UNREGULATED CORPORATE INTERNAL INVESTIGATIONS: ACHIEVING FAIRNESS FOR CORPORATE CONSTITUENTS

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Abstract: This Article focuses on the relationship between corporations and their employee constituents in the context of corporate internal investigations, an unregulated multi-million dollar business. The classic approach provided in the 1981 Supreme Court opinion, Upjohn v. United States, is contrasted with the reality of modern-day internal investigations that may exploit individuals to achieve a corporate benefit with the government. Attorney-client privilege becomes an issue as corporate constituents perceive that corporate counsel is representing their interests, when in fact these internal investigators are obtaining information for the corporation to barter with the government. Legal precedent and ethics rules provide little relief to these corporate employees. This Article suggests that courts need to move beyond the Upjohn decision and recognize this new landscape. It advocates for corporate fair dealing and provides a multi-faceted approach to achieve this aim. Additionally, it recommends a shift in the burden of proof when an individual corporate constituent asserts his or her attorney-client privilege against a corporation that seeks to disclose the acquired information to the government to obtain a non-prosecution, limited fine, or favorable sentence. Ultimately this Article considers how best to level the playing field be-

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tween corporations and their employees in matters related to the corporate internal investigation.

INTRODUCTION

Corporate internal investigations serve important societal functions. They allow entities to discover internal misbehavior, make corrections, and model conduct to assure future compliance with the law and the regulatory structure. Internal investigations offer a cooperative resolution for corporate improprieties, while incentivizing corporations to unmask misconduct. Internal investigations also allow corporations to quietly investigate allegations that may later prove to be bogus, without fear that disclosure will hurt the company’s reputation.

At the same time, corporate internal investigations can lead to abuses. They are privately structured, lacking regulatory oversight, and for the most part unmonitored by law. They are a multi-million dollar business with most of the control resting in the hands of the entity. It has been argued that, at times, corporations’ lawyers conducting internal investigations are deceptive (for example, by exploiting individuals’ belief that the lawyers or the corporation are looking out for their constituents’ interests) and coercive (for example, by employing actual or perceived threats against individuals who fail to cooperate). Corporate officers and employees who later face criminal prosecution have challenged the admissibility of their statements to corporate counsel on a number of grounds, drawing on the law relating to attorney-client privilege, criminal procedure, and lawyers’ professional conduct, among others. But the law places only margin-

1 See Mark P. Goodman & Daniel J. Fetterman, Conducting Internal Investigations, in Defending Corporations and Individuals in Government Investigations 87, 91 (Daniel J. Fetterman & Mark P. Goodman eds., 2011) (discussing management’s obligation to investigate alleged wrongdoing to minimize the company’s risk).
2 See infra notes 29, 83–101 and accompanying text.
3 See infra note 15 and accompanying text.
4 See Mei Lin Kwan-Gett, Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations, PLI Ethics Programs, Summer 2011, at 418 n.28.
6 See infra note 157 (right to counsel); infra notes 177–190 (attorney-client privilege); infra notes 206–207 (attorney ethics rules and malpractice law).
al limits on the conduct of corporate internal investigations and affords protection to corporate constituents only in extreme cases.\(^7\)

To a small degree, ethics rules and corporate practice call upon lawyers to take steps to prevent or correct individuals' erroneous beliefs that the corporation's lawyers represent them, but the traditionally used warnings, to the effect that the lawyers represent only the corporation, do not overcome all expectations developed by employees who have grown accustomed to turning to corporate counsel when an issue with legal implications arises. Once the lawyers have clarified their role, the ethics rules do not forbid them from developing and taking advantage of individuals' expectation that the corporation's interests are aligned with their own and that the corporation, including its lawyers, will protect them.\(^8\)

Consequently, individuals with little or no legal training, and unaware of the ramifications and personal consequences, readily cooperate in providing information to corporate lawyers conducting internal investigations, even when the corporation is already assisting government prosecutors or regulators in their investigation of corporate employees or anticipates doing so in exchange for leniency. The more problematic scenarios occur in situations that never are scrutinized by the judiciary, as they emanate from corporate internal investigations that remain essentially unregulated and private.

The ambiguous nature of the corporate constituent's identity as either aligned with or antithetical to the entity during a corporate internal investigation becomes a more pronounced issue as the number of corporate internal investigations continues to increase each year.\(^9\)


\(^8\) See infra notes 199–203 and accompanying text.

\(^9\) See Benton J. Campbell & Katelyn Beaudette, *The Way Forward: A Primer on Conducting an Independent Investigation,* DIRECTOR NOTES, 1, 1 (Feb. 2012), http://www.conference-board.org/retrievefile.cfm?filename=TCB-DN-V4N3-12.pdf&type=subsite ("Since 2001, public companies have retained outside counsel to conduct more than 3,000 internal investigations encompassing a staggering range of subject matters."). Some of these investigations may be limited to determining if one or a few employees have adhered to corporate compliance measures. The increased growth of Foreign Corrupt Practices Act ("FCPA") cases and the fact that 2011 marked the "largest number of enforcement actions brought in a single year by the U.S. Securities and Exchange Commission (SEC) in the agency's history" has likely increased the need for corporate investigations. Campbell & Beaudette, supra, at 1.
These investigations can commence for a host of different reasons, and lawyers are often an integral part of the internal investigation because their participation enables the corporation to claim attorney-client and work-product protections for the results of the investigation.

In this investigative stage, the corporation may be undecided whether to come forward with evidence of wrongdoing that its lawyers discover or whether to assist the government should it proceed with an investigation or file charges against the company. Notwithstanding the frequent practice of bartering information obtained from an internal investigation in exchange for a non-prosecution, deferred prosecution, or other favorable treatment, it may be uncertain at the very outset, or before the investigation concludes, whether the corporation is an ally or adversary of the government and likewise whether its interests are aligned with or adverse to its employee constituents. Even if the corporation anticipates turning over its investigative conclusions or other work product to the government, disclosing this intention to its constituents may undermine the investigation. Thus, while the corporate internal investigation takes place, the constituent employees may be uncertain whether the company is their friend, or may believe incorrectly that they are being protected by the corporation.

Corporations’ internal investigations contrast with government and regulatory investigations, which are subject to rules of criminal procedure and federal statutes to protect individuals from overreaching by investigators. Because corporations’ internal investigations

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10 See infra notes 83–101 and accompanying text.
13 See Miranda v. Arizona, 384 U.S. 436, 516–17 (1966) (Harlan, J., dissenting) (suggesting that warnings will decrease the incidence of confessions). If the company decides to enter into a plea or a deferred or non-prosecution agreement, a key component of that agreement may be to provide information about wrongdoing by individual employees within the company. The company can secure an advantage by trading this information so that the government can prosecute individual wrongdoers. See infra notes 143–186 and accompanying text.
14 Internal investigations do not provide rights such as the Fifth Amendment right against self-incrimination. See Lisa Kern Griffin, Compelled Cooperation and the New Corporate Criminal Procedure, 82 N.Y.U. L. Rev. 311, 353, 365–71 (2007) (describing the requirement for state action for Fifth Amendment protection to arise). An individual being questioned also does not have a Sixth Amendment right to counsel. See United States v. Stein, 541 F.3d
are regarded by the law as private employment matters in which the
government has no part, they are essentially unregulated by legal pro-
tections and unmonitored by courts as they occur.\textsuperscript{15} Decisions
whether to conduct an investigation,\textsuperscript{16} who will conduct one,\textsuperscript{17} and its
scope are for the entity to decide.\textsuperscript{18} Generally Accepted Accounting
Principles (GAAP)\textsuperscript{19} and professional ethics rules of attorneys\textsuperscript{20}
provide only modest restraints on accountants and attorneys who conduct
these investigations. The Department of Justice (DOJ), a federal
agency,\textsuperscript{21} or a state government that may concurrently or subsequently

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130, 132 (2d Cir. 2008) (noting that the Sixth Amendment right to counsel attaches when
adversarial judicial criminal proceedings have begun). Should an individual assert these
rights, there is no judicial oversight for enforcement as these investigations are not part of
a court proceeding. See Andrew Weissmann & David Newman, Rethinking Criminal Corporate
Liability, 82 Ind. L.J. 411, 425 n.45 (2007) (noting that even when prosecutors are involved
after internal investigations, agreements are not overseen by the court).

In contrast to the employees’ lack of rights when investigated by the corporation, the
corporation has rights when investigated by the government. Corporations are treated as
persons for purposes of prosecution, so they are afforded some of the same rights provid-
ed to individuals. See, e.g., Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 899
(2010). In a few areas differences can be seen. For example, a corporation’s documents
may not have Fifth Amendment protection, although the act of producing those documents
may be provided protection from self-incrimination. See, e.g., Fisher v. United States,

\textsuperscript{15} See Weissmann & Newman, supra note 14, at 425 n.45. Obstruction of justice statutes,
however, which prohibit conduct such as destruction of documents that impedes the “due
administration of justice,” may be an overarching concern during an internal corporate

\textsuperscript{16} The corporate board does have fiduciary duties to shareholders and the company
that may influence this decision. See H. Lowell Brown, The Corporate Director’s Compliance
Oversight Responsibility in the Post Caremark Era, 26 Del. J. Corp. L. 1, 7–16 (2001) (describ-
ing the duties of care and loyalty).

\textsuperscript{17} Routine internal investigations may be conducted by internal corporate counsel.
Larger investigations are typically handled by outside independent counsel. See Kwan-Gett,
supra note 4, at 417–19. It is often difficult to ascertain the complexity of the inquiry and
the problems that may be forthcoming prior to actually conducting an internal investiga-
tion.

\textsuperscript{18} Corporations typically have an independent committee from the board of directors
that will provide oversight of the internal investigation, including setting its scope. Id. at
419–21.

\textsuperscript{19} See generally Dan L. Goldwasser & M. Thomas Arnold, Accountants’ Liability

\textsuperscript{20} States pass rules of professional conduct for attorneys. See generally ABA Model Rules of
Professional Conduct: About the Model Rules, A.B.A.,
http://www.americanbar.org/groups/professional_responsibility/publications/model_rul-
es_of_professional_conduct.html (last visited Nov. 28, 2012). For a discussion of applicable
ethics rules, see infra notes 199–203 and accompanying text.

\textsuperscript{21} The DOJ may not be the exclusive investigator of potential criminal conduct. For
example, the Securities Exchange Commission (SEC) may investigate securities fraud or
insider trading, the Internal Revenue Service (IRS) may be at the forefront in tax investi-
investigate the corporate conduct in question is not a *direct* participant in the corporate internal investigation.\textsuperscript{22} Although the DOJ may become an *indirect* participant in a corporate internal investigation, the procedural protection ordinarily applicable to government investigations does not apply as a result.\textsuperscript{23}

Part I of this Article provides background material on the development of corporate criminality, government investigations, and the motivations and considerations of companies that are conducting internal investigations.\textsuperscript{24} It highlights some of the problems that arise as a result of these internal investigations, while also noting the important purposes these investigations serve for the company and society.

Part II discusses the varying approaches that may be taken by the entity conducting an investigation.\textsuperscript{25} In some instances investigations are conducted with a long-term expectation of confidentiality.\textsuperscript{26} Although counsel does not formally represent the individuals, the individuals expect the company to look out for its employees’ interests and, therefore, to preserve the confidentiality of their statements unless it is in the shared interest of the company and its employees to disclose them.\textsuperscript{27} This paradigm is illustrated and influenced by the U.S. Supreme Court’s 1981 decision in *Upjohn v. United States*, in which the Court held that attorney-client privilege did not protect specific communications from compelled disclosure.\textsuperscript{28}

This contrasts with a growing number of instances in which the interests of the corporation and its individual employees are adverse because the corporation is, or expects soon to be, currying favor with

\textsuperscript{22} A state may be a direct participant if there had been a prior act of misconduct and the corporate entity was subject to a deferred prosecution agreement or non-prosecution agreement that included a government-appointed internal monitor who issued reports directly to the government.

\textsuperscript{23} *But see Stein*, 541 F.3d at 136, 147 (extending procedural rights to employees after the fact due to “the government’s overwhelming influence” in the corporation’s decision to withhold funds for employees’ counsel, and noting that the state action doctrine requires the government to exert “significant encouragement” on a private party before rights will be extended).

\textsuperscript{24} See *infra* notes 35–113 and accompanying text.

\textsuperscript{25} See *infra* notes 114–204 and accompanying text.

\textsuperscript{26} See *infra* notes 205–243 and accompanying text.


\textsuperscript{28} See *id*. The Court also held that the “work-product doctrine does apply in tax summons enforcement proceedings.” *Id.*
public prosecutors or regulators. Corporations effectively serve as agents of the government, providing federal prosecutors with proof of employee criminality. When corporate criminal conduct exists, corporate counsel’s allegiance to the entity translates into an investigation that is minimally independent and more practically an investigation to accumulate evidence that the government cannot obtain from the corporation without trading leniency for the corporation’s waiver of privilege. But the corporation’s adversity to its constituents may not be evident to the individuals from whom the corporation’s lawyers seek information.

