating in dictum that attorney is still bound by privilege).

66. Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 870.

justification for the requirement,[67] he presents a picture of a doctrine spontaneously and mindlessly generated by legions of courts and cemented into law by Wigmore, for no particular reason.[68] This picture supports his contention that the confidentiality requirement is superfluous and unnecessary.

Rice's account, however, is misleading. Although the privilege dates back to Elizabethan times, its acceptance was by no means universal. The justification for the privilege was a matter of contention until the nineteenth century.[69] At first, the attorney-client privilege most often was justified as necessary to protect the honor of the attorney[70]—the law should not force professionals to betray their clients.[71] Thus, it followed that only the attorney could assert or waive the attorney-client privilege; the client himself had no right to assert the privilege.[72] Given this justification for the privilege, confidentiality was entirely irrelevant—the aim was to shelter the attorney from being forced to testify against his client and violate his trust. The presence of a third party did not make the lawyer's trust any less sacred. As the eighteenth century progressed, however, courts often rejected privilege claims as an impediment to the search for truth.[73] When the privilege again gained ground in the early nineteenth century, courts increasingly turned to

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67. *See id.* at 859.

68. *See id.* at 859-60; 869-70.

69. *See* Hazard, *supra* note 24, at 1078-87.

70. *See* 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 3194 (1905) [hereinafter WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE] (explaining that the privilege was a "consideration for the oath and the honor of the attorney, rather than for the apprehensions of his client"); Hazard, *supra* note 24, at 1070 (reporting that "some of the early cases express the idea that the privilege was that of the lawyer (a gentleman does not give away matters confided to him)"). Professor Hazard ventures that another possible explanation for the early conceptualization of the privilege as belonging to the lawyer is the British distinction between barristers and attorneys, scriveners or solicitors. A barrister, who presented the client's case to the court, was considered a "member" of the court, "who could no more properly be asked to reveal a client's confidences than a modern judge could be asked to disclose matters heard in camera." *Id.* at 1071.

71. *See, e.g.*, Andrews v. Solomon, 1 F. Cas. 899 (C.C.D. Pa. 1816) (No. 378) (stating that "[a]n attorney is not permitted to disclose as a witness, the secrets of his client, because in doing so, he would betray a confidence, which from necessity the client must repose in him," but holding that a student in the attorney's office could be forced to testify against the client because "no confidence is reposed in him by the client").

72. *See* WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE, *supra* note 70, § 2290, at 3195 (explaining that the client could not invoke the privilege because "[t]he pledge of secrecy had not been taken by him, and therefore the 'point of honor' was not his to make" (citation omitted)); *see also* Hazard, *supra* note 24, at 1071 (noting that "at one time the privilege was thought to belong to the lawyer rather than the client" but offering as an explanation the differing functions of barristers and attorneys or scriveners).

73. *See* Hazard, *supra* note 24, at 1073-81.

instrumental justifications.[74] Over time, an instrumental theory that "looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser,"[75] began to gain ground.[76] The instrumental justification and the "honor" justification co-existed for some time, with the result that the details of the attorney-client privilege, including the existence of a confidentiality requirement, remained muddled through the nineteenth century.[77] By the turn of the century however, the instrumental justification triumphed, and the "honor" justification was rarely, if ever, invoked.[78] Not coincidentally, the confidentiality requirement became entrenched in the law about this time.[79]

Thus, the confidentiality requirement evolved concurrently with the instrumental justification for the privilege. Once the justification for the privilege changed to encouraging clients to confide in their attorneys, narrowly construing the privilege required protecting only those communications that would not have been made absent the privilege. A broader privilege would needlessly deprive courts of relevant evidence. As Wigmore put it, the privilege should "go[] no further than is necessary to secure the client's subjective freedom of consultation."[80] If clients were willing to divulge their communications to third parties, it appeared unlikely that the privilege was necessary to induce consultation with the lawyer. That the confidentiality requirement emerged should not be surprising.

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74. *See, e.g., id.* at 1073- 80 (discussing the seminal case of Annesley v. Anglesea, 17 How. St. Tr. 1139 (1743), wherein the court emphasizes that the privilege exists to allow the client to "fully and candidly" disclose "everything" to his attorney); WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE, *supra* note 70, § 2290, at 3194.

75. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE, *supra* note 70, § 2290, at 3194 (citation omitted).

76. *See, e.g.*, Goddard v. Gardner, 28 Conn. 172, 174 (1859) (reasoning that a privilege attaches to attorney-client communications because "[i]t is obvious that professional assistance would be of little or no avail to the client, unless his legal adviser were put in possession of all the facts relating to the subject matter of inquiry or litigation, which in the indulgence of the fullest confidence, the client could communicate").

77. *See* WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE, *supra* note 70, § 2290, at 3195; *compare* Blount v. Kimpton, 29 N.E. 590, 591 (Mass. 1892) (holding that presence of third party does not waive the attorney-client privilege, although the third party may testify as to the content of the communications) *with* People v. Buchanan, 39 N.E. 846, 854 (N.Y. 1895) (emphasizing the importance of confidentiality to assertion of attorney-client privilege and stating that the court was unaware "of any extension of the rule [of attorney-client privilege] which would protect the revelation of confidences made to a friend, *or to a lawyer in the presence of a friend*" (emphasis added)).

78. *See* WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE, *supra* note 70, § 2290, at 3196.

79. *See* Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 869 n.41.

80. WIGMORE, EVIDENCE, *supra* note 2, § 2311, at 603.

B. Modern Construction of the Confidentiality Requirement

From Wigmore's day, courts have routinely rejected privilege claims whenever third parties were privy to the attorney-client communication. Recent doctrinal developments, however, have adapted the confidentiality requirement to modern circumstances. A client does not lose the privilege when attorney-client communications are shared with co-parties and their attorneys. In most jurisdictions, inadvertent production of a privileged document during discovery does not automatically constitute waiver. Communications made by a corporation's "independent contractors" to the corporation's lawyers may be privileged even though the corporation and the contractors are separate legal entities.

To Rice, this evolution of the confidentiality requirement demonstrates the "illogic and unfairness"[81] of the confidentiality requirement, and has rendered it "little more than a [legal] fiction."[82] Rice takes a formalistic view of the requirement: Any court that excuses a breach of confidentiality must be disregarding the requirement altogether.

From a functional perspective, however, recent doctrinal developments (with a few exceptions) are consistent with the purpose of the confidentiality requirement; separating those statements that would not have been made without the privilege from those that would have been made in any event. This Section explores these doctrinal developments and shows how Rice's failure to appreciate the functional nature of the requirement causes him to misunderstand their significance.

1. THE "EXPANDING" DEFINITIONS OF "CLIENT" AND "ATTORNEY" IN THE CORPORATE CONTEXT

According to Rice, the realities of modern corporate life, and the corresponding evolution in attorney-client privilege law, renders the confidentiality requirement nothing more than "a legal fiction."[83] Rice points to the expanding definitions of "attorney" and "corporate client," and the *Upjohn Co. v. United States*[84] decision in particular, as evidence that courts are unconcerned with enforcing the requirement. As he does elsewhere, Rice misconceives confidentiality as a concept divorced from function.

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81. Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 874.

82. *Id.* at 876.

83. *Id.*

84. 449 U.S. 383 (1981). The decision takes it as a given that the privilege really is necessary to encourage corporate speech. This Article's analysis of *Upjohn* takes it on its own terms.

The *Upjohn* Court was keenly aware of the competing pulls of the privilege and the confidentiality requirement. First, the Court emphasized that it sought to further the privilege's objectives; in rejecting the "control group test" that the Sixth Circuit had applied, the Court emphasized that the test

> frustrat[ed] the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.[85]

But while the *Upjohn* Court struggled to further the objectives of the privilege with a view to the realities of the modern corporation, it did not undermine the limiting function of the secrecy requirement. Significant to the Court's holding was *Upjohn*'s continuous treatment of the investigation as highly confidential.[86] The corporation promised confidentiality in encouraging its employees to cooperate with *Upjohn*'s internal investigation, emphasizing to each employee interviewed that the investigation, and the employees' responses, were being treated as highly confidential.[87] Given the troublesome nature of the issue being investigated, it is likely that the assurance of confidentiality encouraged at least some employees to communicate to counsel information that they might have otherwise kept to themselves, or distorted.[88] The Court's reluctance to craft a bright-line test was further evidence of its respect for the requirement—the opinion is best read as applying only when confidentiality played an important part in encouraging the initial communications. Any accurate application of *Upjohn*, then, would have to examine whether the communications at issue were encouraged by an emphasis on confidentiality. Thus, *Upjohn* does not heedlessly expand

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85. *Upjohn*, 449 U.S. at 392 (citing Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D.S.C. 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it.")).

86. *See id.* at 395.

87. *See id.* at 387.

88. *See* Sexton, *supra* note 1, at 464-65 (arguing that the attorney-client communication might encourage employees who are reluctant to communicate with corporate attorneys out of fear of personal liability or embarrassment to communicate fully and accurately).

the definition of client in a way that undermines the confidentiality requirement.

Upjohn demonstrates the difficulty in isolating the "client" in the corporate context. Relying on *Upjohn,* some courts have expanded the corporate client to include agents, certain outside consultants, and independent contractors. Rather than undermining the confidentiality requirement, as Rice would have it, this expansion furthers the privilege's objectives while appropriately limiting the scope of the protection afforded. *McCaugherty v. Siffermann* [89] is instructive. A purchaser sued receivers for a corporation and its subsidiary, alleging that the corporations had defrauded the purchaser during negotiations for the purchase of a third subsidiary. The defendant corporations asserted the privilege over communications between attorneys for the corporations and two outside consultants hired by the corporation. The court agreed that the consultants were the functional equivalent of the corporations' employees because the corporation retained the consultants for the express purpose of facilitating the sale that gave rise to the litigation, the consultants were intimately involved in attracting prospective buyers and evaluating offers. The court surmised that the corporation's attorneys would need information provided by the consultants to render legal advice, and that the consultants needed legal advice from the corporation's attorneys to ensure that the consultants "understood the legal environment within which they were required to work, and the legal implications of any deals or terms they proposed."[90]

Nonetheless, the court distinguished the case from *Upjohn,* and held that a substantial number of consultant-attorney communications were not privileged because the corporation could not meet the confidentiality requirement. Although both consultants submitted to the court declarations that they had intended their attorney-client communications to be confidential, the court emphasized that neither the attorneys nor the consultants took sufficient steps to ensure that all corporate actors who might have been privy to the attorney-consultant communications understood their confidential nature.[91] Thus, the court rejected the corporation's after-the-fact attempt to shield communications that clearly would have been made even absent the attorney-client privilege.[92]

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89. 132 F.R.D. 234 (N.D. Cal. 1990).

90. *Id.* at 238-39.

91. *See id.* at 239-44.

