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# Control of the Attorney-Client Privilege after Mergers and Other Transformational Transactions: Should Control of the Privilege Be Alienable by Contract?

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## **Control of the Attorney-Client Privilege After Mergers and Other Transformational Transactions: Should Control of the Privilege Be Alienable by Contract?**

*Grace M. Giesel\**

*In recent years, parties to mergers and other transformational transactions have begun inserting into their deal documents provisions allocating post-transaction control of the attorney-client privilege for pre-transaction communications. The controller of the privilege is the person or entity who decides whether to assert the privilege or, rather, to waive it. Commonly, representatives of the target entity in a merger or representatives of an asset seller in a transformational sale want post-transaction control of the privilege for pre-transaction communications relating to the transaction. They want control of the privilege so the surviving entity cannot access or use those communications against the pre-transaction representatives in post-transaction litigation.*

*Though contractual privilege allocation provisions are now common in transformational transactions, the question of whether these provisions should be enforceable has garnered little attention. If the attorney-client privilege were an asset such as a piece of equipment, there would be no question that the asset could be allocated by contract. But the attorney-client privilege is not a typical asset; it represents a careful balance of public goals and policy and as such is not an asset of any one actor. The precise bounds of the privilege are set by courts and legislatures. They have determined the balance of the societal interest in a justice system that effectively and efficiently finds the truth and the secondary but important interest behind the privilege in assuring that clients fully disclose all matters to their attorneys so that they can have the best possible representation and abide within the law. When private parties contract to allocate control of the privilege, those parties contract to maximize their collective good, but in doing so they are resetting the bounds of the privilege in a way that overrules the balance set so carefully by courts and legislatures—a balance set with full consideration of societal interests. When dealing with claims of privilege based on common interest, courts have not allowed parties to dictate the existence of a common*

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*interest if, in fact, no common interest as determined by the court, exists. These courts have not allowed parties to reshape the privilege by contract. Similarly, control of the privilege for an entity should not be contractually alienable apart from control of an entity. As courts refuse to honor contractual extensions of statutes of limitations before a cause of action accrues because of the public interest at issue, so too should courts refuse to enforce contractual privilege allocation provisions. Control of the privilege for an entity should not be contractually alienable apart from control of the entity.*

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## I. INTRODUCTION

The question of control of the attorney-client privilege for an entity's pre-transaction communications with counsel often arises in litigation after a merger or sale of assets or other arguably transformational transaction.<sup>1</sup> The answer to the question can often be dispositive of the entire litigation, especially when representatives of the target entity or asset seller and the surviving entity or asset purchaser are adverse in the subsequent litigation. Even when the parties to the transaction are not adversaries in the litigation, their interests may not coincide.

Where control of the privilege for pre-transaction communications resides after a transformational transaction may not be clear as a matter of law as a result of the form that the transaction takes<sup>2</sup> or because there is a dearth of precedent in the relevant jurisdiction or simply a lack of clarity with regard to that precedent.<sup>3</sup> In other situations, the law may be clear but the parties to the transaction would rather not have the result dictated by that law. In particular, the representatives of the target or asset seller may not want the survivor entity or asset purchaser to control the privilege for pre-transaction, transaction-related communications—a result dictated by the law of Delaware, for example.<sup>4</sup> Given this state of the law, parties have begun to include in transaction contracts privilege allocation provisions in transaction contracts for pre-transaction communications between the target or asset seller and counsel, especially with regard to transaction-related communications.<sup>5</sup>

May parties, by contract, direct who controls the privilege for pre-transaction communications between the target or asset seller after a transformational transaction? Is control of the privilege for an entity alienable apart from entity control?

The attorney-client privilege is a careful balance of public goals and policy. Courts and legislatures have set the precise bounds of the privilege by determining the right balance of society's interest in a justice system that

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<sup>1</sup> See, e.g., *Newspring Mezzanine Capital II, L.P. v. Hayes*, No. 14-1706, 2014 WL 6908058 (E.D. Pa. Dec. 9, 2014) (in a post-merger setting, the sellers of a controlling interest of the target entity asserted that they had the right to control the attorney-client privilege regarding pre-merger communications with counsel to the target); *Novack v. Raytheon Co.*, No. SUCV201302852BLS1, 2014 WL 7506205 (Mass. Super. Ct. Oct. 24, 2014) (former in-house counsel to the target entity asserted he was the shareholder representative of the target and controlled the attorney-client privilege for pre-merger communications). As to what qualifies as a transformational transaction such that control of the privilege might transfer by operation of law, see *infra* Part III.B.