This Part of the Article also looks at the classic context in which this issue can reach the courts—litigation over the attorney-client privilege. Case law presumes that corporate counsel represents the entity

29 Professor Susan B. Heyman has noted that current DOJ memoranda guide corporations in currying favor with the government and has suggested using a “bottoms-up” approach to “maintain[] employees’ legal rights” and to “better serve the interests of the government, the corporations, the employees, the shareholders, and the general public.” Susan B. Heyman, Bottoms-Up: An Alternative Approach for Investigating Corporate Malfeasance, 37 Am J. Crim. L. 163, 167–69, 170 (2010) (discussing how providing individuals with incentives to cooperate could achieve deterrence). Professor Harry First has noted the “branch office” influence of the government in federal corporate prosecutions. See First, supra note 12, at 28 (discussing how the government enlists corporations against employees to expose criminal liability within the corporation). See generally Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (discussing corporate monitors, deferred prosecution agreements, civil liability from corporate criminal misconduct, and other subjects related to the role of prosecutors in corporate issues emanating from corporate criminal conduct). Additionally, Professor Lisa Kern Griffin has discussed how corporate “partnering” with the federal government shifts to “individual culpability.” See Griffin, supra note 14, at 329–40. Thus, in this paradigm, the emphasis in an internal investigation is on the “investigation”—the discovery of evidence for use in a future government proceeding.


exclusively and therefore employees cannot claim the protection of the privilege. The Article critiques both judicial doctrine that favors corporations and the government at individuals’ expense and ethics rules that fail to protect individuals, with the result that individuals are too susceptible to exploitation.

Part III notes that although corporations may elect at times to protect their constituents and at other times to use the employees as chips with the government, there is no general duty of fair dealing required of the corporation to its constituents. Presented here is an approach that expands upon the analysis used in *Upjohn* to address the applicability of the attorney-client privilege to individual employees in a manner that takes account of the importance of corporate fair dealing. The proposed multi-faceted approach would help level the playing field between the individual constituent and the entity.

This Article also recommends that courts eliminate the presumption that corporate counsel exclusively represents the corporation during a corporate internal investigation. Ultimately, this Article stresses the need for corporate fair dealing during such investigations.

I. CORPORATE CRIMINALITY AND THE GROWTH OF INTERNAL INVESTIGATIONS

Corporations have not always been subject to criminal charges. Section A of this Part looks at the development of corporate criminality, which explains the motivation for corporations to expend millions of dollars on internal investigations. Section B focuses on the increased number of government investigations and threats of prosecution. Corporations obviously seek to avoid criminal liability and the  

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32 See infra notes 187–204 and accompanying text. A growing number of judicial decisions give deference to the corporation when a corporate executive claims that his or her attorney-client relationship precludes disclosure of information given as part of an internal corporate investigation. See Grace M. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. Miami L. Rev. 109, 151–58 (2010). Equally problematic is government interference with executive representation during the corporate or government investigation. See, e.g., *Stein*, 541 F.3d at 135–36 (discussing government interference with the payment of attorney’s fees following the indictment of partners and employees of KPMG).


34 See infra notes 205–242 and accompanying text.

35 See infra notes 40–54 and accompanying text.

36 See infra notes 55–65 and accompanying text.
enormous collateral consequences that accompany a criminal charge, which can include possible shareholder civil actions. Section C discusses the attributes of corporate internal investigations—what they are, who conducts them, and the dynamic between individual employees and the corporation during these investigations. Section D looks at the incentives for a company to conduct such an investigation, including the opportunity to discern problems and prevent corporate exposure to criminal or regulatory proceedings. Finally Section E examines key aspects of an internal investigation, noting how lawyers are integral players in the process.

A. Corporate Criminality

Corporations are characterized as “persons” for purposes of criminal liability. Initially, corporations were precluded from being criminally liable because as a “fiction,” a corporation could not be imprisoned and could not have intent to commit a criminal act. Over time, however, courts allowed corporate criminality when criminal culpability was predicated on an omission, as opposed to an affirmative act. These strict liability crimes did not require a mens rea, so allowing criminal liability was consistent with the initial corporate criminal construct. Eventually, courts moved to allowing corporate criminal liability beyond omission offenses, seeing no logical distinction between omissions and affirmative acts in the case of strict liability offenses. The turning point was when corporate criminality was allowed with mens rea offenses. In 1909, in *New York Central & Hudson River Railroad v. United States*, the U.S. Supreme Court authorized criminal prosecution of a corporation for violations of the Elkins Act,

37 See infra notes 67–82 and accompanying text.
38 See infra notes 83–101 and accompanying text.
39 See infra notes 102–113 and accompanying text.
40 See 1 U.S.C. § 1 (2006) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”).
43 Id.
44 LAFAVE, infra note 41, at 741.
45 See Podgor, supra note 42, at 394.
a federal law, when the violations involved affirmative acts by agents of the corporation.\(^{46}\)

Today, corporate criminality is premised upon either of two methodologies: *respondeat superior*, which is the majority position,\(^{47}\) or the Model Penal Code approach which asks whether a “high managerial agent” acted criminally for the benefit of the corporate entity.\(^{48}\) Establishing a sufficient *mens rea* is facilitated by decisions finding that “collective knowledge” can be used to achieve the requisite *mens rea*.\(^{49}\) Although many argue that the acts of a rogue employee should not subject a corporation to criminal liability,\(^{50}\) courts have not endorsed

\(^{46}\) 212 U.S. 481, 491, 494–96 (1909) (imputing to a corporation the knowledge and purpose of “any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation”). *New York Central* marked a radical departure from historical approaches. *See generally* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 Am. Crim. L. Rev. 1559 (2009) (contrasting the criminal punishment of corporations today with historical approaches).

\(^{47}\) Ellen S. Podgor, *Introduction*, *Corporate Criminal Liability*, 41 Stetson L. Rev. 1, 2–3 (2011). Liability is found if the act is within the scope of the employee’s employment and is for the benefit of the entity. *Id.* at 2.

\(^{48}\) *Model Penal Code* § 2.07(1)(c), (4)(cx) (1985). To incur corporate criminal liability, the individual must commit the act for the benefit of the corporation, as opposed to the individual. *See Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 128–29, 131 (5th Cir. 1962) (reversing convictions that were premised on acts that did not directly benefit the corporation).


\(^{49}\) See Alschuler, *supra* note 46, at 1365 & n.41 (citing cases finding collective knowledge sufficient for *mens rea*); Martin J. Weinstein & Patricia Bennett Ball, *Criminal Law’s Greatest Mystery Thriller: Corporate Guilt Through Collective Knowledge*, 29 New.Eng. L. Rev. 65, 70–79 (1994) (discussing early collective knowledge cases and expressing the importance of the collective knowledge doctrine in corporate criminal law). “[C]ollective knowledge holds a corporation criminally liable where one employee intends an action and another, albeit innocent, employee carries it out.” Weinstein & Ball, *supra*, at 67. Courts will sometimes give a collective knowledge instruction that allows the jury to aggregate knowledge from different parts of the corporate organization to determine whether the corporation has the *mens rea* for the crime. *See United States v. Bank of New Eng.*, 821 F.2d 844, 856 (1st Cir. 1987) (holding that “[s]ince the Bank had the compartmentalized structure common to all large corporations,” a collective knowledge instruction was proper).

\(^{50}\) A “good faith” defense would shelter “law-abiding corporations” from rogue employees by protecting “those who present ‘good faith’ efforts to achieve compliance with the law as demonstrated in their corporate compliance program.” *See Ellen S. Podgor, A New Corporate World Mandates a “Good Faith” Affirmative Defense*, 44 Am. Crim. L. Rev. 1537, 1538 (2007) [hereinafter Podgor, *A New Corporate World*]. Many scholars have argued for a
a “good faith” exception to corporate liability. The Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission* regarding corporate campaign contributions emphasized the value of corporate personhood, thereby offering a schematic for expanding prosecutions of corporations.


See Podgor, *A New Corporate World*, supra note 50, at 1538 (noting that the legal system has not yet adopted a “good faith’ affirmative defense”).

130 S. Ct. at 886.

See id. at 900 (“The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”). Citing a long list of cases, the Supreme Court in *Citizens United* stated that “[t]he Court has recognized that First Amendment protection extends to corporations.” Id. at 899. This can be contrasted with Justice John Paul Stevens’s concurrence and dissent in part, which states that “[t]he fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it.” Id. at 971. He also stated:

> It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

Id. at 972.

B. Government Investigations

Government investigations of corporate misconduct have increased in recent years. In the wake of the Enron scandal, President George W. Bush issued an executive order in 2002 that created the Corporate Fraud Task Force. Although this Task Force was later renamed the Financial Fraud Task Force by President Barack Obama in 2009, a focus on investigating and prosecuting corporate fraud remains.

Government investigations are not limited to the DOJ, as regulatory agencies, state and local entities, and other administrative bodies may also investigate possible misconduct. It is also common to see parallel proceedings with both the DOJ and an agency like the Internal Revenue Service (IRS) or the Securities Exchange Commission (SEC) simultaneously investigating the same conduct. The SEC’s increasing number of enforcement actions demonstrates its growing concern with fraudulent activities within the market. Significantly,
many of these investigations involve conduct extraterritorial to the United States.\(^{60}\)

The increased number of deferred and non-prosecution agreements\(^{61}\) entered into between the DOJ and a host of different corporations also provides ample evidence of government attention to corporate irregularities and fraud.\(^{62}\) Although few prosecutions and regulatory proceedings against corporations go to trial,\(^{63}\) settlement can be onerous. The fines levied against corporations for misconduct corporate defendants alleging a wide range of misconduct arising from the financial cri-

\(^{60}\) See Dervan, supra note 11, at 363, 366 (noting the globalization of internal corporate investigations in the context of corporate relations with the SEC investigations and discussing the challenges faced in conducting internal investigations abroad).


\(^{63}\) See, e.g., U.S. Gov’t Accountability Office, supra note 62, at 2 (describing the debate over deferred and non-prosecution agreements). Although there are many corporate prosecutions, there are very few trials. This is in large part because companies enter into deferred prosecutions or settle via plea negotiations. Three recent prominent trials include United States v. W.R. Grace, United States v. Noreiga (Lindsey Manufacturing Co.), and United States v. Arthur Andersen LLP. Arthur Andersen LLP v. United States, 544 U.S. 696, 698 (2005); United States v. Aguilar, 831 F. Supp. 2d 1180, 1180 (C.D. Cal. 2011); Verdict Form as to Defendant W.R. Grace at 1, United States v. W.R. Grace, No. 05-07-M (D. Mont. May 8, 2009). The W.R. Grace case ended in a verdict of not guilty. See David S. Hilzenrath & Carrie Johnson, W.R. Grace Acquitted in Montana Asbestos Case, 3 Former Officials also Found Not Guilty, May 9, 2009, WASH. POST, at A14. The Lindsey Manufacturing case had the conviction dismissed by the court. See Aguilar, 831 F. Supp. 2d at 1180. Accounting firm Arthur Andersen went to trial and was convicted, but the Supreme Court reversed its conviction. See Arthur Andersen, 544 U.S. at 698.
have reached new levels.64 Following the highly publicized criminal prosecution of Arthur Andersen LLP and the firm’s subsequent collapse, companies fold to government threats of indictment and do virtually anything required to avoid being prosecuted.65 This includes not only paying substantial fines and adopting enhanced corporate compliance programs (including, often, appointing an independent monitor), but also facilitating government investigations and prosecutions of individuals.66

C. Corporate Internal Investigations

Although corporate internal investigations of misconduct are not new,67 the increased focus on corporate criminality has made these investigations a growth industry in the corporate culture.68 Upon no-

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65 See Arthur Andersen, 544 U.S. at 608 (reversing Arthur Andersen LLP’s conviction). Although the accounting firm Arthur Andersen LLP was eventually successful in the U.S. Supreme Court, the collateral consequences of the auditing firm’s indictment had already destroyed the firm through bankruptcy. See Charles D. Weisselberg & Su Li, Big Law’s Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms, 53 Ariz. L. Rev. 1221, 1239 (2011).

66 See Zierdt & Podgor, supra note 61, at 2; see also Weisselberg & Li, supra note 65, at 1243–44 (discussing recent incentives for conducting an internal investigation).

67 See, e.g., 15 Hutton Employees Are Cited, N.Y. Times, Sept. 6, 1985, at D6 (discussing how former U.S. Attorney General Griffin B. Bell cited fifteen employees of E.F. Hutton as a result of evidence gathered in an internal investigation); see also Zierdt & Podgor, supra note 61, at 4.

68 “[W]e have reached a high water mark for government investigations in which the risk of becoming swept up in such an investigation is greater than ever before.” Daniel J. Fetterman & Mark P. Goodman, White Collar Landscape: Regulators, Targets and Priorities, in Defending Corporations and Individuals in Government Investigations, supra note 1, at 1, 30; see Kwan-Gett, supra note 4, at 409 (“Since 2001, over 2,500 public companies
tice of an internal problem, corporate boards can be quick to initiate an investigation to ascertain the corporation’s risk of a prosecution or regulatory proceeding, and, if such risk exists, how to respond. The possibility of shareholder derivative actions or other third-party civil claims looms in the background and complicates both the investigation and the corporation’s response.

There is no fixed definition of a corporate internal investigation, and no specific attributes or set structure. An internal investigation is in essence an effort by a company to learn what has happened within or was done by the corporation. In most instances the scope of this inquiry is decided by the corporation.