92. *See id.* at 239. Similarly, in *In re* Bieter Co., 16 F.3d 929 (8th Cir. 1994), the court held privileged extensive communications between a partnership's "consultant" and partnership's counsel where the partnership's sole objective was to consummate the failed project that ultimately became the subject of the litigation, and the consultant was involved in every aspect of that project, including representing the partnership's interests to third parties. *See id.* at 938-40. As a result of his intimate involvement with the

The purpose of the privilege would be frustrated if independent contractors hired by corporations such as business consultants or accountants were not considered part of the corporate client. These contractors become so enmeshed in corporate affairs that the business's legal position can be substantially compromised if counsel is deprived of information in their possession. When courts, in the wake of *Upjohn*, are willing to expand the scope of the corporate client, it does not follow that they view the confidentiality requirement as irrelevant. Just as courts recognize that such consultants are "functional equivalents" of employees, so do they demand that the contractors exhibit the same degree of concern for confidentiality that courts require of an employee. If the client and the independent contractor do not take serious steps to keep attorney-client communications confidential, it is likely they did not need the privilege's encouragement to make the communications in the first place.

Finally, Rice makes a formalistic argument to show that confidentiality is meaningless in the corporate context. He notes that employees who have been privy to confidential information can leave at any time and take with them the knowledge of the information. In addition, corporate directors often sit on the boards of other corporations simultaneously, which means that, technically, other corporations are privy to the confidential information as it occurs, even if the director does

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project, the court reasoned, the consultant was likely to possess certain information that counsel would need to prepare the partnership's case. *See id.* Invoking *Upjohn*, the court concluded that to rule otherwise would "lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely." *Id.* at 938. Thus, the scope of the definition of client was expanded to the degree that the court thought necessary to avoid frustrating the purpose of the privilege. The court also stressed that the communications were treated as confidential, and that no one other than the consultant and the two partners had access to the privileged communications. *See id.* at 939; *see also In re* Grand Jury Proceedings Under Seal, 947 F.2d 1188, 1191 (4th Cir. 1991) (holding that confidential conversation between client and client's consultant, which took place on way to consultation with client's attorney, was privileged, but that subsequent client-accountant conversations were not privileged); Sexton, *supra* note 1, at 498:

> There is no reason to differentiate between an accountant-employee and a regularly retained outside accountant when both occupy the same extremely sensitive and continuing position as financial adviser, reviewer, and agent: both possess information of equal importance to the lawyer.
>
> A literalistic extension of the privilege only to persons on the corporation's payroll would invariably prevent a corporation's attorney from engaging in *a confidential discussion* with a corporation's regular independent accountant, no matter how important the accountant's information would be to the attorney.

(emphasis added) (footnotes omitted).

not reveal the privileged communication.[93] But once we focus on the functional role of the confidentiality requirement, his concerns become irrelevant. A corporation can act only through its directors, managers, and employees. The fact that ex-employees can leak information to third parties is not important, because the employee is no longer authorized to act on the corporation's behalf. The ex-employee's act, therefore, is not evidence that the corporation no longer desires confidentiality, and a court should not find that the corporation's privilege was waived. Similarly, so long as a current board member keeps corporate attorney-client communications confidential, it should not matter that she sits on more than one board. Her silence is evidence that the corporation desires secrecy.

2. DISCLOSURES OF PRIVILEGED COMMUNICATIONS AFTER THE FACT

Not only does privilege doctrine require confidentiality in the circumstances surrounding the initial attorney-client communication, but it also requires that the client and attorney preserve the confidentiality of the communications after they have occurred. Why does this "continuing confidentiality" requirement exist? Recall that the law requires confidentiality at the time of the initial communication to ensure that it protects only those communications that were encouraged by the privilege. Similarly, the continuing confidentiality requirement smokes out statements that truly need the privilege's protection from those that do not, so that the privilege is applied as narrowly as possible. As a general proposition, a client's willingness to disclose to others the content of attorney-client communications constitutes good evidence that the privilege was unnecessary to induce the communications to the attorney. A client who is not concerned about the embarrassment of disclosure would hardly have been likely to withhold from the lawyer information necessary to secure advice on the client's legal position. The continuing confidentiality requirement, therefore, further narrows the application of the privilege.

In recent years, however, some courts have been willing to sustain privilege claims despite clients' disclosure of privileged communications to adversaries or selected third parties. For example, in recent years controversies have erupted concerning whether the following events result in waiver of the privilege: inadvertent production, partial disclosure to government agencies, voluntary disclosure to parties with similar legal interests, and disclosures during discovery pursuant to protective orders or stipulations. Rice views these controversies, and the willingness of some courts to sustain privilege claims despite disclosure, as evidence

93. *See* Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 876-77.

that the confidentiality requirement has no significant function, and that courts increasingly view the requirement as unnecessary. A closer reading of the case law establishes that courts generally—but not exclusively—interpret the confidentiality requirement in a manner consistent with the requirement's function, excusing disclosure only when doing so will not undermine the requirement's purpose.

a. Inadvertent and involuntary waiver

With the advent of photocopy machines, and with the increase of litigation involving millions of pages of documents, inadvertent waiver issues are increasingly common. Although inadvertent waiver occurs in a variety of contexts,[94] the most common modern scenario is when a corporation's attorney accidentally produces a privileged document during discovery, and then seeks its return on the ground that the disclosure was inadvertent.[95]

Some courts have held that even inadvertent breaches of confidentiality always waive the privilege.[96] These courts often note that inadvertent disclosure can be evidence that the client was careless in handling the allegedly confidential communications, which gives rise to an inference that the client was probably unconcerned with confidentiality when it made the communication in the first instance.[97]

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94. *See, e.g.*, McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163, 165 (D. Md. 1998) (third party retrieved privileged document from trash container); Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 255-56 (N.D. Ill. 1981) (privileged document discovered by person looking through client's garbage); United States v. Olmstead, 7 F.2d 760, 763 (W.D. Wash. 1925) (wiretapper overheard attorney-client communication); Schwartz v. Wenger, 124 N.W.2d 489, 491-92 (Minn. 1963) (witness overheard client-attorney communication in courthouse halls).

95. *See Developments in the Law—Privileged Communications: Implied Waiver*, 98 HARV. L. REV. 1629, 1659-60 (1985) (stating that inadvertent disclosure most often occurs when document falls through cracks during attorney's screening); Roberta M. Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 CATH. U. L. REV. 465, 466 (1993) (noting that the number of inadvertent disclosure cases has increased as cases become more document intensive).

96. *See* Harding, *supra* note 95, at 472-73 nn.21-24, app. tbl.1 (offering a comprehensive listing of courts that have adopted a rule that inadvertent disclosure always waives the privilege); John T. Hundley, *"Inadvertent Waiver" of Evidentiary Privileges: Can Reformulating the Issue Lead to More Sensible Decisions?*, 19 S. ILL. U. L.J. 263, 266-67 n.12 (1995) (listing line of cases that "emphasizes the common premise of confidentiality as a necessary condition of the privilege").

97. *See, e.g.*, *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (reasoning that "[n]ormally the amount of care taken to ensure confidentiality reflects the importance of that confidentiality to the holder of the privilege" because the court wished to encourage clients to "treat the confidentiality of attorney-client communications like jewels—if not crown jewels"). In most cases, the reasons courts give for application of a

These decisions seek to ensure that communications a client would have made even absent the privilege are admitted to evidence.[98] By implication, these courts also surmise that a strict waiver rule will not unduly chill attorney-client communications, because the client knows that waiver is within its control.[99] Moreover, the strict waiver rule has been justified on instrumental grounds. Perhaps it will encourage attorneys and clients to exercise great care in handling privileged documents.[100]

The reasoning of courts holding that inadvertent disclosure constitutes waiver made sense in Wigmore's time. Most inadvertent waiver cases involved oral communications or a small number of documents.[101] Therefore, inadvertent disclosure *was* often attributable to negligence, and excusing inadvertent waiver to shield communications that did not need the privilege's encouragement would have undermined

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strict waiver rule are formalistic. *See, e.g.*, Int'l Digital Sys., Corp. v. Digital Equip. Corp., 120 F.R.D. 445 (D. Mass. 1988), where the court elaborated:

> I see little benefit to doing a painstaking evaluation of the precautions taken by plaintiff's counsel when it is noted that the whole basis for the privilege is to maintain the *confidentiality* of the document. It cannot be doubted that the confidentiality of the document has been destroyed by the "inadvertent" disclosure no less than if the disclosure had been purposeful; it equally cannot be doubted that the confidentiality of the communication can never be restored, regardless of whether the disclosure was "inadvertent" or purposeful.

Id. at 449; *see also* FDIC v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992) (adopting the strict waiver standard because "when a document is disclosed, even inadvertently, it is no longer held in confidence despite the intentions of the party"); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970) (finding waiver because the breach of confidentiality "destroy[ed] the basis for the continued existence of the privilege"); *In re* Standard Fin. Management Corp. 77 B.R. 324, 330 (Bankr. D. Mass. 1987) (stating that "inadvertence is, after all, merely a euphemism for negligence").

98. *See In re Sealed Case*, 877 F.2d at 980 (noting that excusing inadvertent waiver could create "a temptation to seek artificially to expand the content of privileged matter" and that a strict waiver rule "imposes a self-governing restraint on the freedom with which organizations . . . label documents related to communications with counsel as privileged").

99. *See* Fleet Nat'l Bank v. Tonneson & Co., 150 F.R.D. 10, 14 (D. Mass. 1993) (opining that "[i]n essence, courts that subscribe to this view are saying that future communication will not be unduly inhibited as long as attorneys and clients are assured that their discussions will remain private until they themselves disclose them").

100. *See Int'l Digital Systems Corp.*, 120 F.R.D. at 450 (holding that "a strict rule that 'inadvertent' disclosure results in a waiver of the privilege would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure").

101. *See, e.g.*, Schwartz v. Wenger, 124 N.W.2d 489, 491-92 (Minn. 1963) (witness overheard attorney-client communication in courthouse halls); People v. Buchanan, 39 N.E. 846, 854 (N.Y. 1895) (third party overheard oral attorney-client communication). In McNaughton's 1961 revision of Wigmore, there is no analysis of the problem of inadvertent disclosure of privileged documents. *See* WIGMORE, EVIDENCE, *supra* note 2, §§ 2290-2329, at 542-639.

the logic of both the privilege and the confidentiality requirement. Because guarding against inadvertent production was fairly easy, the strict waiver rule would have had little impact on attorney-client communications, and was probably effective in encouraging clients to guard the confidentiality of privileged communications.

But the majority of courts today understand that, in today's climate, even the most careful lawyers and clients may accidentally disclose privileged documents.[102] Large-scale litigation is prevalent, and often involves millions of pages of documents and an army of attorneys.[103] Out of necessity, paralegals and junior associates with little experience are the first line of defense against inadvertent disclosure of privileged documents. Given the sheer scope of the discovery process, and the number of individuals involved, the potential for error is enormous. Absent clear evidence of negligence, the fact that a document was inadvertently produced does not indicate that the privilege played no role in encouraging the generation of the document. Moreover, holding that an inadvertent disclosure could constitute a waiver, not just of the disclosed document, but of all privileged communications concerning the same subject,[104] is likely to chill at least some attorney-client communications.[105] And where clients and attorneys already take

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102. *See, e.g.*, Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 n.8 (N.D. Ill. 1982) (stating that the "strict responsibility doctrine" is "atavistic"); Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 652 (9th Cir. 1978) (holding that inadvertent production of privileged documents in context of accelerated discovery proceedings does not constitute waiver); Harding, *supra* note 95, at 471-74 (noting that quite a few courts excuse inadvertent waiver automatically on the ground that waiver must be knowing, and that the majority of courts excuse inadvertent waiver provided the client can meet five factors tending to show that client intended documents be confidential and that it took reasonable steps to maintain and assert confidentiality).