<sup>2</sup> See *infra* Part III.C.

<sup>3</sup> See *infra* section Part IV.B.

<sup>4</sup> See discussion of Delaware precedent *infra* Part IV.C.

<sup>5</sup> See *infra* Part V.

effectively and efficiently finds the truth and the secondary but important interest behind the privilege in assuring that clients fully disclose all matters to their attorneys so that they can have the best possible representation and abide within the law. When private parties contract to allocate control of the privilege, those parties are contracting to maximize their collective good,<sup>6</sup> but in doing so they are resetting the bounds of the privilege in a way that circumvents the balance set so carefully by courts and legislatures. When dealing with claims of privilege based on common interest, courts have not allowed parties to dictate the existence of a common interest if, in fact, no common interest as determined by the court existed. Courts have not allowed parties to reshape the privilege by contract. Similarly, control of the privilege for an entity should not be contractually alienable apart from control of an entity. As courts refuse to honor contractual extensions of statutes of limitations before a cause of action accrues because of the public interest at issue, so, too, courts should refuse to enforce contractual privilege allocation provisions. Control of the privilege for an entity should not be contractually alienable apart from control of the entity.<sup>7</sup>

After a merger or asset sale or other transformational transaction, litigation may arise from the transaction itself or may arise from actions taken well before the transformational transaction. Perhaps the survivor entity or asset buyer concludes that it paid more for less than it intended. Perhaps the survivor or asset buyer discovers that all is not as the representatives of the target or asset seller represented such that the price paid was excessive. Or perhaps the survivor entity or asset buyer concludes that the representatives of the target or asset seller did not disclose all the information that should have been disclosed in such a transaction. The survivor entity or asset buyer in these circumstances then may seek to hold accountable pre-transaction representatives of the target or asset seller or the entity itself in an effort to recover what it perceives as ill-gotten gains.<sup>8</sup>

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<sup>6</sup> The members of the management of an entity are the decision-makers for the entity. These individuals must make these decisions in light of their fiduciary duty to act in the best interests of the entity. *See* *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348–49 (1985) (“The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.”).

<sup>7</sup> *See infra* Part VI.

<sup>8</sup> For example, in *In re Lyondell Chemical Co.*, No. 16-cv-518, 2016 WL 5818591 (S.D.N.Y. Oct. 5, 2016), the trustee sued former shareholders of the target, Lyondell. The survivor, Lyondell Basell, entered bankruptcy thirteen months after the transformational transaction. The trustee in bankruptcy claimed that the combination was a fraudulent transfer on actual and constructive theories. *See also In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016) (bankruptcy trustee sued former shareholders of target/seller claiming fraudulent transfer); *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842 (Del. Ch. 2016), *aff'd*, 2016 WL 5845786 (Del. Sept. 30, 2016) (After a merger transaction, the survivor sued the target’s shareholders claiming that the target had engaged

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Similarly, a third party might seek a recovery for actions of the target or seller entity taken before the transformational transaction and unrelated to it.<sup>9</sup>

If litigation arises between the survivor or asset purchaser entity and representatives of the target or asset seller, the survivor's or asset purchaser's ability to access and use in the litigation pre-transaction communications between the target or asset seller and its counsel relating to the transformational transaction is extraordinarily important. If the survivor or asset purchaser controls the privilege, that party has access and may use communications that go to the heart of the litigation. Indeed, the determination of who controls the privilege may, in effect, decide the entire matter. For example, if the survivor claims that representations made by the target were not true or that the target concealed important information from the survivor, communications between the target and its counsel that occurred in the lead-up to the transaction and relate to those issues may prove the claim.<sup>10</sup> Such communications might logically be a good place to find a smoking gun.

Similarly, in the context of litigation instituted by third parties, the survivor or asset purchaser may choose to waive the privilege though the waiver might have serious negative repercussions for the pre-transaction representatives of the target or asset seller. A survivor or asset purchaser controlling the privilege may have very different motivations regarding asserting or waiving the privilege for pre-transaction communications between the representatives of the target or asset seller and counsel.<sup>11</sup>

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in illegal activities before the merger and had not disclosed these improper dealings. In addition, the survivor claimed the target had engaged in fraud by its misrepresentations and omissions when dealing with the survivor in the lead-up to the merger.)