Corporations give their lawyers access to corporate records, which become a principal source of information, but unlike government investigators, corporate counsel cannot employ grand juries, subpoenas, or court-authorized searches to gather information from third parties. Their investigation is private, not ancillary to any legal proceeding. Consequently, the other principal source of information is current officers and employees of the corporation, who may cooperate out of consideration for the corporation or as a matter of employment obligation, or decline to do so at the risk of being fired.

The individual who is questioned has no Fifth Amendment right against incrimination or right to counsel: Miranda rights do not ap-

have retained outside counsel to conduct internal investigations into suspected wrongdoing by corporate executives and employees.” (citing Options Scorecard, Wall St. J. (Sept. 4, 2007), http://online.wsj.com/public/resources/documents/info-optionsscore06-full.html (providing examples of internal investigations related to stock-option grants and practices)).

See Campbell & Beaudette, supra note 9, at 1–2.

See Brown, supra note 16, at 18–29 (describing a seminal shareholder derivative suit in which a company’s directors failed to exercise good faith judgments about the company’s information and reporting system). Although there are some risks to a corporation in conducting an internal investigation, there are also huge incentives to move in this direction. See id. at 25–26 (describing the criminal consequences of failing to assure legal compliance).

Cf. id. at 419 (advising companies’ independent committees to set the scope of a special counsel’s investigation); Campbell & Beaudette, supra note 9, at 4 (advising independent committees to set the scope of the investigation). One exception might be when the internal corporate investigation was an outgrowth of a deferred or non-prosecution agreement and is being conducted by an appointed monitor. See U.S. Gov’t Accountability Office, supra note 62, at 3–4 (describing corporate concerns with DOJ-selected monitors, including a lack of transparency in the scope of a monitor’s work).

See Campbell & Beaudette, supra note 9, at 5 (“The committee should clearly communicate that employees who do not cooperate risk termination.”).
ply. The individual also has no due process right not to be coerced or tricked into cooperating. And, as noted by Professor Lisa Kern Griffin, private sector employees do not enjoy immunity during investigations, comparable to what is offered to public employees pursuant to the Supreme Court’s 1967 decision in *Garrity v. New Jersey*, holding that police officers’ statements to the attorney general, elicited under threat of “removal from office,” were coerced statements.

Although the private process of a corporate internal investigation lacks government power, it is not always lacking coercion. Clearly a company may not commit a crime, such as assault, to secure information from its employee. Putting a gun to the employee’s head would not be legally tolerated. But a company does have the ability to fire an individual who fails to comply or participate in the company’s investigation. The individual has no legal protection other than what may be stated in his or her employment agreement or implied in the contractual relationship.

In employment-at-will states this may offer little relief. Additionally, the individual constituent ordinarily owes loyalty to his or her employer and may therefore feel an obligation to participate in the entity’s internal investigation. Although the corporate entity does not have subpoena or grand jury powers, the company’s constituents may nevertheless feel compelled to answer the questions of the attorney conducting the internal investigation.

The corporation and its lawyer essentially have free rein. Any possible judicial scrutiny of this corporate conduct will occur only after the fact, if, for example, the individual is later indicted and challenges the admission of evidence that he or she provided during the internal investigation. The corporation owns the information ob-

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74 See First, supra note 12, at 73. *Miranda* rights apply during a custodial interrogation. See *Miranda*, 384 U.S. at 444 (“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise.”).

75 See *Griffin*, supra note 14, at 366 n.288.

76 See *Garrity*, 493, 494, 500 (1967); *Griffin*, supra note 14, at 353–58.

77 See Ribstein, supra note 33, at 874–75.


79 See *Griffin*, supra note 14, at 337 (implying existing loyalty between the corporation and its employees); McConnell et al., supra note 62, at 556 (noting that employees have an obligation to participate in “internal controls and compliance”).

80 See *Griffin*, supra note 14, at 355, 361 (arguing that because the threat of job loss renders one’s subsequent statements “coerced” in other contexts, the same standard should be applied to corporate internal investigations).

tained during the internal investigation and may exchange it for a favorable disposition from the government. The individual constituent has lost not only the confidentiality of the information but also the opportunity to barter this information with the government, leaving the employee basically powerless.

D. Incentives to Initiate a Corporate Internal Investigation

There are many incentives for corporations to conduct internal investigations. For example, corporations may now need to move more swiftly as new legislation—such as the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and the Sarbanes-Oxley Act of 2002—places added requirements on corporations to timely report misconduct. Other recent statutes similarly require corporations to report misconduct, and an internal investigation may be necessary to assess whether the reporting is mandatory. Leniency programs also can incentivize a corporation to investigate misconduct and self-report. Increased whistle-blowing within entities and external qui tam matters can also serve as a prelude to internal investigations. Companies that enter into deferred and non-prosecution

330 (S.D.N.Y. 2006), aff’d, 541 F.3d 130 (2d Cir. 2008) (holding that a company’s preindictment conduct toward employees should receive judicial scrutiny only after indictment, and suggesting a similar outcome under current DOJ policy)).

85 Cummings, supra note 5, at 681.
86 For example, many environmental statutes have reporting requirements. See, e.g., Oil and Hazardous Substance Liability, 33 U.S.C. § 1321(b)(5) (2006) (amended 2012) (“Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge.”); 42 U.S.C. § 9603 (2006) (“Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility . . . . immediately notify the national response center . . . .”).
88 See Campbell & Beaudette, supra note 9, at 2. The whistleblower provisions of Dodd-Frank likely will increase the need for corporate internal investigations. See Savarese & Miller, supra note 85, at 3.
agreements may find themselves with an internal monitor and an obligation to review corporate conduct under the terms of the monitorship.\textsuperscript{89} The DOJ’s \textit{Principles of Federal Prosecution of Business Organizations}, which guide prosecutors’ discretion in determining whether a corporation will be indicted, take into account “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”\textsuperscript{89} The federal sentencing guidelines also incentivize corporations to “exercise due diligence to prevent and detect criminal conduct,” which often necessitates an internal investigation.\textsuperscript{90} Finally, because of the threat of shareholder lawsuits, internal corporate investigations may be required by corporate boards as a component of combating this litigation.\textsuperscript{91}

The risk of corporate criminal liability places huge pressures on corporations. For attorneys or certain auditors, a criminal charge could lead to the immediate loss of clientele or customers. Arthur Andersen LLP’s successful reversal of its criminal conviction in the Supreme Court proved irrelevant to the company as the collateral effect of the indictment and trial rendered it bankrupt.\textsuperscript{92} Likewise, findings of criminality can result in program exclusion for those involved


\textsuperscript{92} See Campbell & Beaudette, supra note 9, at 3. Courts have noted the importance of having an effective compliance program and have placed civil obligations on boards to maintain adequate compliance programs. See, e.g., McCall v. Scott, 239 F.3d 808, 817 (6th Cir. 2001) (discussing directors’ duty to monitor corporate compliance); \textit{In re Caremark Int’l Inc. Derivative Ling.}, 698 A.2d 959, 967–70 (Del. Ch. 1996); see also Michael Volkov, Caremark, \textit{FCPA and Corporate Governance}, \textit{White Collar Def. & Compliance} (Jul. 11, 2011, 12:59 PM), http://michaelvolkov.blogspot.com/2011/07/caremark-fcpa-and-corporate-governance.html.

\textsuperscript{93} See Podgor, supra note 31, at 78–79.
in the medical field, and defense procurement providers fear government debarment following a criminal conviction.\textsuperscript{94}

Corporate internal investigations are the prelude to forthcoming criminal prosecutions and negotiations with the government.\textsuperscript{95} When a corporation learns of possible wrongdoing, its reaction is typically to commence an internal investigation to ascertain the level and breadth of any misconduct.\textsuperscript{96} Corporations are notified of possible wrongdoing through various sources, including internal whistleblowers, external \textit{qui tam} actions, routine internal compliance measures implemented in response to sentencing incentives,\textsuperscript{97} and judicial acknowledgments that corporate compliance is a necessary component of corporate governance.\textsuperscript{98}

Internal corporate investigations can also accompany a criminal action. When a company is notified by the government of potential criminality, either through receipt of a search warrant or subpoena \textit{duces tecum}, the corporation must assess whether there is truth to the allegations and possibly accumulate the materials for submission to the grand jury.\textsuperscript{99} Corporate investigations may also be a function of a post-indictment or deferred prosecution.\textsuperscript{100} Agreements with the government often provide for monitors to be implanted within the entity to assure corporate compliance.\textsuperscript{101} Internal investigations may occur in this context to assure that the entity abides by the law.

E. \textit{Conducting Corporate Internal Investigations}

Corporate investigations follow no set path. The internal investigation industry basically operates with little oversight as the investiga-


\textsuperscript{95} See Kwan-Gett, \textit{supra} note 4, at 411 (“There is a reasonable likelihood that any major internal investigation will be followed by, or conducted parallel to, an actual (or anticipated) external investigation . . . ”).

\textsuperscript{96} See \textit{id.} at 410.

\textsuperscript{97} See \textit{supra} notes 88–89 and accompanying text.

\textsuperscript{98} See \textit{supra} note 92 and accompanying text; see also Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006) (endorsing the Delaware Court of Chancery’s 1996 decision in \textit{In re Caremark International Inc. Derivative Litigation}, and finding director oversight liability when directors fail to “implement any reporting or information system or controls” or when they implement a system but then fail “to monitor or oversee its operations”).

\textsuperscript{99} See Kwan-Gett, \textit{supra} note 4, at 410.

\textsuperscript{100} See Khanna & Dickinson, \textit{supra} note 89, at 1724–26 (describing the scope of a monitor’s work).

\textsuperscript{101} See \textit{id.} at 1721.
tions are unmonitored and unregulated. The individuals conducting the investigation are often accountants or lawyers, or those working at their direction.\textsuperscript{102} Attorneys and those they contract can provide a better chance of maintaining an attorney-client privilege should the government seek to gather information acquired during the internal investigation.\textsuperscript{103}

Practitioner’s literature provides significant advice to those conducting internal investigations.\textsuperscript{104} This literature addresses who should conduct the internal investigation,\textsuperscript{105} what should be investigated, when the internal investigation should occur,\textsuperscript{106} where it should take place, how it should be conducted,\textsuperscript{107} and why this should occur. For example, some writings advise counsel to quickly determine whether his or her client is a target, subject, or witness of the investigation.\textsuperscript{108} The literature discusses the process of determining who will conduct the investigation, recognizing that outside counsel provides greater objectivity but inside counsel will have greater familiarity with the internal workings of the company.\textsuperscript{109} Decisions are often made through the company’s independent audit committee.\textsuperscript{110} Practitioner literature offers advice on how to conduct the investigation and how to collect documents for review.\textsuperscript{111}

\textsuperscript{102} Kwen-Gett, supra note 4, at 409 (“Since 2001, over 2,500 public companies have retained outside counsel to conduct internal investigations into suspected wrong-doing by corporate executives and employees.”).

\textsuperscript{103} See Dervan, supra note 11, at 367–68.

\textsuperscript{104} See generally Gary R. Brown, Law School Didn’t Prepare You For This, Tips for the Internal Investigation, ACC Docket, May 2010, at 58 (advising in-house counsel on conducting internal investigations, including staffing, research, interviews, and credibility assessments); Ernest E. Badway et al., A Primer on Government and Internal Investigations (2011), http://www.foxrothschild.com/newspubs/newspubsArticle.aspx?id=4294970249 (giving an overview of white collar criminal investigations, the decisions businesses face when under investigation, and the factors businesses should consider in those decisions); Campbell & Beaudette, supra note 9 (describing when and how corporate management should conduct an investigation).

\textsuperscript{105} See J. Justin Johnston, Corporate Investigations After the Mortgage Meltdown, J. Mo. B., March-April 2009, at 70, 73.

\textsuperscript{106} See William M. Hannay, Designing an Effective FCPA and Anti-Bribery Compliance Program §§ 4:2, 4:5 (2011).


\textsuperscript{108} Badway et al., supra note 104, at 4.

\textsuperscript{109} See, e.g., Campbell & Beaudette, supra note 9, at 4.

\textsuperscript{110} See id.

\textsuperscript{111} See Seide, supra note 107, at 229–36 (discussing how to establish an investigative plan).
Of particular significance is literature that recognizes the importance of interviews of employees, and the importance of preserving the attorney-client privilege while also advising interviewees that the attorney represents the corporation.\textsuperscript{112} Much has been written about the warnings that should be given to employees of an entity when being questioned by corporate or external counsel conducting an internal investigation.\textsuperscript{113}

II. VARYING APPROACHES OF INTERNAL INVESTIGATIONS

The corporation’s posture during internal investigations is not fixed. The corporate-constituent role can be set when the investigation first commences, or the relationship may change over time. Clearly, a company that learns that its employee was embezzling will take a position that is not aligned with the employee. Less certain is the corporation’s posture when an internal investigation is triggered by an anonymous message left on a hotline for reporting internal misconduct.