103. *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1156 (D.S.C. 1974) (stating that one million documents had been produced by twenty-two defendants over five years of discovery).

104. *See In re* United Mine Workers Employee Benefit Plans Litig., 159 F.R.D. 307, 311 (D.D.C. 1994) (stating that litigant who inadvertently or involuntarily produces a privileged document waives the right to protect all "corresponding communications relating to the responses to and requests for, legal adviee on the same subject" (citing *Duplan*, 397 F. Supp at 1190)); *In re* Rospatch Sec. Litig., No. 1:90-CV 805, 1991 U.S. Dist. LEXIS 3270, at *44 (W.D. Mich. Mar. 14, 1991) (noting that "'any voluntary disclosure by the client to a third party waives the privilege,' not only to that document, but possibly to all communications relating to that subject matter") (quoting United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982)); *Duplan*, 397 F. Supp. at 1190 (holding "subject matter" waiver test applicable to inadvertent waiver of attorney-client).

105. Professor Richard Marcus points out that the fear of inadvertent waiver can create other ancillary costs. First, counsel might spend substantial resources, both physical and financial, screening and analyzing documents. Marcus points out that this is especially true where a court might apply the subject matter test, and hold that inadvertent waiver of a single document will constitute a waiver of all communications on the same subject. Second, a strict waiver rule might inspire parties to resist producing even

reasonable precautions to guard against inadvertent disclosure, a waiver rule would not encourage greater vigilance.[106] This is evident from the large numbers of inadvertent disclosures that occur despite a strict waiver rule.[107]

Accordingly, most recent cases hold that inadvertent production does not automatically constitute a waiver.[108] Of these courts, most require the proponent to meet criteria designed to insure that the client actually desired secrecy at the time of the initial communication.[109] In this way, courts interpret the attorney-client privilege as narrowly as possible consistent with its objective, and without compromising the logic of the confidentiality requirement.[110] The soundness of the

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inconsequential documents if there is any chance that its adversary might argue that it is privileged. Accordingly, there will be an increase in the number of privilege issues that a court must adjudicate. Finally, parties that can afford to devote substantial resources to guard against inadvertent waiver may have an advantage over parties that cannot. *See* Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator,* 84 MICH. L REV. 1605, 1606, 1614 (1986).

106. In any event, declining to excuse inadvertent waiver by the client's attorney echoes the discredited "lawyer's honor" justification for the privilege, which holds that the privilege is the attorney's, not the client's. *See supra* Part II.A.

107. *See* Harding, *supra* note 95, at 472-73 nn.21-24, app. tbl.1 (listing cases of inadvertent production in jurisdictions that have adopted a strict waiver rule).

108. *See id.* at 471-74 (noting that many courts excuse inadvertent waiver automatically on the ground that waiver must be knowing, and that the majority of courts excuse inadvertent waiver provided the client can meet five factors tending to show that client intended documents be confidential and that it took reasonable steps to maintain and assert confidentiality).

109. *See, e.g.*, McCafferty's Inc., v. Bank of Glen Burnie, 179 F.R.D. 163, 169 (D. Md. 1998) (finding that discovery by trash sifter did not waive privilege because client had taken adequate precautions to preserve confidentiality by tearing up document before disposing of it in a sealed plastic bag in a private dumpster on private property); Bayer AG & Miles, Inc. v. Barr Labs., Inc., No. 92CIV0381(WK), 1994 U.S. Dist. LEXIS 17988, at *8 (S.D.N.Y. Dec. 16, 1994) (excusing inadvertent waiver where "millions of pages of documents were made available for inspection, thousands of documents were copied, an elaborate screening process was utilized and only a dozen documents slipped through the net," and finding that plaintiff's one-year wait to attempt to retrieve privileged documents was not negligent given the circumstances of the case) (quotation marks and citation omitted); Ligget Group v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 208 (M.D.N.C. 1986) (holding inadvertent disclosure involving a single box of documents constituted waiver where client could not demonstrate that it "undertook reasonable precautions to prevent inadvertent disclosure of allegedly privileged documents"); Lois Sportswear, U.S.A., Inc., v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (identifying five factors to be considered in determining whether inadvertent disclosure waives the privilege: (1) the reasonableness of precautions, (2) how quickly client moved to rectify error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) fairness considerations); *see also* Harding, *supra* note 95, at 473-74 (stating that a majority of courts have imposed standards similar or identical to the *Lois Sportswear* factors).

110. At least one commentator has suggested that inadvertent waiver ought to be approached using equitable estoppel principles. Thus, the disclosure ought not to be

justification for excusing inadvertent waiver explains why courts are increasingly willing to allow parties to stipulate the consequences of inadvertent production.[111]

For the same reasons, courts also uphold the privilege when the corporation's disclosure was involuntary, such as when a corporate employee leaks a privileged document, or an ex-employee steals privileged evidence.[112] In such cases, holding that a waiver has occurred would eviscerate the privilege. No corporate actor could be sure that confidential communications would be protected, which could certainly chill attorney-client communications. Moreover, the fact that an employee was willing to leak privileged communications has little if any probative value on the question of whether the privilege was necessary to encourage the communications. Excusing involuntary waiver, therefore, is consistent with the purpose of the confidentiality requirement.

b. Voluntary disclosures of attorney-client communications

There are times when a client needs the encouragement of the privilege to reveal confidential information to its attorney, but later determines that revealing the substance of the privileged communications to a selected third party would further its interests. The majority of courts that have addressed selective disclosure issues have responded in a manner that is consistent with the confidentiality requirement. Some find that the client's selective disclosure waived the privilege. Others excuse selective disclosure only when it falls within tightly prescribed limits that are designed to further the confidentiality requirement's objective of narrowly construing the privilege. The following subsections explore the limited waiver and common interest doctrines, and conclude that although some isolated cases can be read as supporting Rice's argument, on the whole the confidentiality requirement retains its vitality.

i. Limited waiver

The last twenty years have seen the escalation of a controversy over the doctrine of limited waiver. At issue is whether a corporation can

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excused if the adversary to whom the communication was produced relied on the evidence in building its case. *See* Hundley, *supra* note 96, at 280-90.

111. *See infra* Part II.B.2.c.

112. *See* Resolution Trust Corp. v. Dean, 813 F. Supp. 1426, 1428 (D. Ariz. 1993) (holding that corporation did not waive privilege where source of disclosure of privileged document was not clear, but appeared to be the result of a criminal act); *In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863 (D. Minn. 1979) (holding that document that was stolen by an ex-employee did not lose its privileged status).

disclose confidential attorney-client communications to a third party, usually a government agency, without waiving the right to assert the privilege over the same communications in subsequent litigation with a different party. Courts addressing this issue have fashioned three different approaches. The majority have held that a limited disclosure is a waiver for all purposes, and that the corporation cannot assert the privilege in subsequent litigation.[113] A few other courts have allowed limited waiver.[114] A third group takes a middle ground: It will allow the corporation to craft a limited waiver only where the corporation has obtained assurances that the information will not be disseminated further.[115] Rice argues that courts that have adopted the limited waiver doctrine show a complete disregard for the confidentiality requirement. In fact, all three approaches are consistent with that requirement.

In *Permian Corp. v. United States*,[116] the D.C. Circuit held that disclosure of confidential communications to a government agency waives the privilege for all purposes.[117] In rejecting a limited waiver theory, the court declined to excuse the breach of confidentiality because

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113. *See* United States v. Mass. Inst. of Tech., 129 F.3d 681, 687 (1st Cir. 1997); Genentech, Inc. v. United States Int'l Trade Comm'n, 122 F.3d 1409, 1417 (Fed. Cir. 1997); United States v. De La Jara, 973 F.2d 746, 750 (9th Cir. 1992); Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1425 (3d. Cir. 1991); *In re* Martin Marietta Corp., 856 F.2d 619, 623-24 (4th Cir. 1988); United States v. South Chicago Bank, No. 97CR849-1, 2, 1998 U.S. Dist. LEXIS 17445, at *7-15 (N.D. Ill. Oct. 16, 1998); Harding v. Dana Transp. Inc., 914 F. Supp. 1084, 1092-93 (D.N.J. 1996); McMorgan & Co. v. First Cal. Mortgage Co., 931 F. Supp. 703, 708-10 (N.D. Cal. 1996); *In re* Leslie Fay Cos. Sec. Litig., 152 F.R.D. 42, 44 (S.D.N.Y. 1993); Feinberg v. Hibernia Corp., No. 90-4245 § B, 1993 U.S. Dist. LEXIS 3767, at *8-12 (E.D. La. Mar. 23, 1993); *In re* Grand Jury Subpoenas Dated Dec. 18, 1981 & Jan. 4, 1982, 561 F. Supp. 1247, 1260 (E.D.N.Y. 1982); Maryville Academy v. Loeb Rhoades & Co., 559 F. Supp. 7, 9 (N.D. Ill. 1982); Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981); *cf.* Salomon Bros. Treasury Litig. v. Steinhardt Partners (*In re* Steinhardt Partners), 9 F.3d 230, 235-36 (2d Cir. 1993) (applying same rule to work product doctrine). *See generally* Brian M. Smith, Note, *Be Careful How You Use It or You May Lose It: A Modern Look at Corporate Attorney-Client Privilege and the Ease of Waiver in Various Circuits*, 75 U. DET. MERCY L. REV. 389 (1998) (exploring limited waiver doctrine in each federal circuit).

114. *See* Diversified Indus. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977); Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 688-89 (S.D.N.Y. 1980); *In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368, 372-73 (E.D. Wis. 1979); United States v. Shyres, 898 F.2d 647, 657 (8th Cir. 1990).

115. *See* Jobin v. Bank of Boulder (*In re* M&L Bus. Mach. Co.), 161 B.R. 689, 695-97 (D. Colo. 1993); Fox v. California Sierra Fin. Servs., 120 F.R.D. 520, 526-27 (N.D. Cal. 1988); Schnell v. Schnall, 550 F. Supp. 650, 653 (S.D.N.Y. 1982); Teachers Ins. & Annuity Ass'n v. Shamrock Broad. Co., 521 F. Supp. 638, 642 (S.D.N.Y. 1981); *cf.* SEC v. Amster & Co., 126 F.R.D. 28, 30 (S.D.N.Y. 1989) (recognizing limited waiver if client and government have entered into binding confidentiality agreement).

116. 665 F.2d 1214 (D.C. Cir. 1981).

117. *See id.* at 1219-1222.

doing so was not necessary to encourage uninhibited attorney-client communication.[118] The court viewed insistence on strict confidentiality as necessary to a narrow construction of the privilege. In short, the court upheld the traditional view of the confidentiality requirement, as have the majority of courts that have considered this issue.[119] As a threshold matter, then, the confidentiality requirement is alive and well.