<sup>9</sup> See, e.g., *Am. Int'l Specialty Lines Ins. Co. v. NWI-I, Inc.*, 240 F.R.D. 401 (N.D. Ill. 2007) (declaratory action by insurer to determine coverage for remediation costs incurred by the Environmental Protection Agency and state agencies).

<sup>10</sup> See, e.g., *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, C.A. No. 7906-VCG*, 2014 WL 6703980 (Del. Ch. Nov. 26, 2014). The plaintiffs acquired the target by merger. After the transaction, the plaintiffs brought suit, claiming that the target and others had made fraudulent representations to the plaintiffs so that the merger would occur. *Id.* at \*1. Following an earlier determination that the survivor controlled the privilege with regard to all communications of the target that occurred before the merger, see *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155 (Del. Ch. 2013), including communications relating to the merger transaction itself, the court refused the defendants' motion to dismiss. *Id.* The court noted that the plaintiffs had access to privileged communications between the target and its counsel in drafting the complaint and that it had a right to access and rely upon such communications. *Id.* at \*18.

<sup>11</sup> The management of the survivor or purchasing entity should make decisions for the entity that are in the best interests of the entity. See *CFTC v. Weintraub*, 471 U.S. 343, 348–49 (1985) (stating that representatives of the target or asset seller may be focused on self-preservation).

As a general proposition, courts have held that control of an entity's attorney-client privilege relating to pre-transaction communications passes with control of the entity. In *Commodity Futures Trading Commission v. Weintraub*,<sup>12</sup> the United States Supreme Court stated: "The parties also agree that when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well."<sup>13</sup> In the years after *Weintraub*, this basic concept that control of the attorney-client privilege for pre-transaction and post-transaction communications passes with control of an entity in a transformational transaction has been widely accepted without opposition as a matter of federal<sup>14</sup> as well as state law,<sup>15</sup> though there has been much discussion in the courts about the types of transactions that create change of control of the target sufficient to trigger the transfer of the privilege.<sup>16</sup>

When the issue is the narrow one of control of the privilege for pre-transaction, transaction-related communications after a transformational transaction, arguably two approaches have emerged. Delaware, a state whose law is extraordinarily influential in corporate transactional practice,<sup>17</sup> has spoken on the issue and has clarified that the basic rule of *Weintraub* applies; the survivor entity or asset purchaser controls the privilege with regard to all communications of the target or asset seller even when the survivor is suing the representatives of the target with regard to the transformational transaction. The Delaware Court of Chancery, in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*,<sup>18</sup> followed the *Weintraub* rule of general application, holding that, as an incident to control of the entity, the survivor gains control of the privilege of the target for all pre-transaction communications, including those relating to the

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 349. While the Court speaks in terms of control of the privilege "pass[ing]," the theory is that the privilege continues to exist because the entity continues to exist. So the privilege simply continues as a part of the entity while the management of the entity changes. *Id.*

<sup>14</sup> See, e.g., *In re: Optuminsight, Inc.*, No. 2017-116, 2017 WL 3096300 (Fed. Cir. July 20, 2017) (applying rule as a matter of federal law); *U.S. v. Askins*, No. 3:13-cr-00162, 2016 WL 4039204 (M.D. Tenn. July 28, 2016) (same).

<sup>15</sup> See, e.g., *Pittsburgh History & Landmarks Found.*, 161 A.3d 397 (Pa. Commw. Ct. Apr. 21, 2017) (applying the rule as a matter of Pennsylvania law); *Las Vegas Sands v. Eight Jud. Dist. Ct.*, 331 P.3d 905 (Nev. 2014) (applying the rule as a matter of Nevada law).

<sup>16</sup> Often courts evaluate whether a sale of assets creates a change of control. See discussion *infra* Part III.C.

<sup>17</sup> See generally John C. Coates IV, *Managing Disputes Through Contract: Evidence from M&A*, 2 HARV. BUS. L. REV. 295 (2012); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975 (2006).

<sup>18</sup> 80 A.3d 155 (Del. Ch. 2013).