Two approaches are described here—one in which the company is aligned with the individual, and another when the company decides not to protect the individual. Section A presents the first approach: the model used in considering the role of the attorney-client privilege in the 1981 U.S. Supreme Court case of \textit{Upjohn Co. v. United States}, which extended attorney-client privilege to specific communications between corporate employees and corporate counsel.\textsuperscript{114} Section B describes the second approach: the reality of a modern-day internal investigation in which the government is an integral force in the entity’s decision-making.\textsuperscript{115}

\textsuperscript{112} See Gregory A. Markel & Jason M. Halper, \textit{Internal Investigations}, in 1 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 5:47 (Robert L. Haig ed., 3d ed. 2011) (discussing the giving of \textit{Upjohn} warnings); see also \textsuperscript{infra} notes 220–221 and accompanying text (discussing \textit{Upjohn} warnings).

\textsuperscript{113} See, e.g., Heyman, \textit{supra} note 29, at 203–08 (describing the consequences of existing and proposed warnings). Some of the literature has even gone so far as to rename these warnings “Adnarim warnings,”—\textit{Miranda} spelled backward—to highlight the correlation, and lack thereof, to \textit{Miranda} warnings. See Heyman, \textit{supra} note 29, at 204 & n.223 (quoting proposed, broader warnings); Robert G. Morillo & Robert J. Anello, \textit{Beyond ‘Upjohn’: Necessary Warnings in Internal Investigations}, N.Y. L.J., Oct. 4, 2005, at 3, 3 (discussing the problems inherent for lawyers in conducting internal investigations).

\textsuperscript{114} 449 U.S. 383, 394–95 (1981) (protecting, under attorney-client privilege, communications from employees to corporate counsel when the communications were made at the behest of the employees’ superiors and concerning matters within the scope of their employment); see \textsuperscript{infra} notes 118–142 and accompanying text.

\textsuperscript{115} See \textsuperscript{infra} notes 143–186 and accompanying text.
Irrespective of the approach taken, courts and ethics rules favor the entity when issues arise, as discussed in Section C.\textsuperscript{116} When an individual constituent seeks to protect him- or herself in a criminal proceeding and tries to preclude the government from using evidence he or she provided during a corporate internal investigation, courts have typically held that the attorney-client privilege is controlled by the corporation, which may waive the privilege and disclose the constituent’s statements to counsel, to the constituent’s detriment.\textsuperscript{117}

\section*{A. Corporate-Individual Alignment}

One approach to corporate internal investigations assumes a symbiotic relationship between the corporation and its individual employees. In general, the company and its employees are on the same team; they are looking out for each other. Although indictment may follow for rogue employees and executives, the company’s internal investigation is designed strictly for its internal review. If the corporation later reports its findings to the government, it does so as a good corporate citizen when criminality is unexpectedly discovered through this internal review, and not because the corporation all along had an incentive to obtain evidence as a bargaining chip.

The corporate internal investigation in this model is strictly “internal.” It is intended to enable the company’s counsel to give informed advice or other legal assistance and is conducted in secret with an expectation that confidentiality will be maintained long term. Employees provide information to the company’s lawyers, not because they are coerced or tricked into doing so, but because they identify with the company’s interest in obtaining legal assistance and understand that this is consistent with their own interest as employees. Thus, the relationship is cooperative. Although the internal investigation may have been instigated by a government investigation, subpoena, or notice, the federal government is neither an intended beneficiary of the investigation nor a direct or indirect participant in it.

The investigation may be conducted by in-house counsel or outside counsel, and it may be initiated by corporate counsel, the board of directors, or an audit committee.\textsuperscript{118} Investigating counsel may go to

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\textsuperscript{116} See infra notes 187–203 and accompanying text.
\textsuperscript{117} See infra notes 187–203 and accompanying text.
\textsuperscript{118} Brown, supra note 104, at 60; Badway et al., supra note 104, at 6. This acknowledgment that inside counsel may at times conduct the investigation should in no way be interpreted as an acceptance of having this counsel as the primary party overseeing the investigation. The use of internal counsel can present unique problems if the investigation...
enormous lengths to ensure that confidentiality is maintained. This can include stamping all investigative materials “attorney-client privileged” and “work product,” maintaining a separate filing depository, making certain that recorded statements contain opinions, and being careful not to allow for any voluntary disclosure of materials outside the investigating group.\textsuperscript{119} If the government decides to intercede to obtain reports, documents, or statements from the corporate investigation, the corporation is quick to assert its privilege and to advocate that it should be allowed to maintain the confidentiality of this corporate internal investigation.

Because the company and individual employees are aligned, individuals can cooperate in this investigation and not fear that their statements will be relayed to the federal government in order for the company to receive an advantage. Obviously, those with direct criminal exposure may be fearful to cooperate in the investigation, as the corporation remains free to relay criminal evidence to the government in order for the government to prosecute rogue employees. So too, the entity may pressure uncooperative individuals, invoking its power to fire an individual who fails to provide answers to its investigators. But the starting point for this investigation has the corporation and individual on the same page. If the company is in fact a “friend,” proceeding in this manner does not place the individual at unfair risk.

The Supreme Court’s decision in \textit{Upjohn} is the classic illustration of this paradigm.\textsuperscript{120} \textit{Upjohn} involved an internal investigation by a pharmaceutical company that had received word from independent accountants of possible improper payments to “foreign government officials in order to secure government business.”\textsuperscript{121} The company took the initiative to investigate this alleged wrongdoing by sending a questionnaire to key employees “for the purpose of determining the

\footnotesize{escalates to a level that includes government involvement. See Kwan-Gett, \textit{supra} note 4, at 417. That said, it is also important to recognize the realities of these investigations and the fact that when the initial determination is made to conduct an investigation, there may be little evidence of a significant problem that warrants the necessity to invest in the cost of outside attorneys. \textit{Cf. id.} at 410 (“[I]nvestigations are thus meant to determine the validity and seriousness of the circumstances alleged or disclosed . . . .”).}

\footnotesize{\textsuperscript{119} See Philip R. Sellinger, \textit{Preserving the Attorney-Client and Work-Product Privileges While Conducting Internal Corporate Investigations}, ABA \textit{Seminar on White Collar Crime} (1989), \textit{as reprinted in Israel et al., supra} note 94, at 606 (West Publ’g Co. 1996) (listing the different ways counsel can be used in a corporate investigation to ensure that privilege is maintained).}

\footnotesize{\textsuperscript{120} See 449 U.S. at 387–88 (describing how the Upjohn Company refused to produce notes of interviews with employees or questionnaires despite an IRS subpoena).}

\footnotesize{\textsuperscript{121} \textit{Id.} at 386–87.
nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government. Managers were instructed of the “highly confidential” nature of this investigation. Interviews were also conducted by counsel.

Upjohn thereafter submitted disclosures of the questionable payments on reports to the SEC and IRS, which provoked a government investigation to determine tax consequences owing from the company. The IRS issued a summons seeking the files of Upjohn Company’s general counsel regarding the alleged payments, and the agency also sought the questionnaires and written notes of counsel from the interviews conducted.

Upjohn declined to produce the requested items, citing attorney-client privilege and work-product protections. Court proceedings followed, instigated by the IRS’s petition seeking enforcement of the summons for production of these materials. The case eventually reached the U.S. Court of Appeals for the Sixth Circuit, where the court ruled that a “control group test” should be employed to determine the scope of the attorney-client privilege. Limiting the privilege to a “control group” promoted “consultation with counsel” among those individuals in the company who were the decisionmakers.

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122 Id. The investigation was conducted by Upjohn’s general counsel, who consulted with both outside counsel and the chair of Upjohn’s board of directors. Id. at 386. Upjohn’s general counsel also served as Upjohn’s vice president and secretary. Id.
123 Id. at 387.
124 Id. The general counsel for Upjohn, along with outside counsel, “interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.” Id.
125 Id.
126 Upjohn, 449 U.S. at 387–88. The IRS summons, issued pursuant to federal statute, included the following request, which served as the crux of the issue in the case: “The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company’s foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.” Id. at 387–88.
127 Id. at 388.
128 Id. The U.S. District Court for the Western District of Michigan followed a magistrate’s recommendation that the summons be enforced. Id.
130 Upjohn, 600 F.2d at 1227.
The Supreme Court viewed the privilege more broadly, concluding that both the corporation’s privilege and work-product protection extended to the lawyers’ communications with employees. The Court was quick to preface its opinion with a statement that it was not providing “a broad rule or series of rules to govern all conceivable future questions in this area,” but it did reject the lower court’s use of a “control group” test.

The Court’s ruling was premised on the importance of the attorney-client privilege in “encourag[ing] full and frank communication between attorneys and their clients.” It noted that the “control group” test “frustrates 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 Court reasoned that “the 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.”135 In *Upjohn*, the employees were acting “at the direction of corporate superiors in order to secure legal advice from counsel” for the corporation.136

Privileges are narrowly construed because they denigrate the public interest in disclosure of relevant information in legal proceedings.137 They are extended only to contexts in which they are presumed necessary to facilitate communications with counsel.138 The *Upjohn* Court’s presumption was that, absent protection of the privilege, corporate lawyers would not receive candid disclosures from corporate employees, which are necessary for the lawyers to advise and assist their corporate clients.139 But why not? Companies can require their employees to speak and can threaten to fire them if they do not. Presumably, the *Upjohn* Court believed that what would motivate employees to speak freely was not coercion but their identification with the company’s interests and, conversely, absent a promise of legal protection, that they would withhold information out of concern for their own or the company’s shared interests.

Whether identifying with the corporation’s ends or perceiving that it would not be in the corporation’s best interest to receive the information without the guarantee of confidentiality afforded by the privilege, employees believe that their company will not disclose their

the work-product doctrine covered additional materials. *Id.*, The Court used its holdings in *Hickman v. Taylor* and *United States v. Nobles* in discussing the policy rationales behind the work-product doctrine. *United States v. Nobles*, 422 U.S. 225, 236–40 (1975) (emphasizing the “strong public policy” of the work-product doctrine); *Hickman v. Taylor*, 329 U.S. 495, 497–98, 509–12 (1947) (creating and justifying the “work product” doctrine). The Court also looked at Rule 26 of the Federal Rules of Civil Procedure, remanding this aspect of the case to the lower court noting that “such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.” *Upjohn*, 449 U.S. at 400–02. The Court stated that the Magistrate had applied the “substantial need” and “without undue hardship” standard, and that “a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure.” *Id.* at 401–02.

135 *Upjohn*, 449 U.S. at 390.
136 *Id.* at 394.
137 See *Giesel*, supra note 32, at 127 (noting that privilege acts to obstruct truth-finding).
138 See *id.* at 127 & n.73 (“[C]ourts have strictly confined [the privilege] within the narrowest possible limits consistent with the logic of its principle.” (internal quotation marks omitted)).
139 See *Upjohn*, 449 U.S. at 389, 395 (extending privilege protection to employee-counsel communications “to encourage full and frank communication”).
communications to third parties unless it is in the shared interest of the company and the individual to do so.140 Unlike third parties, whose communications with corporate counsel conducting the internal investigation are not privileged, employees’ communications would be covered, as this provides an incentive to be forthcoming, which is something that is beneficial to both the individual and the company.

Underlying the theory and doctrine in *Upjohn* is a practical assumption that the company is aligned with the individual employees against the government.141 Otherwise, the privilege would mean nothing to corporate employees and the corporation’s privilege would not have to protect employees’ communications with corporate counsel.142 The corporation fights to keep the government from obtaining information which it gathered for the corporation’s internal use. There is no *direct or indirect* participation by the government in corporate counsel’s efforts.

**B. Corporate-Individual Discord**

At the opposite end of the spectrum, is the corporate internal investigation that situates the government as an *indirect* participant in, or intended beneficiary of, the corporate internal investigation, rendering the corporation’s interests adverse to those of its individual employees. Although the internal investigation starts out confidential, its work product is meant to be disclosed to the government, which will use the information against the corporate employees and treat

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140 See Heyman, *supra* note 29, at 197 (“[E]mployees often have a false sense of security that their communications will be kept confidential under the protections of the attorney-client privilege and work-product doctrine.”).

141 See *Upjohn*, 449 U.S. at 389, 392, 395. Many cases have examined the attorney-client privilege and work-product doctrine in the corporate context. See, e.g., *In re Grand Jury Subpoenas Dated March 19, 2002 & August 2, 2002*, 318 F.3d 379, 383–87 (2d Cir. 2002) (discussing pre-existing third party documents held by corporate counsel); *In re Allen*, 106 F.3d 582, 605–06 (4th Cir. 1997) (holding that a former employee’s communications with entity counsel were covered under attorney-client privilege); *In re Six Grand Jury Witnesses*, 979 F.2d 939, 943–44 (2d Cir. 1992) (discussing the scope of the attorney-client and work-product privileges). Many cases also arise in the context of who has the authority to waive the privilege and voluntary disclosures. See, e.g., *In re Grand Jury Proceedings*, 219 F.3d 175, 179 (2d Cir. 2000) (holding that a corporate officer can impliedly waive attorney-client privilege and work-product doctrine when testifying before a grand jury even when the corporation has explicitly refused to waive); United States v. Mass. Inst. of Tech., 129 F.3d 681, 684–86 (1st Cir. 1997) (discussing the effects of voluntary disclosures).

142 The emphasis for counsel was on how best to protect attorney-client privilege and work-product doctrine. See Sellinger, *supra* note 119, at 606–09 (listing the different ways counsel can assure that privilege is maintained).
the corporation leniently in exchange. In other words, like a government investigation, the object of the internal investigation is evidence gathering, not the facilitation of legal assistance. A central fact of this paradigm is that however the corporation might pretend to talk to its employees, the corporation is in fact the employees’ foe.