If *Permian* is controlling, how should a corporation respond to an investigation by a government agency? It may decide to disclose privileged information even though it will lose the right to claim the privilege in subsequent litigation. In that case, both the government agency and the corporation's adversaries will have access to the information. Under this scenario, the *Permian* rule furthers the confidentiality requirement's objective by increasing the amount of relevant evidence available to the fact-finder. For some corporations, the *Permian* rule might induce a different response: The corporation may decline to cooperate with the agency. In that case, nobody wins. The corporation's litigation adversaries will be unable to obtain access to the privileged communications, because the communications will retain their privileged character. At the same time, the government agency would be denied access as well, because the corporation would not be willing to risk losing privilege protection. If a court thought that most corporations would react this way to a decision like the one in *Permian*, the court might decide that allowing limited disclosure is more consistent with the confidentiality requirement's objectives.[120] The government agency, and ultimately the public at large, will benefit from receiving additional evidence.[121] The corporation's subsequent litigation adversaries may be

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118. *See id.* at 1220-21. While the court characterized cooperation with government regulatory agencies as a "laudable activity," it nonetheless emphasized that "it is hard to understand how such conduct improves the attorney-client relationship." *Id.* at 1221.

119. *See supra* note 113 and sources cited therein.

120. In *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), the court sustained a corporation's privilege claim even though the corporation had revealed the information to the SEC. *Id.* at 611; *see also* United States v. Shyres, 898 F.2d 647, 657 (8th Cir. 1990) (adopting limited waiver doctrine where corporation disclosed results of confidential information to Government in conjunction with a grand jury investigation); Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 688-89 (S.D.N.Y. 1980) (applying 8th Circuit law); *In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368, 372-73 (E.D. Wis. 1979). Other courts have confined *Diversified* to its facts. *See, e.g.*, Maryville Academy v. Loeb Rhoades & Co., 559 F. Supp. 7, 9 (N.D. Ill. 1982) (distinguishing *Diversified* on similar facts because "[i]n this case, there were no specific documents prepared by independent outside counsel which directly related to the same issues being investigated by the SEC").

121. *See generally* Margaret A. Carfagno, Note, *Settlement Situations and the Maintenance of Confidentiality: A Look at the* Martin Marietta *Decision*, 1990 COLUM. BUS. L. REV. 187 (arguing that courts should allow limited waiver to encourage settlements with government agencies).

able to obtain the information from the agency itself, which would make them better off.[122] Even if the adversaries cannot obtain the information, they will be no worse off than they would have been under the majority strict waiver rule.[123] Thus, Rice is incorrect when he states that courts that have sanctioned the limited waiver doctrine have undermined the confidentiality requirement. In fact, the doctrine's purpose is identical to the requirement's purpose: The limited waiver doctrine has made more relevant evidence admissible to at least one, and possibly more, parties than the strict waiver rule does.

Finally, a few courts have adopted a qualified limited waiver doctrine, which excuses limited disclosure only if the corporation can show that it sought and obtained assurances of confidentiality prior to disclosure to the agency.[124] The insistence of these courts on an express reservation of privilege can also be read as furthering the objectives of the confidentiality requirement. The fact that a corporation refused to disclose without obtaining assurances of confidentiality is some evidence that it would have withheld the information if the *Permian* rule applied. Conversely, a corporation's failure to obtain assurances of confidentiality leads to an inference that the corporation would have disclosed to the agency even if *Permian* were controlling. If so, allowing this corporation

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122. Absent a stipulation or protective order, government agencies arguably may disclose privileged communications without the corporation's consent. *See, e.g.*, *Permian*, 665 F.2d at 1217 (noting that the SEC intended to release Permian's confidential attorney-client communications to the Department of Energy over Permian's objections); *see also Developments in the Law—Privileged Communications: Implied Waiver*, *supra* note 95, at 1651 n.99 (noting that "[t]he non-public nature of the investigation may serve to protect the confidentiality of the disclosure" but citing cases holding that the government's confidentiality rules are for the protection of the SEC, not the target, and thus are the SEC's to waive).

123. *See Developments in the Law—Privileged Communications: Implied Waiver*, *supra* note 95, at 1645 (recognizing that "[b]ecause the privilege-holder's adversary stands in no better or worse position than if the selective disclosure never occurred, selective disclosure, unlike partial disclosure, poses little threat of unfairness"); *see also* Hewlett-Packard Co. v. Bausch & Lomb Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987) (noting that limited disclosures "generally leave the adverse party in no worse position than if no disclosure had taken place and, therefore, create no fairness issue" and that "*Developments* [*in the Law*] suggests that the issue in these cases is one of confidentiality").

124. In *Teachers Ins. & Annuity Ass'n v. Shamrock Broad. Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981), the court held that a corporation's limited disclosure to a government agency does not waive the privilege for all purposes, *provided* that the corporation discloses the documents only pursuant to an order, stipulation or other "express reservation" of a privilege claim. *Id.* at 642, 646; *accord* Jobin v. Bank of Boulder (*In re* M&L Bus. Mach. Co.), 161 B.R. 689, 696 (D. Colo. 1993); Fox v. California Sierra Fin. Servs., 120 F.R.D. 520, 526-27 (N.D. Cal. 1988); Schnell v. Schnall, 550 F. Supp. 650, 653 (S.D.N.Y. 1982); *cf.* SEC v. Amster & Co., 126 F.R.D. 28, 30 (S.D.N.Y. 1989) (recognizing limited waiver if client and government have entered into binding confidentiality agreement).

to claim limited waiver harms its litigation adversaries, because the corporation could shield evidence that it would have otherwise chosen to make available. Decisions taking this middle ground, therefore, can be read as consistent with the confidentiality requirement's quest to maximize admissible evidence.[125]

In sum, the case law on limited waiver does not support the proposition that courts are abandoning the confidentiality requirement. The majority hold that limited waiver to an agency is a breach of the privilege. Others are motivated to increase the amount of evidence available to regulatory agencies, and understand that allowing limited waiver to accomplish this objective will not, in most cases, expand the scope of protected evidence. The decisions of those courts are not inconsistent with the spirit or function of the confidentiality requirement.

ii. Joint defense doctrine/common interest doctrine

As another example of courts' supposed disregard for the confidentiality requirement, Rice points to judicial recognition of the joint client, joint defense, and common interest doctrines, and argues that the doctrines have expanded the "circle of confidentiality" so far as to undermine the confidentiality requirement. Rice particularly focuses on what he sees as the broad application of the common interest doctrine, which enables corporations to share privileged information with certain parties who share a common interest without waiving the privilege.[126] Rice claims that courts have applied the common interest doctrine so broadly that the corporate attorney-client privilege is nothing more than a "right of privacy" that the client can choose to share with others.[127] Although the common interest doctrine does lend some support to Rice's argument, much of the case law is consistent with the confidentiality requirement's objective.

First, examine the joint client and joint defense doctrines. Suppose a defendant *A* and his best friend *B* have been charged with possession with intent to distribute a controlled substance. Further suppose that *A* and *B* hire one attorney, Jones, to represent both their interests. They intend to argue that neither sells drugs, and the police planted the cocaine in *A*'s car in retaliation for an argument that *A* and *B* had with the police officer the previous evening.

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125. Of course, once the court announces the rule, the fact that the client sought assurances of confidentiality from the agency ceases to be a predictor of whether the client would have waived the privilege under the strict rule, because all corporations would simply refuse to disclose absent assurances of confidentiality.

126. *See* Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 877-80.

127. *See id.* at 880.

Should *A* be able to reveal confidences to Attorney Jones in *B*'s presence without losing the privilege's protection? Of course. Both *A* and *B* have an attorney-client relationship with Jones, and both have a reasonable expectation that Attorney Jones will keep their communications confidential. Failing to interpret the privilege in this way would have problematic results. The attorney would have to meet with *A* and *B* separately, and would be unable to share information gleaned from one with the other. In many cases, this would seriously crimp the attorney's ability to prepare a defense, and her clients would suffer. Moreover, because the clients are (for the moment) in exactly the same legal position, their willingness to speak frankly with their attorney in each other's presence is not evidence that they do not need the privilege's encouragement.[128] Thus, the policy of extending privilege protection to communications between co-clients and their common attorney has never seriously been questioned.[129]

Suppose instead that *A* and *B* take the wiser course, and hire separate attorneys. *A* hires Jones, and *B* hires Smith. Suppose that sometime before trial *A* confides to Jones that, unbeknownst to *B*, *A is* involved in selling drugs. Can Jones reveal this information to Smith without waiving the privilege? If the law holds that Jones's sharing of the information with Smith waives the privilege, then Jones will not share the information with Smith, and *B*'s defense will be seriously compromised. For example, Smith may be taken by surprise by a prosecution witness

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128. The privilege is a qualified one. If *A* and *B* subsequently sue one another, and the subject matter of their attorney-client communications is relevant to the case, neither can invoke the privilege to prevent the other from testifying to the communications. *See* WIGMORE, EVIDENCE, *supra* note 2, § 2312, at 603-604.

129. *See id.* (noting that when the same attorney acts for two parties having a common interest, and each party communicates with him, a third person renders the communications clearly privileged from disclosure); *see also* MCCORMICK, EVIDENCE § 91, at 190-91 (2d ed. 1972):

> [W]here two parties separately interested in some contract or undertaking as in the case of borrower and lender or insurer and insured, engage the same attorney to represent their respective interests, and each communicates separately with the attorney about some phase of the common transaction. Here again it seems that the communicating client, knowing that the attorney represents the other party also, would not ordinarily intend that the facts communicated should be kept secret from him. Accordingly, the doctrine of limited confidentiality has been applied to communications by the insured under a liability insurance policy to the attorney employed by the insurance company to represent both the company and the insured. A confidential statement made by the insured to the attorney, or to the insurer for use of the attorney, would thus be privileged if sought to be introduced at the trial of the injured person's action against the insured, but not in a controversy between the insured, or one claiming under him, and the company itself over the company's liability under the policy.

(footnotes omitted).

who will testify that she saw *A* selling drugs on the day in question. Or, the parties' inability to share information might cause them to advance conflicting defenses: *A* might claim that *B* was the drug-dealer, while *B* might claim that both were framed. Failure to recognize the joint defense doctrine would seriously derail the parties' attempt to present a united defense.[130] For this reason, some courts have suggested that the Constitution mandates recognition of the joint defense doctrine in criminal cases.[131]

Extending the privilege to allow communications between joint defendants and their attorneys does not undermine the confidentiality requirement's limiting function. Consider the hypothetical. Absent the joint defense rule, Jones would probably choose to withhold information from Smith and his lawyer rather than waive the attorney-client privilege. When courts allow the joint defense doctrine, no additional evidence is protected as a result. Accordingly, the law has long recognized the common attorney and joint defense exceptions to the attorney-client privilege.[132]

In recent years, courts have extended the rationale of the joint client and joint defense doctrines, and have, under the rubric of the "common interest doctrine," sustained privilege assertions when civil litigants have shared information with co-defendants or certain third parties.[133] The extension of the joint defense doctrine to co-defendants, or to parties who anticipate becoming co-defendants, in a civil suit does not undermine the

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130. *See* Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 871 (1996) (stating that when multiple co-defendants are charged in a single indictment, "each individual's fate depends upon his ability to join with co-defendants to mount a coordinated counterattack on the government's proof" and that "a fair trial requires that co-defendants have an unpenalized opportunity to coordinate the defense"); Susan K. Rushing, Note, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege,* 68 TEX. L. REV. 1273, 1280 (1990) (establishing that "[t]he policy underlying the joint-defense privilege . . . is to promote the general efficieney of legal representation by giving parties the tactical advantage of access to information in the possession of others. Where parties have a natural and common interest in cooperating, recognition of the common-interest privilege will likely save money, time, and effort" (footnotes omitted)).