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transaction.<sup>19</sup> The court then defined the *Weintraub* rule as a default rule that the parties to the transaction could have circumvented by clearly stating that control of the privilege does not travel to the survivor.<sup>20</sup>

New York, another state whose law is extraordinarily influential in corporate transactional practice,<sup>21</sup> has also addressed the question of control of the privilege for pre-transaction, transaction-related communications of the target or asset seller after a transformational transaction. In *Tekni-Plex, Inc. v. Meyner & Landis*,<sup>22</sup> the court placed control of the attorney-client privilege for pre-transaction communications of the target or asset seller after a transformational transaction with the survivor or asset purchaser generally.<sup>23</sup> But for transaction-related communications, the court carved out an exception. In this narrow situation, the court held that the privilege does not travel to the survivor.<sup>24</sup> The reach of this opinion is unclear, however, because the *Tekni-Plex* court relied to some extent on the fact that, in the court's opinion, the parties had agreed in the merger documents that the "rights of the acquired corporation, . . . relating to the transaction would remain independent from and adverse to the rights of [the survivor]".<sup>25</sup> Yet, the *Tekni-Plex* opinion contains no indication that the parties specifically addressed in their deal documents the control of the attorney-client privilege.<sup>26</sup> Importantly, however, the *Tekni-Plex* court's mention of the agreement shows that the court shared the opinion of the *Great Hill* court that parties can allocate control of the privilege by contract.

The result of *Weintraub*, *Great Hill*, and *Tekni-Plex* is that parties entering into transactions may not be able to determine where control of the attorney-client privilege will lie after the transaction. If the transaction is a sale of assets, the parties to the transaction may not be certain, should a dispute arise, whether the court will recognize the sale of assets as a change of control of the seller such that control of the privilege travels to the purchaser of the assets. If the situation is clearly a transformational transaction, the parties may not want the survivor or asset purchaser to control the privilege for any pre-transaction communications or, more specifically, may not want the survivor or asset purchaser to control the privilege for pre-transaction, transaction-related communications.

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<sup>19</sup> *Id.* at 159–60.

<sup>20</sup> *Id.* at 161.

<sup>21</sup> See generally John C. Coates IV, *supra* note 17; Eisenberg & Miller, *supra* note 17.

<sup>22</sup> 674 N.E.2d 663 (N.Y. 1996).

<sup>23</sup> *Id.* at 666.

<sup>24</sup> *Id.* at 672.

<sup>25</sup> *Id.*

<sup>26</sup> See discussion *infra* Part IV.B.



In such an environment the parties to a transaction may heed the encouragement of the Delaware court in *Great Hill* and the *Tekni-Plex* court's attention to the parties' agreement and allocation of control of the attorney-client privilege by contract. Indeed, parties to transformational transactions have, in recent years, begun to include a variety of provisions in the deal documents that address the issue of privilege control.<sup>27</sup>

While the attorney-client privilege for an entity shifts as control of the entity shifts, this limited alienability is the result of policy decisions by courts and legislatures that have balanced various public interests. These courts and legislatures have determined that the best balance is that an entity that experiences a transformational transaction does not lose privilege protection for pre-transaction communications but rather that control of the privilege passes with control of the entity. The new controller of the entity should decide whether to assert the privilege or not in light of what would be in the best interest of the entity. Some courts or legislatures may decide that control of the privilege for transaction-related communications between the target or asset seller and counsel does not pass to the survivor or asset purchaser as a result of the transformational transaction. Whatever the rule, the privilege travels as a result of policy decisions made by entities charged with consideration of public interests.

Contrary to the suggestion of the *Great Hill* court and others, this Article argues, as some courts have held,<sup>28</sup> that parties motivated by their own self-interest but with no consideration of the public interest, should not be allowed to allocate control of the privilege by contract. The parameters of the privilege should not be dictated by private parties. Not only is nonalienability by contract dictated by the values and policies the privilege represents, but also its own structure demands this result. The notion of waiver, a vital part of the bounds of the privilege, is at odds with any notion of shifting control of the attorney-client privilege by contract. Recognizing that control of the privilege can be transferred by contract also creates a practical nightmare as parties follow the logical slippery slope to parsing control of the privilege in pieces and parts, perhaps to travel with the sale of this or that asset or even unattached to assets or control.<sup>29</sup>

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<sup>27</sup> See discussion *infra* Part V.

<sup>28</sup> See, e.g., *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, No. 01-c-4366, 2003 WL 21911066 (N.D. Ill. Aug. 7, 2003) (concluding the privilege cannot be transferred by contract). See also *Am. Int'l Specialty Lines Ins. Co. v. NWI-I, Inc.*, 240 F.R.D. 401 (N.D. Ill. 2007) (court did not follow the agreement).

<sup>29</sup> See discussion *infra* Part VI.A.