In this approach, an alliance with its employees is not essential to the corporation’s ability to obtain their cooperation. Corporations can fire individuals who fail to cooperate with an internal investigation. Likewise, companies can offer perquisites to those who do provide information. The scope of the investigation and what is said to those being investigated places corporations in a superior position to individuals who have no constitutional rights in this corporate investigatory process, allowing the entity to exploit employees for its own benefit.

In large part, the federal government’s power to indict the corporation places the company in an adverse position to its employees and executives. The corporate entity has no choice but to be aligned with the government if it desires a beneficial resolution of any alleged criminal activity. Even when no criminal activity is involved, entering into a cooperation agreement avoids the risks of going to trial, possibly encouraging a flood of shareholder lawsuits, and bankruptcy. Because most internal investigations are not within the court’s view, there is no body to offer relief to an executive or employee placed in the disadvantageous position of being asked to provide information to the investigating counsel—information that may later be used against the individual.

The problem, though, is that employees may be unaware of counsel’s desire to secure information that will benefit the company at the employees’ expense. This sometimes becomes an issue in litigation over the admissibility of the individual’s statements to corporate counsel after the corporation has waived the privilege and provided the evidence to the government. In this context, individuals

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143 See Campbell & Beaudette, supra note 9, at 5.
144 See Gregory M. Gilchrist, The Expressive Cost of Corporate Immunity, forthcoming 64 Hastings L.J. (forthcoming 2012) (manuscript at 8).
145 See Giesel, supra note 32, at 164–65 (suggesting that in case after case, counsel fails to correct employees’ misunderstandings because the omission permits corporate counsel to gain more useful information); see Heyman, supra note 29, at 203.
146 See Jonathan N. Rosen, In-House Counsel and the Government’s War on Corporate Fraud, Crim. Just., Fall 2010, at 5, 6 (discussing a district court that granted an employee’s motion to dismiss on the grounds that corporate counsel was also the employee’s personal counsel).
sometimes claim that they were implicitly represented together with the corporation and that they can therefore personally assert the privilege. It may then become significant whether counsel complied with the ethics rules and recommended practices. Typically, the corporation’s lawyers caution employees that they represent the company only and that the company has the exclusive authority to assert or waive its privilege with respect to the employees’ statements to counsel. Sometimes, however, counsel does not make his or her role clear. The individual employee may have previously dealt with corporate counsel and assume that counsel continues to serve as his or her attorney. The corporation’s lawyer may deliberately exploit this misunderstanding because emphasizing that counsel represents the entity may discourage the individual from cooperating.

Unfortunately for the individual employee seeking the benefit of a personal attorney-client privilege, the applicable case law tends to favor the corporation and the government. Jurisdictions often follow the Bevill test, established by the U.S. Court of Appeals for the Third Circuit in the 1986 case, In re Bevill, Bresler & Schulman Asset Management Corp. The Bevill test places on the individual asserting a privilege with the corporation’s counsel the onus to prove the following five factors:

First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with

\[147\] See Giesel, supra note 32, at 113 n.8 (noting a case in which an employee claimed that corporate counsel represented the employee personally).

\[148\] See Rosen, supra note 146, at 6 (describing the affirmation of a district court’s finding of corporate counsel’s professional misconduct because the employee thought counsel represented him personally); infra notes 199–204 and accompanying text (describing attorney ethics rules).

\[149\] See Griffin, supra note 14, at 337.

\[150\] See Cummings, supra note 5, at 681 (describing how corporate counsel give “watered-down” warnings that leave employees with the mistaken belief that counsel represents them in addition to the corporation).

\[151\] 805 F.2d 120, 123–25 (3d Cir. 1986).
[counsel] did not concern matters within the company or the general affairs of the company.\(^{152}\)

The premise of the *Bevill* test is that corporations are ordinarily adverse to their employees, that employees understand that adversity, and that, therefore, employees will not regard the corporation’s lawyer as their own except in the most limited circumstances. This test places a near-insurmountable burden on the individual employee seeking to show that he or she is entitled to assert attorney-client privilege.\(^{153}\)

Once the internal investigation concludes, the company may turn over its work product and the government may proceed against individuals, at which point there may be opportunities for judicial oversight and regulation. The government may be restrained in its ability to use the company essentially as its investigative or prosecutive agent.\(^{154}\)

\(^{152}\) *Bevill*, 805 F.2d at 123–25 (alterations in original) (citing *In re Grand Jury Investigation*, 575 F. Supp. 777, 780 (N.D. Ga. 1983)) (approving implicitly how the district court placed the burden on the employee to establish five factors to assert personal attorney-client privilege over communications with corporate counsel); see also United States v. Norris, 722 F. Supp. 2d 632, 639–40 (E.D. Pa. 2010) (noting that “the burden of demonstrating that a privileged relationship exists nonetheless rests on the party who seeks to assert it”) (citing United States v. Costanzo, 625 F.2d 465, 468 (3d Cir. 1980)).

\(^{153}\) Some circuits may still examine the individual’s perception of whether an attorney-client privilege existed. See *Cummins*, supra note 5, at 676–77 (2007) (discussing circuits that favor the individual). A rare occasion might allow for individual consideration under *Bevill*. For example, one court stated that

if the communication between a corporate officer and corporate counsel specifically focuses upon the individual officer’s personal rights and liabilities, then the fifth prong of *In Matter of Bevill* can be satisfied even though the general subject matter of the conversation pertains to matters within the general affairs of the company.

*In re Grand Jury Proceedings*, 156 F.3d 1038, 1041 (10th Cir. 1998) (holding that the individual could not meet the test of showing that the matter related to the individual’s personal rights).

\(^{154}\) For example, in the 2008 case *United States v. Stein*, the U.S. Court of Appeals for the Second Circuit held that KPMG’s policy of conditioning and capping its employees’ legal fees infringed on those employees’ right to counsel because of the government’s influence in setting KPMG’s policy. 541 F.3d 130, 136 (2d. Cir. 2008). The court rejected the government’s argument that KPMG’s past fee practices for those facing indictment was voluntary, finding that the district court had determined “that absent any state action, KPMG would have paid defendants’ legal fees and expenses without regard to cost.” *Id.* at 156. In *Stein*, the court examined government actions that resulted in accounting firm KPMG not paying the attorney’s fees of thirteen former partners, employees, and one executive of the company who faced indictment. *Id.* at 135. The court found that “KPMG’s adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government’s over-
United States v. Norris, an unpublished 2011 Third Circuit decision affirming an employee’s conviction for conspiracy to obstruct justice, illustrates the risk of unfairness at the unregulated internal investigation stage. Ian P. Norris, a foreign national, served as the Chief Executive Officer (CEO) of Morgan Crucible Company (“Morgan”), a United Kingdom corporation. Norris was indicted in the U.S. District Court for the Eastern District of Pennsylvania following an antitrust investigation. He was subsequently extradited to the United States, tried, and convicted for conspiracy to obstruct justice. The government, in a press release following sentencing, said “that Norris orchestrated an elaborate conspiracy with his subordinates to obstruct the grand jury’s investigation by creating a false script that employees of both Morgan and its competitor were to fol-

whelming influence.” Id. at 136. The court used the Memorandum of Deputy Attorney General Larry Thompson (“Thompson Memo”) as part of its basis for finding government interference with the defendants’ right to counsel. Id. at 136, 142–44. The post-investigative restraint in Stein contrasts with the essentially unregulated nature of corporate internal investigations. In Stein, a court was able to intercede and provide relief to the corporate constituents because the case had passed the internal corporate investigation stage. See id. at 139 (describing how the employees were indicted after the company signed a deferred prosecution agreement and implying that most employee-defendants had not made proffer statements or pled guilty). Absent court oversight, one has to wonder if the defendants would have received paid counsel. It can be argued that the right to counsel does not accrue until criminal charges have been filed, and therefore there is no right during an investigatory stage. See Susan R. Martyn, Accidental Clients, 33 Hofstra L. Rev. 913, 916–17 (2005) (noting that the right to counsel attaches when a person is accused of a crime). Professor Lisa Kern Griffin has discussed a possible extension of Garrity immunity for employees interviewed by internal investigators pursuant to pending deferred prosecution agreements. Griffin, supra note 14, at 353–58; see Garrity v. New Jersey, 385 U.S. 493, 494, 500 (1967). This contrast with internal corporate investigations suggests the need for better oversight during internal investigations.

155 419 F. App’x 190, 195 (3d Cir. 2011).
156 Id. at 191–92; United States v. Norris, 719 F. Supp. 2d 557, 560 (E.D. Pa. 2010) (noting that Norris is a citizen of the United Kingdom), aff’d, 419 F. App’x 190 (3d Cir. 2011).
158 Id. at 192. Norris was convicted of violating the conspiracy statute, 18 U.S.C. § 371, by conspiring to violate 18 U.S.C. § 1512(b)(1) and § 1512(b)(2)(B). Interestingly, he was acquitted of the actual substantive counts that served as the underlying conduct of the conspiracy. Id. He was sentenced to eighteen months imprisonment and was fined $25,000. Id.
low when questioned during the investigation.”159 Norris’s appeal did not provide him relief; he was left to pay the fine and serve the eighteen-month prison sentence.160

For purposes of this discussion, it is important to focus on an unsuccessful pre-trial, trial, and appellate argument raised by Norris concerning the court’s permitting counsel who conducted the internal investigation to testify against Norris at his trial.161 This argument sheds light on the workings of the internal corporate investigation and the clash between corporate individuals and the company.

Upon receipt of a subpoena from the government, the company (Morgan) retained counsel to handle its response to the subpoena and to conduct an internal investigation.162 One partner in this outside firm, considered the “relationship partner,” assigned the matter to another partner to handle the response for the grand jury.163 For over a two year period, this latter attorney served as the main internal corporate investigator and as the company’s connection to the DOJ Antitrust Division.164 As internal investigator, this attorney requested that Morgan executives provide documents for his review.165 He also interviewed key executives in the United Kingdom.166 During his investigation, the attorney found that subordinates of the defendant, Norris, had created “non-contemporaneous meeting summaries (‘scripts’)” of the meetings between representatives of Morgan and representatives of its competitors, and that these “scripts” were being

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160 Norris, 419 F. App’x at 191–92. The Third Circuit rejected Norris’s arguments that the evidence was insufficient to show that he “corruptly persuaded others with intent to influence their grand jury testimony,” that the jury had been improperly instructed on an element of one specific offense of obstruction, and that the trial court had erred by “failing to identify for the jury the overt acts alleged in the indictment.” Id. at 193–95. The court also rejected Norris’s argument that it was improper for counsel to testify at trial. Id. at 195. The U.S. Supreme Court denied certiorari on October 3, 2011. United States v. Norris, 132 S. Ct. 250 (2011)(denying certiorari).

161 See Norris, 722 F. Supp. 2d at 639–40 (finding that corporate counsel did not represent Norris individually); see also Norris, 419 F. App’x at 195 (affirming the district court’s denial of privilege).

162 Norris, 722 F. Supp. 2d at 634.

163 Id. at 635.

164 Id. at 634–35.

165 Id. Specifically, the attorney requested that Morgan’s executives “[p]rovide any documents (located in the U.S. and abroad) describing or referring to any meeting or other communication between (i) any of the relevant individuals and (ii) representatives of any competitor in the relevant business area.” Id.