131. Some courts have suggested that the joint defense doctrine is constitutionally required. *See, e.g.*, United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979) (noting that communication between co-defendants is in some circumstances necessary to afford the defendants a fair opportunity to defend); Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964) (stating that the joint-defense doctrine is a "vital and important part of the client's right to representation by counsel").

132. *See, e.g.*, Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 835-36 (1871) (recognizing a joint defense privilege where two lawyers and three co-defendants met prior to trial to discuss strategy). For arguments that the joint defense doctrine should be considered as a separate and unrelated doctrine from the attorney-client privilege, see Bartel, *supra* note 130, at 871-72; Rushing, *supra* note 130, at 1280.

133. *See* RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 5, at 4-138 to 4-165.

confidentiality requirement because clients would not disclose privileged information absent the doctrine.

The question becomes harder, however, when clients share information with third parties who are not co-defendants. Here, to the extent courts permit assertion of the privilege to third parties, Rice is on firmer ground. Ultimately, however, the case law provides shaky support for his argument.

In most of the cases in which courts have applied the common interest doctrine to sustain privilege claims, a client has disclosed confidential attorney-client information to a third party with whom it is involved in a joint enterprise and with whom it shares the same legal interests. The key is that the parties, though legally two separate entities, are functioning as one. For example, suppose a defendant insurer is sued, and a reinsurer who will share liability in the event of an adverse judgment, assists the insurer with its defense.[134] Or, suppose a patent owner and its exclusive licensee join together in a common enterprise to obtain foreign patents.[135] In either case, the parties' aligned legal interests cause them to harbor a reasonable expectation that all information exchanged between the parties and their cooperating attorneys will be kept confidential. Moreover, each party perceives the other's attorney as acting in its interest. In any of these cases, the parties could just as well have combined into one entity; one corporation could handle insurance and reinsurance issues; parties in a joint venture could incorporate or create a partnership and all information shared would then be protected.[136] Courts seem intuitively to understand that it would be

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134. *See, e.g.*, Hartford Steam Boiler Inspection & Ins. Co. v. Stauffer Chem. Co., No. 701223-24, 1991 Conn. Super. LEXIS 2527, at *4 (Conn. Super. Ct. Nov. 4, 1991).

135. *See, e.g.*, *In re* Regents of the Univ. of Cal., 101 F.3d 1386, 1388-89 (Fed. Cir. 1996).

136. In all but two of the cases Rice cites wherein courts have applied, or remanded for an application of, the common interest doctrine, the separate legal natures of the corporations was fortuitous. In each case, either the organizations could have combined into one, or the timing of the litigation required two, instead of one, parties to obtain legal advice. In *Hodges, Grant & Kaufmann v. United States Government, Department of the Treasury, IRS*, 768 F.2d 719 (5th Cir. 1985), the court remanded for a determination of whether the third party to whom the client had disclosed information was in fact represented by the client's attorney. *See id.* at 720. In *SCM Corp. v. Xerox*, 70 F.R.D. 508 (D. Conn. 1976), the court sustained a privilege claim by applying the common interest doctrine to shield communications among three entities that had formed a committee to study and strengthen certain patents. *See id.* at 514. In *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974), parties joined in a common enterprise to obtain patent approval. In *Draus v. Healthtrust, Inc.—The Hospital Co.*, 172 F.R.D. 384 (S.D. Ind. 1997), the former owner of a hospital had shared confidential information about a doctor's disciplinary report with the hospital's new owners to enable the new owners to respond to an investigation. *See id.* at 391-92. In *Hartford Steam Boiler Inspection & Insurance Co.*, an insurance company involved in litigation shared information with its reinsurer, which would share liability if the insurance company were

unfair to prejudice these parties because they have not taken the steps to merge legal ownership into one entity.

To illustrate, in *In re Regents of the University of California*,[137] the University of California, a patent holder, and Eli Lilly, its exclusive licensee, endeavored to obtain foreign patents.[138] Eli Lilly agreed to pay the foreign patent cost and took control of the process, collaborating extensively with the University's patent counsel.[139] In subsequent litigation against the University by a third party, the University's adversary sought to compel testimony of three Eli Lilly attorneys concerning their conversations with University counsel and employees. The district court granted the motion, and declined to apply the common interest exception on the ground that at the time the communications were shared, the parties were not preparing a common defense.[140] In reversing, the court of appeals emphasized that because of the identical interests of the University and Eli Lilly, the University had, in effect, an attorney-client relationship with Eli Lilly's lawyers. The court stated that

> the issue is not who employed the attorney, but whether the attorney was acting in a professional relationship to the person asserting the privilege. "The professional relationship for purposes of the privilege for attorney-client communications 'hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.'"[141]

Therefore, the University had a reasonable expectation of confidentiality, and the privilege applied.[142]

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found liable. *See* 1991 Conn. Super. LEXIS 2527, at *4. In *In re State Commission of Investigation Subpoena No. 5441*, 544 A.2d 893 (N.J. Super. Ct. App. Div. 1988), the doctrine applied to communications between the New Jersey School Board Association and an insurance group that it had created. *See id.* at 896. In *In re United Mine Workers Employee Benefits Plans Litigation*, 159 F.R.D. 307 (D.C.C. 1994), the court remanded to enable the lower court to determine whether a trust and a union had common interests because their legal interests in litigation were the same, although one was a non-party amicus. *See id.* at 314-15.

137. 101 F.3d 1386 (Fed. Cir. 1996).

138. *See id.* at 1388-89.

139. *See id.* at 1389.

140. *See id.*

141. *Id.* at 1390 (quoting Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978) (quoting MCCORMICK, *supra* note 129, § 88, at 179)).

142. According to the court:

> Where there is consultation among several clients and their jointly retained counsel, allied in a common legal cause, it may reasonably be inferred that resultant disclosures are intended to be insulated from exposure beyond the confines of the group; that inference, supported by a demonstration that the

Similarly, in *SCM Corp. v. Xerox Corp.*,[143] Xerox formed a committee with others to study and strengthen technological patents.[144] The court stated that "[i]n this setting of joint analysis and cooperative study, the three parties' common interests in patent protection predominated."[145] Thus, "the requisite common interest to satisfy the confidentiality aspect of the privilege appears to have been present."[146] Thus, the communications that the committee had with members' attorneys to obtain legal advice were privileged in subsequent litigation.[147]

What implications does this have for the confidentiality requirement? Does application of the common interest doctrine to these settings undermine its limiting function by protecting evidence that would have otherwise been discoverable? It is difficult to say. First, consider the litigant who discloses information to a non-party. It is possible that if the litigant were informed that disclosure would waive the privilege, it would chose not to disclose. To the extent this is true, applying the common interest doctrine does not broaden the privilege's scope. On the other hand, if the parties' interests are sufficiently intertwined, they might choose to share privileged information even though it might constitute a waiver. Application of the common interest doctrine in this instance would protect evidence that would otherwise be discoverable. The expansion, however, might not be substantial. Where parties share information in anticipation of litigation, a great deal of it might be protected as attorney work product. On the whole, application of the common interest doctrine when litigants disclose to non-parties with a common legal interest would not appear to broaden significantly the scope of the attorney-client privilege.

The more difficult question occurs when parties share attorney-client communications for planning purposes outside of the specter of anticipated litigation, such as when parties cooperate to strengthen or obtain patent protection. Here, it is more likely that the parties would have shared information even absent the privilege. Sharing greatly facilitates the parties' ability to achieve their common goals, and each assumes that the other will keep information confidential. Because there

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> disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation, will give sufficient force to a subsequent claim to the privilege.

Id. at 1389 (quoting *In re* Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975)).

143. 70 F.R.D. 508 (D. Conn. 1976).

144. *See id.* at 514.

145. *Id.*

146. *Id.*

147. *See id.*

is no litigation in the wind, they may not be concerned with the effect of their actions on a later ability to claim the privilege if a suit materializes. Arguably, then, extending privilege protection in such a case would undermine the confidentiality requirement's purpose, because it would protect evidence that would otherwise be discoverable.[148]

Nonetheless, these cases do not provide overwhelming evidence in support of Rice's claim. They are few in number. Many courts have limited the doctrine to apply *only* if the shared communications were made in anticipation of litigation against a common adversary.[149] In addition, courts have fashioned other limitations on the common interest doctrine to ensure that its application is consistent with the goals of the confidentiality requirement. For example, courts have insisted that the client and the third parties' interests must be aligned, even identical.[150] Even if the parties have a common goal, if their relationship can be characterized as arm's length or adversarial, most courts will find the privilege was waived.[151] This limitation furthers the objective of the

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148. *But see* Fischer, *supra* note 59 (arguing that no valid reason exists for limiting the common interest doctrine to matters involving anticipated or pending litigation).

149. *See, e.g., In re* United Mine Workers Employee Benefits Plans Litig., 159 F.R.D. 307, 314 (D.D.C. 1994) (remanding with instructions to the magistrate judge to consider "whether plaintiffs can establish that any particular privileged documents were transferred in anticipation of litigation against a common adversary on the same issue"); Edward Lowe Indus., Inc. v. Oil-Dri Corp., No. 94C7568, 1995 WL 410979, at *3 (N.D. Ill. July 11, 1995) (holding that "the court applies the common interest doctrine insofar as the documents defendants withheld clearly address either anticipated litigation or a joint effort to avoid litigation"); Medcom Holding Co. v. Baxter Travenol Lab., Inc., 689 F. Supp. 841, 845 (N.D. Ill.1988) (stating that the common interest should "arise[] out of the need for a common defense, as opposed merely to a common problem" (citation omitted)).

150. *See, e.g.*, DuPlan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974) (applying common interest doctrine where parties seeking legal patent advice had an identical legal interest in obtaining patent approval); Baltimore Scrap Corp. v. David J. Joseph Co., No. L-96-827, 1996 U.S. Dist. LEXIS 18617, at *21 (D. Md. Sept. 17, 1996) (declining to apply common legal interest doctrine, in part because the parties would have taken adversarial positions in anticipated litigation). The court in *In re Regents of the University of California*, 101 F.3d 1386 (Fed. Cir. 1996), elaborated on the definition of "identical legal interest":

> The district court erred in concluding that Lilly and UC did not have an identical legal interest in the '877 patent and its foreign counterparts because "a patentee and a nonexclusive licensee do not share identical legal interests." Lilly was more than a non-exclusive licensee, and shared the interest that UC would obtain valid and enforceable patents. UC is a university seeking valid and enforceable patents to support royalty income. Lilly is an industrial enterprise seeking valid and enforceable patents to support commercial activity. Valid and enforceable patents on the UC inventions are in the interest of both parties.

Id. at 1390.