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Similarly, courts have recognized the impropriety of allowing parties to define the parameters of the attorney-client privilege doctrine in the area of common interest claims.<sup>30</sup> Parties enter into agreements stating that they share a common interest and thus claim they may share communications without waiving privilege, but courts independently evaluate whether the parties in fact share a legally sufficient common interest before finding no waiver. The contracts of the parties are relevant but do not dictate to the courts the bounds of privilege protection.

Finally, there is precedent outside the realm of privilege law of doctrines of the justice system that private parties cannot redefine by agreements because these creations represent interests and policy beyond parties to any one agreement. For example, courts routinely recognize that parties to a contract cannot enlarge a statute of limitations before a cause of action accrues because there is a public interest in not requiring defendants to face stale or possibly fraudulent claims and stale evidence and in “giving repose to human affairs.”<sup>31</sup> Just as the statute of limitations is a doctrine with interests at play beyond those of parties to a contract, likewise, the attorney-client privilege is a doctrine with interests at play beyond those of parties to any one particular contract.

Parties should not be able to allocate control of the attorney-client privilege by contract apart from control of an entity. Control of the privilege should not be alienable by contract. Any contractual attempt to do so should be unenforceable as against public policy.

## II. GENERAL PRINCIPLES OF THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege protects communications between an attorney and a client, made in confidence, and made for the purpose of obtaining or rendering legal advice or assistance,<sup>32</sup> but only if such communications were not made in furtherance of a crime or fraud<sup>33</sup> and the

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<sup>30</sup> See discussion *infra* Part VI.B.

<sup>31</sup> *Flanagan v. Mount Eden Gen. Hosp.*, 248 N.E.2d 871, 872 (N.Y. 1969). See discussion *infra* Part VI.C.

<sup>32</sup> “Five elements are common to all definitions of the attorney-client privilege: (1) an attorney, (2) a client, (3) a communication, (4) confidentiality anticipated and preserved, and (5) legal advice or assistance being the purpose of the communication.” *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 795 (E.D. La. 2007). See also *Wellin v. Wellin*, 211 F. Supp. 3d 793, 807 (D.S.C. 2016) (defining the attorney-client privilege under South Carolina law).

<sup>33</sup> See *In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016) (“Under the crime-fraud exception, communications are not privileged when the client ‘consults an attorney for advice that will serve him in the commission of a fraud’ or crime.”) (quoting *Clark v. United States*, 289 U.S. 1, 15 (1933)); *United States v. Gorski*, 807 F.3d 451, 460 (1st Cir. 2015) (“The crime-fraud exception ‘withdraws protection where the client sought or employed legal representation in order to commit or facilitate a crime or fraud.’”) (quoting *In*

privilege is not waived after the consultation.<sup>34</sup> A long-revered, oft-cited definition of the privilege is as follows:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.<sup>35</sup>

If the privilege applies, disclosure of the communication cannot be compelled regardless of any argument of need. The protection is absolute.<sup>36</sup>

The modern rationale for the privilege, often called the utilitarian rationale,<sup>37</sup> is that the privilege exists to encourage clients to be forthright with their attorneys. If a client is completely truthful and forthcoming with counsel, that attorney can provide the client with the best possible advice. The client can then act preventatively to stay within the bounds of the law or can deal appropriately with the justice system for conduct that has already occurred. Society benefits in either scenario.<sup>38</sup> The Supreme Court in *Upjohn Corporation v. United States*,<sup>39</sup> stated that the purpose of the privilege:

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*re* Grand Jury Proceedings, 417 F.3d 18, 22 (1st Cir. 2005)).

<sup>34</sup> See *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015) (disclosure is waiver); *In re Icenhower*, 755 F.3d 1130, 1141 (9th Cir. 2014) (same).

<sup>35</sup> *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950). See also *In re* Grand Jury Subpoena, No. 3:16-mc-00079, 2016 WL 4385874, at \*2 (W.D.N.C. Aug. 16, 2016) (quoting the *United Shoe* test); *S.E.C. v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 161 (S.D.N.Y. 2014) (same). See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68–86 (Am. Law Inst. 2000). Some jurisdictions, such as New York, have codified the privilege. See, e.g., N.Y. C.P.L.R. § 4503(a).

<sup>36</sup> See *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998) (“[W]hen the privilege applies, it affords confidential communications between lawyer and client complete protection from disclosure”). See also *Kerner v. Superior Court*, 141 Cal. Rptr. 3d 504, 524 (Ct. App. 2012) (“The privilege is absolute and prevents disclosure of the communication regardless of its relevance, necessity or other circumstances peculiar to the case.”); *Batra v. Wolf*, 922 N.Y.S.2d 735, 738 (Sup. Ct. 2010) (“Privileged attorney-client communications are absolutely immune from disclosure.”).