166 Id.
used by employees in answering the attorney’s questions.\textsuperscript{167} The attorney eventually turned these “scripts” over to the Antitrust Division.\textsuperscript{168}

As one might surmise, the “scripts” became a component of the government’s case against Norris for conspiracy to obstruct justice.\textsuperscript{169} The trial court was then faced with the question of whether the investigating attorney could testify against Norris.\textsuperscript{170} The backdrop of this issue concerned whether the internal investigating attorney represented Norris, the employee, in addition to Morgan, the company.\textsuperscript{171} Norris presented strong evidence confirming his belief that counsel served concurrently as his personal attorney.\textsuperscript{172} This evidence included the fact that the attorney was at Norris’s side when he was interviewed by Canadian antitrust authorities\textsuperscript{173} and that the attorney’s law firm “provided Norris with a letter identifying the Law Firm as Norris’ counsel in case he encountered difficulties with immigration officials.”\textsuperscript{174} Additionally, the relationship partner—that is, the original attorney assigning the case to the investigating attorney—testified that

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\textsuperscript{167} Id.
\textsuperscript{168} Norris, 722 F. Supp. 2d at 636. The attorney negotiated “an agreement with the Antitrust Division that by providing certain documents, including the scripts (the ‘selected documents’), Morgan would not waive its right not to produce other foreign-based documents.” Id. at 635. There is conflicting evidence on whether the attorney had permission from Morgan’s executives to submit these documents to the government. Id. at 636.
\textsuperscript{169} Norris, 419 F. App’x at 193.
\textsuperscript{170} Id. at 192.
\textsuperscript{171} See Norris, 722 F. Supp. 2d at 634.
\textsuperscript{172} Id. at 636–37.
\textsuperscript{173} Id. at 636. The attorney was also at Norris’s side during a regulatory proceeding before the Federal Trade Commission. Id. at 637.
\textsuperscript{174} Id. at 637. This letter was marked “Privileged and Confidential Communication From Counsel,” and instructed Norris to contact his lawyer if he ran into problems with the Immigration and Naturalization Service when flying into the United States. Joint Appendix at 407–08, Norris, 419 F. App’x 190 (No. 10-4658) (letter of Oct. 29, 1999 to Ian Norris from Winthrop, Stimson, Putnam & Roberts). The letter stated, “Give us a call, and we’ll handle it from there.” Id. at 407. It also stated “your lawyers are” and then provided the names of the individual lawyers within the firm. Id. at 408. The letter included the lawyers’ telephone, cellular, home, and in one case a pager number for Norris were he to encounter problems at the border. Id. at 408. Additionally, Norris had letters addressed “To Whom it May Concern” for the INS, FBI, and DOJ. Id. at 409–10 (letter of Nov. 1, 1999 to whom it may concern from Winthrop, Stimson, Putnam & Roberts); id. at 411 (letter of Nov. 1, 1999 to whom it may concern from Winthrop, Stimson, Putnam & Roberts). These letters explicitly stated that Norris wished to remain silent and that federal agents were “prohibited by law from interrogating him at this time.” Id. at 409–11. One letter also stated, “[w]e also hereby advise and represent to you that our client has authorized us to accept service on his behalf of any grand jury subpoena addressed to him.” Id. at 409–10.
he “understood the Law Firm also represented Norris personally.”\textsuperscript{175} Contrary evidence was presented by the internal investigating attorney, who “told Norris that he represented the company (Morgan) and did not represent Norris personally.”\textsuperscript{176}

Interestingly, the government recognized this ambiguity and explicitly asked the law firm to specify by name the individuals it represented,\textsuperscript{177} to which the firm responded, “this [Law Firm] represents the parent company, its affiliates and its current employees.”\textsuperscript{178} Despite this evidence, the trial court found that Norris had not asked the attorney to represent him personally and had never discussed personal legal matters with him.\textsuperscript{179} Therefore, the court held that the attorney could testify against Norris at his trial.\textsuperscript{180}

The trial court used the well-accepted \textit{Bevill} test\textsuperscript{181} and placed the onus on Norris to prove its five factors.\textsuperscript{182} Finding that Norris’s proof was deficient, the court ruled that Norris could not claim an attorney-client privilege.\textsuperscript{183} The Third Circuit upheld this decision, holding that the district court was the fact finder and that it “did not legally err in applying this test.”\textsuperscript{184}

Whether or not Norris reasonably believed that the company’s lawyers also represented him personally, he certainly reasonably be-

\begin{itemize}
\item \textsuperscript{175} Norris, 722 F. Supp. 2d at 635, 637.
\item \textsuperscript{176} Id. The internal investigating attorney also testified at a preliminary hearing that “[a]t no time did Norris ask [the corporate attorney] to represent him personally.” \textit{Id.}
\item \textsuperscript{177} Joint Appendix, supra note 174, at 3416–17 (letter of July 30, 2001 from Lucy P. Mcclain, DOJ, to Sutton Keany of Pillsbury Winthrop LLP).
\item \textsuperscript{178} Norris, 722 F. Supp. 2d at 636. An internal email supported the firm’s answer to the government attorney. \textit{Id.} It stated that the firm represented Morgan’s current employees, “including but not limited to, Mike and Bruce.” \textit{Id.} A follow-up letter to the government stated in part:

[T]his [Law Firm] represents Morganite Industries, Inc. and its parent company, The Morgan Crucible Company plc, in connection with matters related to the investigation which you are conducting on behalf of the Division. We presumptively also represent all current employees of the companies in connection with the matter. Only Messrs. Cox and Muller were at one time identified as individuals that you would like to have appear before the grand jury; when that occurred, we acted on their behalf. We continue to do so. Should you wish to call other current employees, I assume that we would also represent those individuals.

\textit{Id.}
\item \textsuperscript{179} Id. at 637.
\item \textsuperscript{180} Id. at 639–40.
\item \textsuperscript{181} See \textit{supra} notes 151–153 and accompanying text.
\item \textsuperscript{182} Norris, 722 F. Supp. 2d at 638.
\item \textsuperscript{183} Id. at 639–40.
\item \textsuperscript{184} Norris, 419 F. App’x at 193–95.
\end{itemize}
ieved that his interests were aligned with those of the company. Indeed, the two-year time span of this corporate internal investigation, the fact that the internal investigators were not immediately supplying documents to the government and were preserving the corporate privilege, and the fact that they accompanied Norris to regulatory hearings and provided him with legal documentation asserting a representative capacity all indicate that the company and Norris were not initially taking opposite positions.

One has to wonder whether Norris would have supplied the company investigators with the script if he thought his interests were not aligned with the company. The evidence provided to the government by Morgan, the company, proved detrimental to Norris. Morgan, however, may have been able to use the evidence as leverage to obtain a favorable plea agreement for the company with the government at Norris’s expense. The plea agreement certainly reflects the corporate advantage given its cooperation with the government.

C. How Law and Ethics Favor Corporate Superiority

1. Legal Theory Favoring the Entity

Although the Norris case has its idiosyncrasies, the legal theory presented in this case with respect to attorney-client privilege in the corporate sphere is not unique. In several recent cases in which a corporate internal investigation has provided the government a clear basis for a prosecution of executives and employees, those individual employees and executives have argued that the attorney conducting

186 Morgan Crucible Company pleaded guilty in 2002 to tampering with witnesses and destroying documents and paid a fine of one million dollars. See Press Release, Department of Justice, Former CEO of the Morgan Crucible Co. Found Guilty of Conspiracy to Obstruct Justice (July 27, 2010), http://www.justice.gov/atr/public/press_releases/2010/260826.htm. Morganite Inc. pleaded guilty to fixing prices, paying a ten million dollar fine. Id. The plea agreement outlines the company’s agreement for cooperation, although it explicitly excludes Norris and three others from being required to cooperate with the government as part of this agreement. See Plea Agreement at 12–17, United States v. Morganite, Inc., No. 02-733 (E.D. Pa. Nov. 4, 2002).
the investigation was serving as the individual’s own counsel.\textsuperscript{188} Courts, however, adhere to the principle that “corporate officers and directors may not claim a privilege for communications made to counsel in their corporate capacities,”\textsuperscript{189} favoring the position that counsel represents the corporation and not the individuals who provided counsel with evidence as part of an internal investigation. Individuals do not appear to make the alternative argument that, although the lawyers may have represented the company exclusively, there was an implied understanding that the company would not disclose the individual’s statements to the government without the individual’s agreement, or that the employment relationship otherwise required the company to consider the individual’s interests in deciding whether to waive privilege.

Courts routinely reference the \textit{Bevill} decision in holding that the entity has the power to control the release of the privilege between the entity and the corporate constituent.\textsuperscript{190} Individual employees, thus, are faced with the impossible task of proving that counsel represented them individually.

For example, the statements of three former employees of AOL Time Warner, who had been interviewed by general and retained counsel, were found not to be privileged.\textsuperscript{191} This was despite the fact that the individuals believed “that the information [they] disclosed to the investigating attorneys was privileged under the common interest doctrine.”\textsuperscript{192} The U.S. Court of Appeals for the Fourth Circuit placed

\begin{footnotes}
\item[188] See, e.g., United States v. Graf, 610 F.3d 1148, 1157 (9th Cir. 2010) (finding that a corporate investigating attorney represented the company, and had no individual attorney-client relationship with the company’s employees); \textit{In re Grand Jury Subpoena: Under Seal}, 415 F.3d 333, 335 (4th Cir. 2005) (denying motions to quash grand jury subpoenas for items claimed by AOL Time Warner employees to be attorney-client privileged materials from an internal investigation). \textit{See generally} Paul B. Murphy & Lucian E. Dervan, \textit{Attorney-Client Privilege and Employee Interviews in Internal Investigations, White-Collar Crime Rep.}, Aug. 2006 (discussing the attorney-client privilege in internal investigations); Rosen, supra note 146 (discussing the consequences of a company’s decision to cooperate with the government).
\item[190] See, e.g., Graf, 610 F.3d at 1159; United States v. Ruehle, 583 F.3d 600, 608 n.7 (9th Cir. 2009).
\item[191] \textit{In re Grand Jury Subpoena: Under Seal}, 415 F.3d at 335–36.
\item[192] Id. at 337. The Fourth Circuit stated:

\textit{[W]e conclude that appellants could not have reasonably believed that the investigating attorneys represented them personally during the time frame covered by the subpoena. First, there is no evidence that the investigating attorneys told the appellants that they represented them, nor is there evidence

\end{footnotes}
the burden on the corporate constituents to prove that their statements were privileged.\textsuperscript{193}

The possible consequences of denying attorney-client privilege to individual employees are not limited to the government’s use of the individuals’ statements against them. Individuals who provide false statements to corporate counsel may be prosecuted for obstruction of justice when counsel in turn conveys those statements to the government. For example, in the highly publicized Computer Associates investigation, the government prosecuted the former CEO and chair of the board under an obstruction of justice statute for acts that included allegedly lying to the corporation’s private outside counsel who was conducting an internal investigation.\textsuperscript{194} The case was never reviewed by the appellate court because it was resolved via plea agreement.\textsuperscript{195}

The government’s legal theory may be fair when the employee understands that the company intends to provide the employee’s statements to the government. But the company is unlikely to make this intention plain because doing so places the attorney-client privilege at risk as the ambiguous communication might not be considered confidential.\textsuperscript{196} Additionally, the employee may be less likely to

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\textsuperscript{193} Id. at 339–40.

\textsuperscript{194} See United States v. Kumar, 617 F.3d 612, 618 (2d Cir. 2010) (“Specifically, the government alleged that Kumar, in an effort to cover up the existence of the 35-day month practice, lied to [Computer Associates’ (“CA’s”)] outside counsel, instructed CA’s general counsel to coach CA employees to lie, authorized CA’s general counsel to pay a $3.7 million bribe to an individual to procure his silence, and lied to FBI agents and others during his interview at the [U.S. Attorney’s Office].”).

\textsuperscript{195} Id. at 619–20.

\textsuperscript{196} It is a necessary element of the privilege that statements be made in confidence to counsel for the purpose of legal assistance. Giesel, supra note 32, at 123 n.55 (quoting Wigmore, supra note 133, § 2292). If the lawyer’s intended role is to serve as a mere conduit—for example, to convey the information to a third party—then there is no expectation of confidentiality, and hence no privilege, from the outset. See id.
cooperate with counsel if there is an indication that the statements may eventually be evidence used against him or her.

Further, the employee may expect not only confidentiality but also loyal and competent advice. For example, an employee of the Stanford Group Company sued for malpractice the law firm and partner she thought was representing her individually before the SEC.\textsuperscript{197} Her complaint claimed that the attorney was representing the interests of the Stanford Companies, a company executive, and the attorney and his law firm, and that as a result of this conflicting representation, her interests were not protected and she was criminally charged.\textsuperscript{198} Thus, the consequences of a legal theory favoring the entity can be severe for the individual caught up in an internal investigation.

2. Ethical Considerations

Although ethics rules require clarity when lawyers are dealing with an unrepresented party, the corporate standards appear to favor the entity’s interest in access to and control over its employees’ information. Rule 4.3 of the ABA’s Model Rules of Professional Conduct requires lawyers generally to make “reasonable efforts to correct the misunderstanding” if an unrepresented person misunderstands the

\textsuperscript{197} Plaintiff’s Original Petition at 2–3, Pendergest-Holt v. Stanford Grp. Co., No. 2009-22392 (N.D. Tex. Apr. 9, 2009). The employee claimed that the evening prior to meeting with her, the law firm partner “had solicited a multi-million dollar retainer from Allen Stanford to represent him personally.” Id. at 5.


[D]uring the sworn oral testimony, [the attorney] gave contradictory answers about whether, as an attorney, he represented Plaintiff by stating: ‘I represent the company Stanford Financial Group and affiliated companies,’ while contradicting that very statement, by also informing Plaintiff and the SEC, on the record, as follows:

Q. Just so we’re clear. As I understand your statement, you do not as far as you’re concerned, represent the witness here today?

A. I represent her insofar as she is an Officer or director of one of the Stanford affiliated companies.

Plaintiff’s First Amended Complaint, supra, at 6 (emphasis in original.); see also Plaintiff’s Original Petition, supra note 196, at 6; Cahill, supra, at 9; Ashby Jones, Did Pendergest-Holt Lawyer Up Too Late?, WALL ST. J. L. BLOG (Mar. 4, 2009, 8:56 AM), http://blogs.wsj.com/law/2009/03/04/did-pendergest-holt-lawyer-up-too-late/.
role of the attorney. Specifically, the attorney must clarify his or her role when dealing with corporate constituents. But at the same time, the rule presumes that corporate counsel represents the company exclusively. Rule 1.13, which governs corporate representation, begins with the statement that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” This sentence is matched in the Restatement of Law Governing Lawyers, which states that “[w]hen a lawyer is employed or retained to represent an organization: (a) the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to the organization’s decision-making procedures.” Both ethics rules emphasize corporate counsel’s relationship to the entity over counsel’s relationships with the entity’s constituents.

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199 Model Rules of Prof’l Conduct R. 4.3 (2009). The rule states:

   In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Id.