151. Thus, in *Baltimore Scrap* a potential plaintiff threatened to sue the David J. Joseph Company on antitrust grounds. By telephone, the plaintiff also threatened to sue

confidentiality requirement; where interests are not aligned, the parties should have no reasonable expectation that the other's attorney represents its best interest. A willingness to disclose to that attorney, then, indicates that the privilege was not necessary to induce the communication. Finally, several courts have declined to apply the common interest doctrine when the parties' common interest was primarily commercial rather than legal.[152] For example, in *Duplan Corp. v. Deering Milliken,*

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various community groups for antitrust. *See* 1996 U.S. Dist. LEXIS 18617 at *25. The David J. Joseph Company's attorney disclosed an antitrust analysis to the attorneys for the community groups, and later sought to privilege the letter under the common interest doctrine. *See id.* at *12-13. The court ordered the David J. Joseph Company to produce the analysis. *See id.* at *39. In doing so, it emphasized that, had the community groups been joined in the antitrust litigation, its defense would have been against the interests of the David J. Joseph Company. *See id.* at *37.

See also Edward Lowe Indus., 1995 WL 410979 (applying the common interest doctrine to shield privileged documents that co-defendants shared during litigation, but declining to apply the doctrine to shield communications shared during the same parties' negotiations about a distributorship agreement); First Pacific Networks v. Atlantic Mut. Ins. Co., 163 F.R.D. 574 (N.D. Cal. 1995) (holding that common interest doctrine does not apply to shield insured party's communications with insurance carrier because carrier reserved rights to deny coverage after litigation was over).

But see Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308 (N.D. Cal. 1987). In *Hewlett-Packard,* the court sustained a privilege claim when the client disclosed a confidential attorney opinion letter to a corporation with whom it was negotiating for the purchase of one of their divisions. *See id.* at 308. The client apparently revealed the letter to convince the potential purchaser that it would prevail in pending patent litigation. *See id.* at 309. The court's reasoning reveals that it was keenly aware of the need to narrowly construe the privilege, and that it believed it was doing so. The court emphasized that it was sustaining the privilege claim because "[t]hese kinds of disclosures generally leave the adverse party in no worse position than if no disclosure had taken place and, therefore, create no fairness issue." *Id.* at 311. The court further reasoned that "[s]o long as the information is disclosed upon conditions of and with regard for confidentiality there should be no finding of waiver" because a finding of waiver would "make it appreciably more difficult to negotiate sales of businesses and products that arguably involve interests protected by laws relating to intellectual property." *Id.* Thus, although the court viewed its finding as consistent with a narrow construction of the privilege, it appears that the client's motivation in disclosing the communication was of a business nature, and thus the disclosure might have occurred in any event. Arguably, then, the court's decision did, in fact, put the adversary in a worse position than it otherwise would have been.

See also Rayman v. American Charter Fed. Sav. & Loan Ass'n., 148 F.R.D. 647 (D. Neb. 1993) (following *Hewlett-Packard,* and applying the common-interest doctrine to privileged communications exchanged between parties negotiating to merge, on the theory that application worked no unfairness to the adversary).

152. As one court put it, "[t]he community of interest doctrine does not encompass a joint business strategy that includes as one of its elements a concern about litigation." *Edward Lowe Indus.*, 1995 WL 410979, at *1 (citing Bank Brussels Lambert v. Credit Lyonnais (Suisse) 160 F.R.D. 437, 447 (S.D.N.Y. 1995)); *see also* Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 152 F.R.D. 132, 141 (N.D. Ill. 1993) (finding privilege waived because conversations between attorneys of litigant and reinsurer were "normal communications between parties with a contractual obligation to keep each other informed about insurance claims").

Inc.,[153] the court held that the client, a patent owner, had waived the privilege by sharing attorney-client confidences with its United States sales licensee, a non-party to the patent litigation in which the patent owner was involved.[154] Although the sales licensee undoubtedly would have been affected commercially by a ruling adverse to the patent holder, the court found this purely commercial interest insufficient to justify application of the common interest doctrine.[155] In the court's view, sustaining the privilege claim was not necessary to the privilege's goal: securing the client's "objective freedom of mind."[156] Similarly, in *SCM* the court rejected a privilege claim because Xerox had disclosed to a joint venturer its attorneys' analysis of an anti-trust case in which Xerox was involved.[157] The court held that the common interest doctrine did not apply because Xerox's discussions with the joint venturer did not concern "the possibility of shared exposure to antitrust liability," and that the joint venturer was only "indirectly concerned with Xerox's antitrust posture in that Xerox was a joint venturer."[158]

These decisions reflect the view that parties that disclose attorney-client communications for commercial purposes probably would do so even if the privilege did not apply. For example, in *SCM*, the client disclosed the attorney-client communications to strengthen its bargaining position with its joint venturer.[159] This reasoning is especially persuasive when the party that discloses attorney-client communications is removed from the threat of litigation, and privilege concerns are not uppermost in mind. If so, extending the privilege to protect the communications that would have otherwise been discoverable *would* harm the client's adversary by broadening the scope of protected evidence.

A fourth limitation on the common interest doctrine is that the non-party with whom the litigant shares information must genuinely face the risk of legal exposure. Fears of legal exposure that are merely speculative are not sufficient to warrant the doctrine's application.[160] As the *SCM* court emphasized, the joint venturer's claim that it feared it

153. 397 F. Supp. 1146 (D.S.C. 1974).
154. *See id.* at 1175.
155. *See id.*
156. *Id.*
157. *See* 70 F.R.D. at 525.
158. *Id.* at 512-13.
159. *See id.* at 513.
160. *Compare* Hartford Steam Boiler Inspection & Ins. Co. v. Stauffer Chemical Co., No. 701223-24, 1991 Conn. Super. LEXIS 2527, at *4 (Conn. Super. Ct. Nov. 4, 1991) (applying common interest doctrine to non-party who would be partially liable if client lost case), *with* Baltimore Scrap Corp. v. David J. Joseph Co., No. L-96-827, 1996 U.S. Dist. LEXIS 18617, at *21 (D. Md. Sept. 17, 1996) (rejecting the privilege claim in part because there was no evidence that the third party believed it faced a serious threat of litigation).

"might" become involved in the litigation was insufficient to establish a common interest; "[u]nless the interests of the parties are demonstrably common, as when potential defendants discuss grand jury questioning, or intended pleas, the risk of shared exposure must at least be sufficiently substantial to have prompted the third party's lawyer to counsel his client regarding the prospective hazard."[161]

Finally, courts will not apply the common interest doctrine unless the client can show that it took steps to ensure the non-party would disseminate the information no further.[162]

Thus, the common interest doctrine does not give corporations carte blanche to share information with third parties as they please. Courts impose stringent limits on the doctrine—limits that seek to ensure the objective of the confidentiality requirement is not undermined. While some cases viewed in isolation seem to frustrate the requirement,[163] they are of insufficient number to prove the broad proposition that courts view the requirement as irrelevant.

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161. 70 F.R.D. at 525 (citations omitted).

162. *See* Baltimore Scrap Corp., 1996 U.S. Dist. LEXIS 18617, at 35-36.

163. Of the cases Rice cites, only two cases, *Cooke v. Superior Court*, 147 Cal. Rptr. 915 (Cal. Ct. App. 1978), and *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308 (N.D. Cal. 1987), can be read as applying the common legal interest doctrine to protect communications with a non-party with whom the litigant shares purely business interests. *Hewlett-Packard,* discussed *supra* note 151, claimed to be advancing the objectives of the confidentiality requirement nonetheless. *Cooke,* a California divorce case, bases its holding on an inaccurate reading of the applicable California Evidence Code provision. *See* 147 Cal. Rptr. at 919. In *Cooke,* the court found that the client had not waived the attorney-client privilege when he shared attorney-client information with various friends and business associates. The court reasoned that according to the applicable statute,

> [t]he law is that privilege extends to communications which are intended to be confidential, if they are made to attorneys, to family members, business associates, or agents of the party or his attorneys on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interests of the litigant.

Id. at 588. In actuality, the code provision the court cites seems to mirror the commonly accepted definition of the agency exception. The statute allows disclosure only to "those who are present to further the interest of the client in the consultation *or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.*" CAL. EVID. CODE § 952 (West 1999) (emphasis added). Thus, the court's broadening of the limitation to "matters of joint concern" would seem to be error.

c. Voluntary mutual disclosure between adversaries for discovery purposes

Recent amendments to the Federal Rules of Civil Procedure seek to expedite discovery, decrease costs, and curb abuses.[164] Judges now have wide latitude to craft discovery orders to achieve those ends. Rice reports that an increasingly popular protective order allows parties to circulate allegedly privileged documents during discovery and still assert the privilege claim in the future, even against third parties.[165] Parties may also stipulate in advance that inadvertent production of privileged documents shall not waive the privilege. Like the *Teachers* rule and the "common-legal interest" doctrine, allowing voluntary disclosures of this sort furthers important policy goals without undermining the objective of the confidentiality requirement.[166]

First, discovery disclosures pursuant to agreement between the parties do not frustrate the confidentiality requirement's goal of making available as much evidence as possible; if anything, such disclosures

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164. The Advisory Committee Notes on the 1983 Amendment to the Federal Rules of Civil Procedure state:

> Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties.
>
> The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Hickman v. Taylor, 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.
>
> Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay . . . . These practices impose costs on an already overburdened system and impede the fundamental goal of the "just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

FED. R. CIV. P. 26 advisory committee's note (select citations omitted). The notes following detail the changes designed to curb abuses, cut expenses and speed discovery.

165. *See* Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 885 (stating that "[b]y simply noting on each document its privileged nature, the client can limit its circulation to designated individuals, and, at the end of the litigation, require their return with all privilege claims intact for future assertion").

166. *See, e.g.*, Krenning v. Hunter Health Clinic, Inc., 166 F.R.D. 33, 35 (D. Kan. 1996) (stating that "[i]n camera procedures should be a rare procedure in discovery disputes" because Federal Rule of Civil Procedure 26(b)(5)'s objective is to reduce need for in camera examination of allegedly privileged documents).

channel more evidence to adversaries. Although some of this evidence might be inadmissible at trial on privilege grounds, during discovery it might lead to the discovery of admissible, non-privileged evidence.[167]

Moreover, allowing parties by private agreement to determine the scope of privilege does not in any way undermine the confidentiality requirement.[168] Courts routinely allow parties to make their own settlements without questioning them. Parties may stipulate to facts or applicable law (even if they are wrong) and can settle disputes on terms the court would not have imposed. Allowing parties to stipulate to discovery disclosure is an efficient course of action when it is in the best interests of both parties. A court enforcing such an agreement has made no statement about the merits of the law that would apply if the parties had failed to agree. In sum, allowing disclosures by private agreement does not violate the spirit of the confidentiality requirement.

d. Compelled disclosure in prior proceeding

According to Rice, another issue that reveals courts' lack of concern for confidentiality is their treatment of documents that have been found not privileged in prior litigation.[169] To Rice, the issue is simple: When a client produces attorney-client communications after failing to prevail on a privilege claim, the documents lose their confidential character.[170] Thus, the client should not be able later to re-assert the privilege over the same documents in litigation involving a different party. To Rice, the fact that litigants rarely contend that compelled disclosure constitutes waiver indicates that litigants, too, view the requirement as irrelevant.[171] As further confirmation of his theory, Rice claims that some courts have noted that court-ordered disclosure does not waive the privilege in subsequent litigation.[172]

Rice improperly conflates collateral estoppel and waiver concepts. A court would be correct if it declined to use waiver as a rationale for

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167. Further, allowing this type of limited waiver is unlikely to prejudice third parties who might later seek access to the privileged information. Even if a court found that the previous disclosure was limited to the prior proceedings, the third party would be in no worse position than if the protective order had not been entered.