<sup>37</sup> See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §5:13 (2017 update).

<sup>38</sup> See *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating the privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of the person having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”).

<sup>39</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

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is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.<sup>40</sup>

A second rationale, sometimes called a “non-utilitarian” or “humanistic” rationale, has been put forward by commentators.<sup>41</sup> It is a rationale based on individual rights.<sup>42</sup> While the courts have not adopted this reasoning expressly, this rationale may have some implicit sway.<sup>43</sup> This individual rights rationale posits that the privilege protects the privacy and dignity of the client.<sup>44</sup> In balancing the societal good of a system of justice that reliably reveals truth on one side with the right of the individual to be left alone in the attorney-client relationship, this rationale leans in favor of the right of the individual.<sup>45</sup>

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<sup>40</sup> *Id.* See also *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn*); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (“[T]he attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice.”); *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126 (9th Cir. 2012) (“Though this in some way impedes the truth-finding process, we have long recognized that ‘the advocate and counselor [needs] to know all that relates to the client’s reasons for seeking representation’ if he is to provide effective legal advice.”) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980) (alteration in original)); *Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002) (“The rationale for the privilege is that safeguarding communications between attorney and client encourages disclosures by the client to the lawyer that facilitate the client’s compliance with the law and better enable the client to present legitimate arguments should litigation arise.”). For a very early statement, see *Annesley v. Anglesea*, 17 How. St. Trials 1139 (1743) (“No man can conduct any of his affairs which relate to matters of law, without employing and consulting with an attorney; even if he is capable of doing it in point of skill, the law will not let him; and if he does not fully and candidly disclose every thing that is in his mind, which he apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him . . .”).

<sup>41</sup> See MUELLER & KIRKPATRICK, *supra* note 37, § 5:13. See also KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5472 (2017) (“Unlike the [utilitarian] argument, [the nonutilitarian argument] does not depend on any assumption or proof of the consequences likely to follow such disclosures.”).

<sup>42</sup> See *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1502–04 (1985) (discussing the competing rationales).

<sup>43</sup> See Edward J. Imwinkelried, *The Alienability of Evidentiary Privileges: Of Property and Evidence, Burden and Benefit, Hearsay and Privilege*, 80 ST. JOHN’S L. REV. 497, 507 (2006) (stating the law grants the privilege “out of respect for the client as an autonomous person with cognitive and volitional ability”).

<sup>44</sup> See Deborah Stavile Bartel, *Drawing Negative Inferences Upon a Claim of the Attorney-Client Privilege*, 60 BROOK. L. REV. 1355, 1363 (1995) (stating the privilege is “as a protection of the right of privacy and as a promotion of the right of individual independence and autonomy within the confining framework of a given system of laws”).

<sup>45</sup> See MUELLER & KIRKPATRICK, *supra* note 37, § 5:13 (generally discussing the

The privilege prevents some evidence that might assist the courts in reaching the truth from being before the court.<sup>46</sup> In recognition of this impediment to the truth-finding goal of the justice system, courts view the privilege warily and tend to apply it narrowly.<sup>47</sup> Yet, “[t]he social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.”<sup>48</sup> In particular cases the truth-finding aspect of the justice system may be thwarted, but the recognition of the privilege optimizes the ultimate goal of a just and law-abiding society.<sup>49</sup> The privilege is thus a balance of interests set by courts and legislatures—a determination of what would be in the best interest of society as a whole rather than individual actors in the justice system.

The confidentiality requirement of privilege doctrine is a limit on the scope of the privilege.<sup>50</sup> While the privilege protects communications between the attorney and the client to encourage the client to confide in the lawyer, the confidentiality requirement assures that the privilege does not apply to communications that would likely have occurred absent protection. The assumption is that if the client does not care about the confidentiality of

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rationale and noting the court’s espousal of the utilitarian rationale). *See also* Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241 (2002) (same).

<sup>46</sup> *See* *United States v. Nixon*, 418 U.S. 683, 710 (1974) (noting that the privilege stands “in derogation of the search for truth”). Courts tolerate the privilege only to the extent necessary “to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’” *Swidler & Berlin v. United States*, 524 U.S. 399, 403, (1998) (quoting *Upjohn*, 449 U.S. at 389). *See also* *Western Trails, Inc. v. Camp Coast to Coast, Inc.*, 139 F.R.D. 4, 8 (D.D.C. 1991) (“The privilege is an exception . . . to the fundamental principle that discovery should be liberal and broad in furtherance of the search for truth.”).