200 Id. R. 1.13(f). Subsection (f) of Rule 1.13 states:

   In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

Id. A different provision of the Model Rules, which applies to lawyers who represent multiple constituents in a corporation, states that although this is possible, it is subject to the conflict rule. See id. R. 1.13(g).

201 Id. R. 1.13(a).

202 Restatement of Law Governing Lawyers § 96(1) (2000) (first subsection). The second subsection of this rule provides that this is qualified when the lawyer:

   knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.

Id. § 96(2).
Additionally, the rules do not require corporate counsel to clarify the company’s relationship to the constituent, to disclose the company’s intention to assist the government, or otherwise to provide information needed to dispel misconceptions and allow the employee to make an informed decision whether to speak to counsel. Although other ethics rules can also come into play here, they do not instruct corporate counsel to notify corporate constituents that the information they provide as part of an internal investigation can and likely will be used against them and will not be protected by an attorney-client privilege. Nor do they require corporate counsel to let employee constituents know that the entity may barter their information for its own corporate benefit. There is also no ethics requirement that the investigating attorney offer legal counsel to the constituent or suggest that the constituent should have counsel.

III. Court Considerations in Leveling the Playing Field

Scholars have explored the contours of the Bevill test and have noted its deficiencies, focusing on the question of when an individual establishes an attorney-client relationship with corporate counsel. Professor Grace M. Giesel, for example, has called for enhanced clarity between lawyers and individual employees within the corporation, including having a written record that memorializes the disclosures regarding representation of the investigating attorney. Others have addressed the general unfairness of the government’s ability to extract privilege waivers from corporations, critiquing the various DOJ
memoranda pertaining to benefits available to a company for providing attorney-client privileged information.208

Our focus, in contrast, is on how the Upjohn decision and other attorney-client privilege cases fail to recognize today’s reality in which the entity may have multiple concerns in an internal investigation. Maintaining the confidentiality of the internal investigation may or may not be the route eventually taken by the corporation. A corporation may also change its position, starting initially with the protections provided by Upjohn, but later wishing to waive those restrictions to secure a resolution favorable to the company.

It is important to recognize the legitimacy of internal investigations, which may expose criminal conduct, but it also is important to eliminate deceptive and coercive conduct on the part of corporations. This is particularly difficult, as the unfair conduct may come to light only in an after-the-fact court hearing that is held when an employee is charged with criminal conduct and then seeks to assert the privilege regarding statements made during an internal investigation.

Offered here is a model for resolving an individual constituent’s claim that his or her statements to corporate counsel are covered by the attorney-client privilege. It is meant to incentivize corporations to act fairly throughout the process, even when the investigation is unregulated and private. After-the-fact court monitoring, in the context of deciding privilege claims, would provide “expressive rhetoric” to companies to proactively adhere to conduct that is non-coercive and non-deceptive.209


208 See Copeland, supra note 81, at 1210–37 (discussing the Attorney-Client Privilege Protection Act of 2009 and the history of different DOJ memoranda). Although, the Thompson Memorandum has been modified to remove the incentive for a corporation to give attorney-client privileged material to the government, Professor Heyman has noted that the “top-down” practice still has coercion and waiver as an aspect of its practical application. Heyman, supra note 29, at 169.

209 See Dan M. Kahan, What’s Really Wrong with Shaming Sanctions, 84 Tex. L. Rev. 2075, 2081–86 (2006) (arguing that laws that are “perceived as affirming the values of only some cultural perspectives and as denigrating others” are vulnerable to being overturned);
This Part describes three aspects of this model, all of which arise in the context of the attorney-client privilege. First, a conceptual model of fair dealing needs to be at the forefront of corporate conduct when there is an interaction between the corporation and the individual as part of an internal investigation. Second, courts evaluating the corporate-individual relationship need to go beyond the constricted approach offered by courts using the *Bevill* test or similar methods that favor the entity without full examination of the circumstances of a particular case. Suggested here are a constellation of different considerations that could be used by courts in deciding who will be allowed to maintain an attorney-client privilege. Finally, the burden of proof should be placed on the entity to show that it has treated its employee constituents fairly. All three aspects of the proposed model emphasize the need, decades after *Upjohn*, to reflect upon the reality of a modern-day internal investigation.

A. Conceptualizing Corporate Fair Dealing

Courts are quick to adopt a *Bevill* approach without examining how the corporation’s internal investigation differs from the classic approach embodied in the *Upjohn* case. To evaluate this landscape properly, two questions need to be examined. First, how should the corporation and its lawyer conduct themselves at the outset to make it clear whether the corporation is aligned with its individual constituents? Second, if the entity fails to clarify its role, how should courts evaluate the corporate dynamic for purposes of attorney-client privilege and representation by counsel? The essence of this discussion is the role of fair dealing by the entity to its corporate constituent.

Corporations should have a duty of fair dealing with their employees. General employment law provides that “[e]mployers must realize that if they are going to reap the profits and rewards of employee loyalty and enhanced workmanship which are coaxed by implied promises made to the workforce, then such employers must be held to their word.”

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Gilchrist, *supra* note 144, at 62–63 (“Maintaining the expressive value of criminal prosecutions . . . means structuring a system of liability, prosecutorial discretion and criminal penalties that express clear condemnation where it is appropriate to do so.”).

210 See infra notes 213–221 and accompanying text.

211 See infra notes 222–242 and accompanying text.

212 See infra note 243 and accompanying text.

faith and fair dealing,” which includes not creating or exploiting a misperception. Although employment contracts may provide for duties of good faith and fair dealing, only a minority of states have allowed terminated employees to succeed with claims that the employer owes the employee a duty of good faith and fair dealing absent such a contractual provision.

This employment theory is not explicitly replicated in corporate law with respect to the corporation’s duties to its constituents. Although directors and officers of a corporation have duties of fair dealing to the corporation and its stockholders, these fiduciary duties are not manifest in corporate law for the corporation’s dealings with its employees. Likewise, individual employees of an entity have duties of fair dealing to the entity, but the reverse is less certain without turning to basic employment principles.

Corporate counsel conducting an investigation may have, or appear to have, a common interest with corporate executives and employees. But counsel also is often caught between his or her allegiance to, and representation of, the entity and the practical need to counsel and acquire information from corporate executives and employees. Corporate investigating counsel is caught in what one court termed “a potential legal and ethical mine field.”

Particularly troubling is the predicament of the corporate executive or employee who has been working closely with in-house counsel over a period of years. A trust relationship may have developed between the parties, as it may be a common practice for corporate counsel to obtain information from the constituent on various corporate matters. In an Upjohn world, the counsel and the individual work together for the benefit of the company. In today’s reality, however, the employee or corporate executive can now find him- or herself suddenly pitted against the corporation and its counsel whom he or she once thought of as the person encouraging the sharing of infor-

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214 Id.
216 See Brown, supra note 16, at 8 n.11 (describing officers’ duty of fair dealing to the corporation and shareholders).
217 See Brudney, supra note 215, at 794 (noting that employees’ duty of loyalty is derived from a master-servant framework rather than a theory of mutual responsibility).
mation in a trusting relationship. Yet, the individual constituent may be unaware, because of his or her longstanding relationship with counsel, that their interests now differ.

Counsel may attempt to alleviate any concern by providing warnings to the employee. These warnings, referred to as Upjohn warnings,219 fail to negate the fact that the corporation will still try to secure information from its employees that may ultimately be harmful to them.220 These Upjohn warnings should not be accepted as alleviating the direct conflict that the corporation has with its constituents.221 In many cases, the individual employee will perceive that the corporation’s lawyer represented him or her in the past. Even if the lawyer advises that he or she is now representing only the company, the individual will expect some loyalty. One would not be allowed to move from defending a criminal client to then prosecuting the defendant. The conflict remains and cannot be avoided by language offered by a coercive party, an employer who may eventually barter the information for its own benefit. Even if the employee does not expect loyalty from the corporation’s lawyer, the employee will expect loyalty

219 Despite being called “Upjohn warnings,” Upjohn did not deal with warnings to employees at all. Giesel, supra note 32, at 110 n.2. According to practitioners’ literature, the warnings should include: a warning that the attorney represents the company and not the employee; a warning that the attorney does not represent the employee’s interests; a warning that although the conversation is protected by attorney-client privilege, privilege belongs to the company, not the employee; and a warning that the company will decide whether to waive the privilege, including whether to give the information to third parties. See, e.g., Campbell & Beaudette, supra note 9, at 7.

220 As is common to police agencies, providing Miranda warnings can result in not receiving desired information. See Miranda v Arizona, 384 U.S. 436, 516–17 (1966) (Harlan, J., dissenting). Hearing that one is entitled to counsel or that statements can be used against oneself may cause a suspect to choose silence or to retain a lawyer. See id. Obviously, a major difference in the corporate setting is that the investigating corporate counsel has not been schooled by and is not a direct part of a police agency. Another major difference is that unlike a police investigative agency that is meeting the defendant for the first or second time, there may be a longstanding relationship premised upon the attorney-client privilege between the corporate investigating counsel and the employee. It may be only now, during the internal investigation, that criminal misconduct is alleged, and it is not in the individual’s benefit to have this alliance with the corporation.

from the corporation. The *Upjohn* warnings do not advise the employ-
ee that the corporation’s interests are potentially adverse and that in
exchange for leniency, the corporation may assist the prosecution by
conveying the employee’s communications, thereby facilitating a
prosecution of the employee.

Recognizing a duty of fair dealing by a corporation to its individ-
ual constituents would allow courts to evaluate conflicts between the
entity and individual without summarily finding that the entity’s view
controls. The good faith of the employer in its internal investigation
would be paramount in ascertaining the rights and remedies of the
individual constituent. As a matter of fair dealing, corporations and
their attorneys conducting an internal investigation should have to be
candid about whether the corporation intends to cooperate with the
government and the resulting risks to the employees. When the cor-
poration leads its employees to understand that their interests are
aligned with those of the entity, the corporation assumes an implied
duty not to waive the privilege with regard to the employees’ commu-
nications without their consent, or at least fairly to consider the em-
ployees’ interests in deciding whether to waive the privilege.

This suggested approach is not without concerns. Obviously, the
use of a conceptual standard comes at the risk of diminishing reliabil-
ity and consistency. The existing *Bevill* standard, which essentially
places the decision to waive attorney-client privilege in the hands of
the corporation, offers certainty that cannot be replicated with either
a conceptual or multi-faceted approach.

**B. A Multi-Faceted Approach**

An entity’s failure to clarify properly its role at the initial stages of
the corporate internal investigation or to designate whether it is
aligned with its employeeshould weigh heavily in determining whether
the corporation can unilaterally waive the privilege and provide its
employee’s statements to the government. In these situations, courts
may need to evaluate the corporate dynamic for purposes of attorney-
client privilege claims. It is important when scrutinizing the entity-
constituent relationship that courts not summarily find corporate super-
iority to the detriment of the individual.

Rather, courts need to examine a host of factors when consider-
ing the investigating corporate counsel’s role in conjunction with the
rights of the individual employee. This section offers several consider-
ations for a court to use in determining whether the corporation and
its constituents are aligned or in conflict. Although this multi-faceted
approach may offer some reliability and consistency to this process, it is important to note that there is no formula or quantitative analysis with which to provide definitive clarity. Rather, a fact-specific approach is warranted, and these factors are merely attributes for courts to consider in balancing corporate and individual interests.

1. Guilt of the Corporate Constituent

Some may argue that the disintegration of the corporate-employee relationship is warranted in situations in which the individual has deliberately committed criminal conduct that imposes liability on the corporation. One cannot, however, assume that the corporate constituents act solely for individual benefit and thus should be the subject of a criminal prosecution. Obviously, within organizations there can be rogue employees who act criminally for personal motives. But there also can be employees who receive no personal benefit and may be committing criminal acts solely to benefit the corporation.\textsuperscript{222} Achieving corporate demands in a difficult market is not an unrealistic possibility.\textsuperscript{223} The superior negotiating position of the corporation, however, allows it to negotiate a benefit to the detriment of the less culpable party—the individual who has no motive other than to enhance the entity’s position in the market.

Thus, omitted from the existing court’s review process is the culpability of the individual. Individuals who act merely to benefit the corporation and receive no personal incentives should not be placed in an inferior position on issues such as attorney-client privilege. Corporations should also protect individuals who act improperly because of their strong allegiance to the company.

2. Culpability of the Corporate Entity

Equally likely is a corporate culture that breeds criminal conduct. Although prosecutorial discretion provides prosecutors with the ability to prosecute, reach a plea agreement, defer prosecution, or reach a non-prosecution agreement, the assessment of the evidence used in

\textsuperscript{222} See, e.g., Podgor, Educating Compliance, supra note 50, at 1525 n.14 (noting the case of Jamie Olis who received no monetary benefit from his alleged criminal conduct on behalf of his company, Dynegy).

\textsuperscript{223} See Mary Kreiner Ramirez, The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty, 47 Ariz. L. Rev. 933, 964–66 (2005) (discussing corporate culture and how employees may have to “navigate through the political, economic, socio-cultural, physical, and technological demands of regulators”).
making the determination may be skewed when provided by a corporate entity that has resources beyond an individual employee.\footnote{224} Corporate counsel’s allegiance to the corporation will make him or her advocate for prosecutors to use their prosecutorial discretion to minimize corporate liability. In contrast, the unrepresented or poorly represented employee may not be able to make as strong a case as the entity.