168. Professor Marcus argues that courts should enforce discovery stipulations regarding privilege issues for pragmatic reasons, but worries that such enforcement is "theoretically untidy." Marcus, *supra* note 100, at 1612-13. In fact, as this subpart shows, there should be no theoretieal difficulties with enforcing these stipulations.

169. *See* Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 886-88.

170. *See id.* at 888.

171. *See id.* at 887.

172. *See id.* at 886 n.94.

preventing re-litigation of a privilege claim.[173] It is well accepted as a general principle that compelled disclosure of privileged materials does not create a waiver for all purposes.[174] The reason is simple; that a client makes disclosures against its will is not persuasive evidence that the client was unconcerned with confidentiality to begin with. Moreover, a rule that would equate compelled or involuntary disclosure with waiver might, at the margin, chill attorney-client speech. Thus, courts' reluctance to find waiver in this instance undermines, rather than supports, Rice's claim. He fails to see this because he views the requirement from a formalistic, rather than functional, perspective.[175]

Collateral estoppel is another matter. A court that would bar re-litigation of a privilege claim in a subsequent proceeding on collateral estoppel grounds would not conceptualize the privilege as waived.[176] Rather, the court would find that the issue has been fully and finally litigated, and the documents are not privileged.[177] The fact that they were disclosed in the prior litigation is irrelevant to the determination. Here, it makes sense to apply collateral estoppel doctrine to avoid wasting judicial resources.[178] As Rice points out, the one court that has squarely addressed the issue has agreed.[179] And if in another case parties or courts do not invoke collateral estoppel to defeat once-rejected privilege claims,

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173. *Cf.* Rattner v. Netburn, No. 88CIV2080(GLG), 1989 U.S. Dist. LEXIS 6876, at *27 (S.D.N.Y. Jun. 20, 1989) (noting in dictum that "[i]f a party withholds a document from disclosure on the basis of privilege and, on motion of its adversary, the Court holds that the document is not privileged, the resulting disclosure of the document will not be deemed a waiver of the privilege for purposes of other lawsuits").

174. *See, e.g.*, Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 650-51 (9th Cir. 1978) (holding that compelled disclosure does not waive the privilege); State v. American Tobacco Co., No. 96-2-15056-8SEA, 1997 WL 728262, at *1-2 (Wash. Super. Ct. Nov. 21, 1997) (allowing tobacco company to reassert privilege over 32 documents that it had produced in a prior case pursuant to court order, but requiring company to produce portion of document over which it had failed to claim the privilege in the prior litigation).

175. *See* Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 888 (arguing that "[r]egardless of who was responsible for the disclosure, the factual reality is that the disclosure destroyed the confidentiality that allegedly formed the basis of the privilege").

176. *See* Sprecher v. Graber, 716 F.2d 968, 972-73 (2d Cir. 1983).

177. *See id.* at 972-73.

178. Assuming, that is, that all the elements of collateral estoppel doctrine are satisfied. For example, in *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 76 F.R.D. 47 (W.D. Pa. 1977), the court refused a litigant's request to delay adjudication of attorney-client privilege claims. *See id.* at 54. The litigant had asserted the privilege over identical documents in a different action and urged the court to await the finding of the first court on the privilege issue to save judicial resources. *See id.* at 52. Although sympathetic to concerns for judicial efficiency, the court declined to do so on the ground that different laws applied in the first action that might influence the privilege determination. *See id.* at 54.

179. *See* Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 887 n.96 (citing *Sprecher*, 716 F.2d at 972-73).

refusal to invoke that doctrine provides little evidence about the judicial view of the confidentiality requirement.

Rice argues that courts have eroded the continuing secrecy requirement because they "have intuitively grasped that requiring the *preservation* of confidentiality following an attorney-client communication does not further the end of open communication between the attorney and client since the basic communication has already taken place."[180] But Rice's conclusions do not follow from the evidence that he presents. His own evidence shows that courts intuitively understand privilege law as a delicate balance, and that they struggle to apply the confidentiality requirement in a way that both advances the objectives of the privilege and limits its applicability as much as possible.

III. RICE'S COST ARGUMENT

Rice argues that eliminating the confidentiality requirement would reduce the costs associated with privilege determinations because courts would no longer have to engage in the time-consuming process of determining whether otherwise-privileged communications are confidential.[181] He focuses on the costs of proving confidentiality when it is not evident from the circumstances surrounding the communication, or presumably, the privilege log.[182] The party asserting the privilege must establish that the corporation intended that the communication be confidential by providing the court with an affidavit from the drafter of the document or one with knowledge of the corporation's policy regarding the distribution of confidential documents.[183] The corporation also must supply affidavits establishing the identities of each recipient and their reason for needing to be privy to the attorney-client communication.[184] The client must also establish that it maintained the document's confidentiality.[185] Although this can usually be established by providing evidence of the corporation's record-keeping system, when it cannot, the document's recipients must file affidavits swearing that there has been no further distribution.[186] In the uncommon event that the memo's recipient distributed the document to third parties, the corporation must establish by affidavit that distribution to the third party was not a breach of confidentiality (because that third party was

180. *Id.* at 888.
181. *See id.* at 868.
182. *See id.* at 861.
183. *See id.* at 861-62.
184. *See id.* at 862.
185. *See id.* at 863.
186. *See id.* at 864.

permitted to be privy to it under *Upjohn Co. v. United States*[187]), and that the third party did not further distribute the document.[188]

In some cases, documents may contain handwritten notations or interlineations. In that case, the corporation must establish that the interlineations were made by a person within the circle of confidentiality.[189] If the interlineations were made by previously unidentified individuals, the identity of those individuals and their entitlement to view the document must also be established by affidavit.[190] Finally, Rice emphasizes that courts spend substantial resources adjudicating waiver issues.[191]

Although Rice demonstrates that for the party asserting the privilege, establishing the elements of the confidentiality requirement can sometimes be costly, he fails to examine whether eliminating the requirement would generate substantial costs. In particular, he ignores three important costs of eliminating the confidentiality requirement (beyond the always-present cost of excluding relevant evidence). First, the confidentiality requirement is an easy-to-apply screen that shields courts from making more difficult privilege determinations. Eliminating the requirement would require courts to focus more often on the content of the allegedly privileged communication rather than dispose of privilege claims merely by examining the parties present when the communication was made. Second, abolishing the confidentiality requirement would increase the incentive for clients—particularly corporate clients—to hire lawyers to be present at corporate meetings simply to lay the foundation for privilege claims. Third, by reducing the information each party has about the strength of the other party's case, abolishing the confidentiality requirement might reduce the incentive for parties to settle their disputes before trial. Finally, Rice's claim that eliminating the confidentiality requirement would simplify waiver doctrine is unpersuasive.

A. Confidentiality as a Screen

In many cases, it is easy for a court to determine whether attorney-client communications were made in confidence. Many cases, especially criminal ones, do not involve a large number of documents. In others, privilege logs and supporting affidavits enable courts to adjudicate confidentiality issues without having to examine the contents of the communications. The confidentiality requirement acts as a screen. If, by

187. 449 U.S. 383, 392 (1981).
188. *See id.*
189. *See id.*
190. *See id.*
191. *See id.* at 864-68.

examining the log, the court determines that lack of confidentiality renders the privilege inapplicable, then the court does not have to consider other issues that would require examination of the disputed documents themselves. Elimination of the requirement would create costs where they do not currently exist, necessitate more complex and time-consuming adjudication processes, and increase the numbers of privilege claims that are made.

Examine the role that confidentiality currently plays in cases involving individual litigants. In this context, the cost of establishing confidentiality is often minimal. The issues are straightforward: Was anyone besides the attorney and client present during the communication? If so, can that person be classified as an agent of either the attorney or client? Did the client subsequently divulge the contents of the protected communication to a third party? Complex waiver issues are relatively rare in cases involving individual litigants, especially criminal cases. Criminal defendants and their attorneys are unlikely to write memoranda detailing legal advice, and to circulate those memoranda to third parties. Rice's concerns for the costs of establishing confidentiality for widely circulated documents are not compelling in this context.

In addition, the confidentiality requirement acts as a shield. If the court determines that the requisite confidentiality did not exist, it does not need to examine the more difficult privilege issues. Even if the proponent can establish confidentiality, the requirement makes the determination of the remaining issues easier. Under current law, once the proponent can show that her attorney-client communications were conducted in an atmosphere of confidentiality, it is a small jump to show that the purpose of the communication was to obtain legal advice—individuals do not have many other reasons to visit attorneys. But without a confidentiality requirement, individual litigants could use the privilege as a pretext for communicating damaging information to third parties, because the client could assert the privilege to prevent the third party from revealing the substance of the attorney-client communication. Thus, if a third party had been present at the initial communication, or was subsequently informed of the contents of the communication, a court would have to determine whether the purpose of the communication was to obtain attorney advice, or whether the litigant was using the privilege as a shield to enable her to reveal damaging information to those who might need to know for non-legal reasons. Such an inquiry would be more time consuming and more difficult than adjudication of the confidentiality requirement.

The screening function of the confidentiality requirement is even more vital in the corporate context. Rice argues that currently, the proponent of the privilege must spend an inordinate amount of resources showing that confidentiality existed and was maintained, and that judges

are forced to waste judicial resources by performing extensive in camera reviews to resolve waiver issues.[192] Rice's argument is unpersuasive for two reasons: First, his scenario involving costs is likely to occur in a small subset of cases; and second, he fails to consider the possibly overwhelming costs that eliminating the requirement would create.

In simple litigation, the extraordinary costs that Rice lists are not likely to arise with serious frequency. For one, the number of documents that raise confidentiality issues are relatively small, because documents are unlikely to have been distributed to many people in a corporate hierarchy. Even in complex litigation the confidentiality requirement does not always create excessive costs. Courts have discretion whether to perform in camera reviews,[193] and because of amendments to the Federal Rules of Civil Procedure, they are increasingly less likely to do so.[194] When courts do, it is usually because viewing the documents is necessary to determine whether the *subject* of the communications fits the definition of the privilege.[195] In camera review is less necessary to determine confidentiality issues for obvious reasons. Parties must supply privilege logs, which list the identity of the sender and all recipients of the documents.[196] Any documents that contain handwritten notations or subsequently made markings should be separately listed. Thus, the confidentiality issue is often apparent on its face: If the privilege log lists

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192. *See id.* at 861-68.

193. *See, e.g.*, Standard Chartered Bank v. Ayala Int'l Holdings (U.S) Inc., 111 F.R.D. 76, 86-87 (S.D.N.Y. 1986) (declining to perform an in camera review); *see also* Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 889-90 n.100 (listing six reasons, with citations, that courts commonly give for refusing to engage in an in camera review).