<sup>47</sup> *See, e.g., In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126 (9th Cir. 2012) (alteration in original) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)) (“[B]ecause . . . this rule ‘contravene[s] the fundamental principle that the public has a right to every man’s evidence,’ . . . we construe it narrowly to serve its purposes”); *FTC v. Boehringer Ingelheim Pharm., Inc.*, 180 F. Supp. 3d 1, 17 (D.D.C. 2016) (quoting *In re Lindsey*, 158 F.3d 1263, 1272 (D.C. Cir. 1998)) (“This Court and the D.C. Circuit have consistently emphasized that ‘the attorney-client privilege must be strictly confined within the narrowest possible limits consistent with the logic of its principle.’”).

<sup>48</sup> *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) (quoting MODEL CODE OF EVID. R. 210 & cmt. (1942)).

<sup>49</sup> *See Developments in the Law: Privileged Communications*, *supra* note 42 (noting the utilitarian rationale focuses “not on the benefits produced during particular lawsuits, but on the aggregate benefits that accrue from having the privilege in all court cases”).

<sup>50</sup> *See* Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 47 (2000); Paul R. Rice, *Attorney–Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L. J. 853, 856 (1998); Paul R. Rice, *A Bad Idea Dying Hard: A Reply to Professor Leslie’s Defense of the Indefensible*, 2001 WIS. L. REV. 187, 187–88 (2001).

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the communication, the client would have that communication with the attorney even without privilege protection—the privilege protection is unnecessary. If a client has other people present, actually or virtually, when the communication occurs, the client has indicated that secrecy privacy is not important. The privilege does not protect that communication as a result.<sup>51</sup>

Likewise, the client must keep the communication confidential after it occurs. Sharing the communication with others indicates to the world that privacy is not important with regard to the substance of the client-lawyer communication. Thus, the protection of the privilege is no longer necessary. So disclosure to third parties waives the privilege that otherwise protects the communication.<sup>52</sup>

Even with this emphasis on confidentiality, the protection of the privilege does not evaporate with every disclosure of an otherwise protected communication. The law recognizes situations in which the communication is disclosed but the privilege still applies. For example, courts often do not find a waiver of the attorney-client privilege if a communication has been inadvertently disclosed.<sup>53</sup> Similarly, the privilege is not waived when the

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<sup>51</sup> See *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 361 (3d Cir. 2007) (“A communication is only privileged if it is made in confidence. In other words, if persons other than the client, its attorney, or their agents are present, the communication is not made in confidence, and the privilege does not attach.”); *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (stating the privilege will only be recognized when “the communication between the client and the attorney is made in confidence of the relationship and under circumstances from which it may reasonably be assumed that the communication will remain in confidence”); *In re Condemnation City of Phila.*, 981 A.2d 391, 397 (Pa. Commw. Ct. 2009) (“Confidentiality is key to the privilege, and the presence of a third-party during attorney-client communications will generally negate the privilege; presumably, the client does not intend communications to be confidential if they are heard by someone else.”). See also RESTATEMENT, *supra* note 35, § 68 (stating presence of a third party prevents confidentiality).

<sup>52</sup> See *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126–27 (9th Cir. 2012) (citation omitted) (quoting *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation*, 130 U. PA. L. REV. 1198, 1207 (1982)) (“Most pertinent here is that voluntarily disclosing privileged documents to third parties will generally destroy the privilege. The reason behind this rule is that, ‘[i]f clients themselves divulge such information to third parties, chances are that they would also have divulged it to their attorneys, even without the protection of the privilege.”); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 361 (3d Cir. 2007) (citation omitted) (“The disclosure rule operates as a corollary to this principle: if a client subsequently shares a privileged communication with a third party, then it is no longer confidential, and the privilege ceases to protect it. This is because the act of disclosing signals that the client does not intend to keep the communication secret.”); *Lynx Servs. Ltd. v. Horstman*, No. 3:14-cv-01967, 2016 WL 4565895, at \*2 (N.D. Ohio Sept. 1, 2016) (“If a client voluntarily discloses privileged communications to a third party, the client waives the privilege as to communications on the same subject matter.”). See generally PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:28 (2016) (discussing waiver by disclosure).