Therefore, considering the culpability of the corporation is just as important as looking at the culpability of an individual employee. The corporation that has a criminal “ethos”\footnote{225} and wishes to throw its constituents to the prosecution to protect the entity should receive less protection than a corporation with a strong compliance program that was not adhered to by a small number of rogue employees.

3. Corporate Willful Blindness

Likewise, a corporation that opts for willful blindness and fails to investigate wrongdoing among its constituents should not be allowed to then turn on these same individuals when it initially took a laissez-faire approach to governing internal conduct. Knowledge of corporate or individual misconduct may be found when an individual or corporation is willfully blind. The Model Penal Code describes “knowledge of the existence of a particular fact” to include a situation in which “a person is aware of a high probability of [the fact’s] existence, unless he actually believes that it does not exist.”\footnote{226} Most recently, in the 2011 patent infringement case, Global-Tech Appliances, Inc. v. SEB S.A., the U.S. Supreme Court ruled that willful blindness requires that “(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.”\footnote{227}

An entity that puts its head in the sand\footnote{228} and avoids knowing the truth of criminal conduct occurring within the company should bear...
greater liability than an individual who honestly thinks his or her conduct is legal and acceptable under corporate norms. Courts, therefore, might consider whether the entity was willfully blind in ascertaining whether the constituent had a trust in the entity and corporate counsel that created an attorney-client relationship.

4. High Managerial Agent or Low-Level Employee

Courts should also consider the placement of the individual in the corporate structure. A high-level managerial agent is more likely to interact with corporate counsel. In contrast, a lower level employee may not even know the identity of corporate counsel, not to mention that the company even has corporate counsel.

Whereas corporate criminality is typically premised upon respondeat superior, the Model Penal Code takes a minority approach and also considers whether the alleged criminal act related to a member of the board of directors or a “high managerial agent acting in behalf of the corporation within the scope of his office or employment.” Although high managerial agents should likely assume a greater culpability for knowledge of corporate acts, they also are more apt to secure legal guidance. Thus, the placement of the individual within the company may be indicative of his or her interaction with corporate or investigating counsel, such as whether there has been a reliance on counsel and the entity in accord with the perception of the individual constituent.

530 F.3d 596, 604 (7th Cir. 2008) (clarifying that ostriches really do not bury their heads in the sand when frightened).


230 See Model Penal Code § 2.07(1)(c) (1985). The Model Penal Code also states that “high managerial agent” means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

Id. § 2.07(4)(c).

231 A neutral investigation is usually conducted by attorneys that are not within the office of corporate counsel. Outside counsel is typically hired to assure a thorough and conflict-free investigation.
5. Prior Involvement with Corporate Counsel

An examination of the employee’s prior involvement with corporate counsel may also provide information that allows a court to ascertain whether the employee properly relied on the corporate counsel as being his or her own when the corporate constituent was cooperating with the internal investigation. Some of the questions one might ask here are: Did counsel routinely appear with the individual at regulatory hearings? Did counsel often meet with the individual to work on legal matters such as answering interrogatories in civil matters? Who was at counsel’s side when he or she appeared in a court hearing? Did the constituent often turn to counsel seeking answers to corporate policy questions?

When individuals routinely turn to counsel for legal advice, it can set a tone that said counsel is representing the individual in addition to the corporate entity. Looking at the relationship between the constituent and corporate counsel can offer clues as to whether an attorney-client relationship actually existed. More importantly, it can also provide evidence of whether the individual constituent rightfully relied on the existence of an attorney-client bond.

6. Size and Structure of the Entity

Corporations with many employees are treated differently for purposes of sentencing than entities with fewer employees. For example, larger organizations are expected to “devote more formal operations and greater resources in meeting the requirements” or applicable guidelines than are smaller organizations.\(^{232}\) As a result, larger companies receive a greater culpability score. Similarly, organizations that tolerate criminal activity are assessed at different levels depending on the number of employees; an entity with a higher number of employees will receive a greater culpability score than an entity with fewer employees.\(^{233}\) Using this analysis, it would seem appropriate to consider the size of the organization in determining whether the corporation should bear the brunt of the criminality and whether counsel should be more focused on compliance in the larger corporate setting.

\(^{232}\) U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. n.2(C) (2011).

\(^{233}\) See id. § 8C2.5. Differences in the culpability score are based on factors of whether there are more than ten, fifty, two hundred, one thousand, or five thousand employees. Id. “[T]olerance of the offense by substantial authority personnel” that is “pervasive throughout the organization” can also influence the culpability score. Id.
Equally important is whether the corporation is a public company subject to SEC compliance or a small, closely held corporation that is family run. In a closely held corporation, it may be more difficult to ascertain exactly who counsel is representing. This suggests that perhaps a different standard with respect to the attorney-client privilege should be used for closely held companies.234

7. Expansiveness of the Company

Corporations that have many domestic or foreign offices may raise additional considerations. Do employees routinely need to advise counsel of activities in these foreign countries? Does counsel routinely oversee the activities of corporate employees? A long standing relationship can create reliance between the parties that is sufficiently unique to warrant a court moving beyond the strict language found in the Bevill standard.

Likewise, for those operating outside the United States, with little understanding of U.S. law, it may be common for the constituents to defer to corporate counsel. One has to wonder about the level of knowledge of CEO Ian P. Norris. After all, he was not a citizen of the United States and was operating in a company that was located outside this country.235 In this regard, one can ask whether it would make an individual more likely to rely on the corporate counsel where operating as part of an international organization?

On the other hand, a large company with many different offices may be very removed from corporate counsel, leaving less of a connection to counsel to establish a relationship that would lead to reliance on the part of the employee that he or she was being represented by the counsel and corporation.

8. Crime Involved

One cannot assume that all crimes should be treated the same when determining whether corporate counsel was aligned with its corporate constituent. Some crimes may be more personally focused whereas others may be more corporate. For example, the Foreign Corrupt Practices Act requires the involvement of a public compa-

235 See supra notes 155–160 and accompanying text.
Antitrust crimes also can offer a corporate setting. In contrast, a perjury charge is personal to an individual. Other crimes may cross into both the corporate and personal spheres. For example, companies as well as individuals have been charged with the crime of obstruction of justice.

Looking at the specific crime may offer some guidance. If the crime is specific to the person, one has to wonder why corporate counsel might be accompanying that person to the grand jury. Alternatively, a corporate charge under the Sherman Act may indicate that counsel is there to represent the company.

Here again, this factor alone does not offer conclusive guidance in determining if the corporation’s actions are consistent with the interests of its constituents. But using this factor in examining the totality of the circumstances may provide insight as to the role of the investigating counsel relative to the entity’s constituents.

9. Entity’s Efforts to Dispel the Perception that Counsel Represents the Individual

In civil matters, the perception of the client can play a crucial factor in determining the existence of an attorney-client relationship. Some courts use contract law, others tort law, and finally some examine both disciplines. Reasonable reliance can be a key component in determining whether an attorney-client relationship was formed through negligence.

Noticeably, in the corporate context courts are reluctant to consider these factors, adhering instead to a corporate bias that labels counsel as representing the corporation. In this regard, corporate efforts to dispel the individual’s perception that counsel is representing

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237 See id. § 1 (making restraint of trade illegal).
239 For example, the Racketeer Influenced and Corrupt Organization Act (RICO) offers a host of state and federal offenses that can serve as predicate acts for a RICO charge. See id. §§ 1961–1963.
241 See Martyn, supra note 154, at 919–20 (discussing how courts find attorney-client relationships).
242 See id. at 919.
them personally should be factored into the court’s analysis of the dynamic between counsel and its constituent.

When counsel gives clear *Upjohn* warnings— which include a strict statement that counsel’s role is limited to protecting the corporation’s interests and obtaining written acknowledgment that counsel does not represent the individual—the *Upjohn* warnings would weigh in favor of the entity’s claim that it did not represent the individual constituent. The entity would have strong evidence that its constituent’s perception of an attorney-client relationship was unfounded when the constituent was given documentation explicitly showing that he or she had been fully apprised that counsel solely represented the entity.

That said, a written statement should not be conclusive of a finding that counsel did not represent a corporate constituent. One could easily envision an employee being coerced to sign such documentation under fear of being fired. *Upjohn* warnings should not be a proxy for alleviating corporate liability, but rather should be one factor that a court might consider. Looking at the totality of the circumstances is important to truly ascertain the voluntariness of such a document and the circumstances surrounding its endorsement.

Moreover, even the conventional *Upjohn* warnings do not dispel an individual employee’s expectation of loyalty from a corporation’s lawyer with whom he or she has had past dealings. Nor do the warnings dispel the individual’s belief that there is a unity of interest between the individual and the corporation and that the corporation will treat the individual fairly in its dealing with the government. A court should consider the employee’s reasonable expectations that the corporation and lawyer will look out for the individual’s interests in assessing whether the corporation has met its obligations of fair dealing.

10. Other Factors

Although many considerations are noted here, it is important to recognize that no list can exhaust all the possible considerations that might reflect whether the corporation has acted in good faith with its constituents. Courts need to think about all the factors outlined here, but also must be open to other factors that might be offered by the parties.

There is a cost to a multifaceted approach in that it limits consistency and reliability. Different courts may find that specific circumstances warrant different resolutions. As with all legal decision making, the addition of more factors may result in less predictability. But
this downside is surpassed by the fact that these factors will allow
courts to evaluate all circumstances and provide a more balanced ap-
proach than the existing methodology.

C. Burden of Proof

An additional point that can level the playing field so that courts
do not summarily side with corporations without consideration of the
circumstances would be to adopt a burden of proof that places the
onus on the corporation to show why it is fair for the corporation uni-
laterally to control the attorney-client privilege. The existing Bevill
approach places the burden on individuals to prove that counsel was
representing them personally if they wish to achieve an attorney-client
privilege. This framework empowers the party that least needs the
assistance. It fails to consider that the entity may have the resources
and power to assure that the employee’s argument does not survive.
So, it is not merely an examination of the constellation of factors that
is necessary, but also a recognition that the burden of proof and pre-
sumptions should not flow automatically to the entity rather than the
individual.

Conclusion

Criminal procedure jurisprudence has developed for well over a
century to establish limits on government investigators’ ability to ex-
tract confessions from individuals for use against them in criminal
prosecutions. The law targets both deceptive and coercive methods
of extracting admissions. The nineteenth century evidence law, now
largely supplanted, identified conduct that led to out-of-court admis-
sions that were deemed insufficiently reliable to be admitted at trial.
Twentieth century constitutional case law, which developed initially
out of the due process clause and later out of the right against self-
incrimination and the right to counsel, expanded beyond concerns
about reliability to protect a host of other interests.

243 See supra notes 151–153 and accompanying text.
244 See, e.g., Miranda, 384 U.S. at 458–66 (describing the history of the privilege against
self-incrimination).
245 See id. at 448 (“[C]oercion can be mental as well as physical.”).
246 See generally Steven Penney, Theories of Confession Admissibility: A Historical View, 25
Am. J. Crim. L. 309 (1998) (detailing the “long and convoluted history” of the admissibility
of confessions).
In recent years, analogous concerns have been raised about corporate lawyers’ methods of obtaining admissions from corporate employees for later use in criminal prosecutions. The government’s role as an indirect participant in internal corporate investigations increases the corporation’s superiority in the process and motivates this growing concern. The unregulated nature of corporate internal investigations exacerbates the disparity between the positions of the corporation and the individual. The practice of distancing corporate counsel from its constituents by giving Upjohn warnings during internal investigations fails to eliminate the individual’s reasonable expectation that his or her interests are aligned with the corporation. This failure is particularly problematic when the corporation later uses information it gained from its employee to achieve leniency for the corporation at the individual’s expense.

In Upjohn, the U.S. Supreme Court held that a corporation could claim the attorney-client privilege with respect to its lawyers’ confidential communications with corporate constituents in the context of an internal investigation. The Court was not asked to consider, and did not address, whether the constituent also could claim the privilege or bar the corporation from waiving the privilege, and the Court has failed to address this question since. Lower courts have assumed, however, that except in exceptional circumstances, the privilege is exclusively for the corporation to assert or waive, without regard to the interests of the constituent who made the communications in question. Upjohn addressed a corporation aligned with its constituents. This does not reflect the contemporary reality of internal investigations.

Upjohn implicitly recognized an alignment of interests between the corporation and its employees, but it did not address whether, as a consequence, corporate employees may assert the privilege with regard to their communications with counsel in an internal investigation. To the extent that Upjohn implied that corporations have exclusive authority to assert the privilege or to barter the individual’s statements to the government, it should be reconsidered. The standard for determining when a corporation may waive the privilege and disclose what its constituent communicated to corporate counsel should take into account whether, in eliciting the individual’s statements and then seeking to disclose them, the corporation would be violating its duty of fair dealing to the individual. If disclosure would violate fair dealing in light of the various factors set forth in this Article, the company should not be permitted to disclose the constituent’s statements without the constituent’s authorization.
Courts presently use an efficient approach that can deprive corporate constituents of fairness and good faith by the company. Courts need to expand upon the current attorney-client privilege jurisprudence to take account of a corporation’s duty to treat its employees fairly and not to exploit them.