194. *See, e.g.*, Krenning v. Hunter Health Clinic, Inc., 166 F.R.D. 33, 35 (D. Kan. 1996) (noting that since the purpose of Federal Rule of Civil Procedure 26(b)(5) is to reduce need for in camera examination of documents that are claimed to be privileged, in camera procedures should be a rare procedure in discovery disputes).

195. In point of fact, of the fifteen cases Rice cites to support his proposition that courts often conduct in camera reviews, in only two of the cases was the court required to consider whether the confidentiality requirement was breached. *See* United States v. Tratner, 511 F.2d 248, 252 (7th Cir. 1975); Saxholm v. Dynal, Inc., 164 F.R.D. 331, 339 (E.D.N.Y. 1996). The issue in the remaining cases concerned, for example, whether an attorney-client relationship existed or whether the communication was made for the purpose of obtaining legal advice. *See* Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 889-90 & n.100.

196. *See, e.g.*, Board of Educ. v. Admiral Heating & Ventilating, Inc., 104 F.R.D. 23, 34 (N.D. Ill. 1984) (requiring defendants to supply names of persons who received any document or were present during any allegedly privileged communications); Burns v. Imagine Films Entertainment, 164 F.R.D. 589, 593 (W.D.N.Y. 1996) (holding that party asserting privilege and resisting discovery has burden of establishing existence of privilege; blanket assertions of privilege are insufficient to satisfy this burden; and party claiming privilege must supply opposing counsel with sufficient information to assess applicability of privilege or protection).

as a recipient someone who does not personify "the client" for privilege purposes, the opponent will challenge the assertion of the privilege on secrecy grounds. The court need not look at each copy of the document. Rather, the court must consider the affidavits and determine whether the individual named as the recipient does or does not personify "the client." It is likely that in camera review would be necessary only when clients cannot account for markings on documents.

Suppose, by contrast, a corporation were not required to establish that allegedly privileged communications were made in confidence and kept confidential. Suppose further that the corporation's privilege log listed as recipients of a privileged memo several individuals who may not constitute "the client" for privilege purposes. Although an opponent could no longer challenge the applicability of the privilege based on non-confidential distribution, the fact that the allegedly privileged document was distributed to individuals who do not personify "the client" would give reasonable grounds for suspecting that the document's contents do not concern the giving or receiving of legal advice. Thus, the court must examine the contents of each such communication to determine its purpose. Absent the confidentiality requirement, the court cannot adjudicate the issue based on the privilege log and supporting affidavits. It must personally inspect each document for which the privilege is claimed.

Explore another illustration of how eliminating the confidentiality requirement would complicate the adjudication of privilege issues and increase judicial costs. Return to the example of the tobacco company explored in Part I. Under current law, the corporation would be unlikely to assert the privilege to protect statements made at the meeting and notes or minutes recording those statements. The corporation knows that the presence of the lobbyist renders the communications made at the meeting non-confidential. Now suppose the lobbyist had not been present. Here, the corporation might make a privilege claim. To do so, it would have to explain who was present at the meeting, and establish, if it could, that all those present constituted "the client" for privilege purposes. To that end, the corporation would submit affidavits detailing the job description of all attendees, and the court would rule after hearing argument.

Eliminate the confidentiality requirement and the issue shifts. In the first example, the presence of the non-employee lobbyist is less likely to deter the corporation from making an attorney-client privilege claim. Even if the lobbyist had not been present, the court's tasks have multiplied. The proponent's adversary would likely cite the presence of non-"client" employees as evidence that statements at the meeting were made for business, not legal, purposes. The court would then have to decide whether the primary purpose of each communication made during the meeting was made for the purpose of obtaining legal advice, and

whether each communication made by or to an attorney was made to him as a legal advisor, and not as a business advisor. The court must examine the notes of the meeting and must hear offers of proof or review extensive affidavits concerning the potential testimony of each witness present. An adjudicative process that is relatively simple under current law would evolve into an enormous problem that will require substantial judicial resources to solve. Moreover, the substantive question will be more difficult to resolve than determining whether the communication was confidential. For instance, if obtaining legal advice was a significant, but not sole, purpose of the meeting, should the privilege claim be sustained?

At the very least, a world without the confidentiality requirement is a world where deep-pocket litigants have even greater abilities to manipulate privilege law to drag out litigation to their adversary's detriment. Even if the confidentiality requirement creates serious costs, those costs pale by comparison to those that would be created by the requirement's elimination.

B. Increased Attorney Fees

As explained in Part I, eliminating the confidentiality requirement would increase the temptation to invoke the privilege falsely by having an attorney present at every meeting, with a corresponding increase in privilege issues to be adjudicated. Most potentially damaging facts relevant to planning or litigation would eventually have to be communicated to an attorney. It would be easier simply to have an attorney present at all times, in the hope of increasing the number of communications that might subsequently be viewed as privileged.

Indeed, only attorneys are gnaranteed to benefit from the elimination of the requirement. As Daniel Fischel points out, to the extent that litigation is a zero-sum game, rules that increase investments in legal services have value only if that increase generates a benefit to clients as a class.[197] Clients as a class would not benefit from elimination of the confidentiality requirement. Although any individual client who asserts the privilege might derive an initial benefit from the decreased cost of asserting the privilege, those costs often would be more than offset by (1) the increased costs of adjudicating the other issues that would arise, (2) the client's decreased ability to access relevant evidence possessed by the adversary,[198] and most importantly, (3) the greater fees to attorneys that clients would feel obligated to incur. Occasionally, a particular client

197. *See* Fischel, *supra* note 40, at 16-17. Fischel argues that attorney confidentiality rules in general benefit only attorneys because they increase the demand for legal services while providing little benefit to clients. *See id.* at 16.

198. This is a basis for Fischel's criticism of the privilege as a whole. *See id.* at 5 n.13, 16.

might benefit if the additional information it is able to shield is sufficiently damaging, and its adversary's privileged information is not damaging. But because no client can predict in advance whether it or its adversary will have the most to hide, clients as a class will lose. Thus, eliminating the requirement would primarily constitute a wealth transfer to attorneys.[199]

C. Disincentive to Settlement

Because eliminating the confidentiality requirement would decrease the amount of evidence available to adverse parties, settlements would occur less frequently. If a party conducting a pre-trial assessment of its position has less evidence to consider, the party will be less able to predict the outcome of the trial.[200] In general, the more information about a case that is available to the parties, the better able the parties will be to predict the outcome of the trial. If both parties have complete and accurate information, and equally strong legal advice, they have little reason to go to trial. Both clients will understand the probability of success in litigation, and they will therefore have strong incentives to avoid litigation costs by settling.[201] By contrast, if the parties have incomplete and/or inaccurate information, their estimates about litigation outcome are likely to diverge. This divergence, in turn, may reduce the likelihood of settlement.[202]

To the extent a broad privilege doctrine deprives each party of relevant information, therefore, privilege doctrine is likely to reduce the likelihood of settlement. Of course, that might be a price worth paying if necessary to induce free communication between lawyer and client. But Rice's proposal would broaden the privilege unnecessarily.

D. Complication of Waiver Issues

Finally, Rice asserts that eliminating the confidentiality requirement will greatly simplify the costs of litigating waiver issues. He proposes that attorney-client communications that the client discloses to others

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199. *See id.* at 17 (noting that clients derive no benefit "from wealth transfers to attorneys that have no effect other than to alter the results in a zero-sum game").

200. *See* Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 426 (1973) (arguing that discovery that enables both parties to improve estimates of outcomes is likely to facilitate settlement).

201. *See* Richard Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1499 (1999) (arguing that the more predictable the outcome of the trial, the higher the settlement rate).

202. Scholars have conducted significant work exploring the effect of information asymmetry on settlement prospects. *See, e.g.*, Bruce L. Hay, *Effort, Information, Settlement, Trial*, 24 J. LEGAL STUD. 29 (1995).

could not be used against the client "unless the client's sharing had placed the [adversary] in an unfair position relative to the issues . . . being litigated."[203] He advocates for a simple "fairness" standard, under which courts would consider "whether, and to what extent, the client should be required to relinquish the privilege protection."[204] In making this determination, courts should consider (as they currently do) the claims that the client asserts, the client's use of other privileged materials, and the client's good faith in claiming the privilege protection.[205] To Rice, this approach would greatly simplify privilege law.[206]

But the vague nature of Rice's proposed standard would create as many complications as it resolves. To begin with, to what should the court refer when determining "fairness?" Is it ever fair to exclude relevant evidence that did not need the privilege's encouragement? If so, when? In analyzing the limits of waiver, courts could end up creating limits that are consistent with the current confidentiality requirement. If so, the issue will not have been made simpler.

Consider, once again, the tobacco hypothetical. If the tobacco company allows a lobbyist to be present when it seeks attorney advice, and the meeting is the only source of the lobbyist's knowledge of the facts revealed at the meeting, would it be "fair" to allow the corporation to claim the privilege to preclude the lobbyist from testifying? Under Rice's proposal, it would be able to do so.[207] But is it "fair" to allow a corporation to throw the cloak of privilege over facts that would have been discoverable if the attorney had not been present? Undoubtedly, the plaintiff would not think so. Or, consider the inadvertent production problem. Under the majority rule currently in force, a client that has inadvertently produced a document can sustain a privilege claim if it can show that it took reasonable steps to protect the document's confidential nature. Under Rice's waiver rule, the adversary to whom the client had inadvertently produced the document could claim that sustaining the privilege claim would be unfair. For example, the client could argue that it had developed an argument based on the contents of the document, or that prior to settlement negotiations it considered the document in assessing its chances of prevailing, or even that protecting the document would be unfair because the adversary had spent considerable resources protecting their own.

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203. Rice, *Eroding Concept of Confidentiality*, *supra* note 6, at 891.

204. *Id.* at 893.

205. *See id.* at 893-94.

206. *See id.* at 895.

207. *See id.* at 897 (stating that "[o]f course, if the third party's source of factual information was the attorney-client communication itself, the third party *would not be permitted to testify to those facts*" (emphasis added)).

Moreover, the new waiver rule would inject waiver arguments into cases where they would not have been if the confidentiality requirement had been in effect. In simple litigation involving individual litigants, waiver issues rarely arise, and when they so, they are relatively straightforward. But if the client can use the privilege to expand the scope of inadmissible evidence, adversaries will be increasingly tempted to cry "foul" and contest the privilege claim on grounds of waiver. Elimination of the confidentiality requirement, therefore, is unlikely to reduce the amount of waiver litigation or simplify the law.

IV. CONCLUSION

Rice views the confidentiality requirement as extraneous to privilege law because it fails to further the privilege's objective of encouraging attorney-client communications. But the same can be said of all limitations on the privilege, some of which generate even more costs than the confidentiality requirement. Taking his reasoning to its logical extreme, all limitations on the requirement should be abolished, since none of them are necessary to encourage attorney-client speech and hence the costs they create are unnecessary.

Because Rice ignores the impact of an expanded privilege on the truth-seeking process, he can enthusiastically argue for its expansion. Because Rice takes a formalistic view of the confidentiality requirement, he misinterprets the case law. Because he fails to consider the costs of his proposal, he fails to understand that the confidentiality requirement saves expense. Although the privilege does present serious problems for clients and the judiciary, eliminating the confidentiality requirement is not a solution.