<sup>53</sup> See, e.g., *McDermott Will & Emery LLP v. Superior Court*, 217 Cal. Rptr. 3d 47 (Ct.

disclosure of otherwise privileged communications results from illegal acts.<sup>54</sup> Also, some courts have recognized a common interest doctrine which allows parties with a common interest to share privileged communications without waiving the privilege.<sup>55</sup>

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App. 2017) (no waiver from inadvertently disclosed email); *Estate of Savage v. Kredentser*, 55 N.Y.S.3d 484 (App. Div. 2017) (no waiver from inadvertent disclosure of report).

Federal Rule of Evidence 502 states in part:

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection. . . . (b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

FED. R. EVID. 502(b). *See also* *Bhd. of Teamsters, Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC*, 722 F. Supp. 2d 845, 849–51 (E.D. Mich. 2010) (applying Federal Rule of Evidence 502; “the defendants took reasonable steps to prevent disclosure during the . . . document production” requiring review of “63,025 documents totaling an estimated 4.7 million pages” and that “the defendants took prompt steps to recall the documents once they realized that they had been disclosed”).

<sup>54</sup> *See, e.g., Sackman v. Liggett Grp., Inc.*, 173 F.R.D. 358, 365 (E.D.N.Y. 1997) (expert testimony based on a stolen document was excluded); *Parnes v. Parnes*, 915 N.Y.S.2d 345, 349 (App. Div. 2011) (no waiver; wife accessed husband’s e-mail without authorization).

<sup>55</sup> *See, e.g., Schaeffler v. United States*, 806 F.3d 34 (2d Cir. 2015) (no waiver because the consortium of banks and the taxpayer shared a common interest); *Crane Sec. Techs., Inc. v. Rolling Optics, AB*, 230 F. Supp. 3d 10 (D. Mass. 2017) (no waiver regarding communications between patentee’s inventor and patent counsel, inventor and patent counsel for the future licensee of the patent and between two counsel because of common interest).

The Restatement (Third) of the Law Governing Lawyers section 76 states:

(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68–72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (Am. Law Inst. 2000). *See generally* Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting* 95 MARQ. L. REV. 475 (2012) (discussing the history and use of the common interest doctrine); Katharine Taylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49 (2005) (same).

## III. CONTROL OF THE PRIVILEGE

A. *The Client's Privilege*

In modern times, the privilege is the client's right: the client may assert it or waive it.<sup>56</sup> Long ago, the privilege was viewed as the attorney's right.<sup>57</sup> A court could not require an attorney to testify against the client with regard to the client's secrets,<sup>58</sup> even if those secrets were not the product of confidential communications.<sup>59</sup> Gradually, courts turned to the modern rationale to justify the privilege and concomitantly adopted the view that the client controlled the privilege.<sup>60</sup> This modern approach is now universally accepted.<sup>61</sup>

In the vast majority of situations, the person or entity with the right to control the privilege is obvious. The individual client controls the privilege for him or herself.<sup>62</sup> Individuals who manage an entity control the privilege for the entity,<sup>63</sup> regardless of the identity of the employee with whom counsel

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<sup>56</sup> See *United States v. Yielding*, 657 F.3d 688, 707 (8th Cir. 2011) ("The privilege belongs to and exists solely for the benefit of the client."); *Sandra T.E. v. S. Berwyn Sch. Dist.* 100, 600 F.3d 612, 618 (7th Cir. 2010) ("The [attorney-client] privilege belongs to the client, although an attorney may assert the privilege on the client's behalf."); *In re New England Compounding Pharm., Inc.* MDL No. 13-2419, 2016 WL 6883215, at \*2 (D. Mass. July 28, 2016) (stating the privilege belongs to the client). See also RICE, *supra* note 52, at § 9.1 (stating the privilege belongs to the client).

<sup>57</sup> See MUELLER & KIRKPATRICK, *supra* note 37, at § 5:13 n.5.

<sup>58</sup> See RICE, *supra* note 52, § 1:2. See also Giesel, *supra* note 55, at 494.

<sup>59</sup> See Leslie, *supra* note 50, at 48 ("Given this justification for the privilege, confidentiality was entirely irrelevant—the aim was to shelter the attorney from being forced to testify against his client and violate his trust."). See also Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928).

<sup>60</sup> For a time, courts were of two minds. See, e.g., *Baker v. Arnold*, 1 Cai. R. 258, 266 (N.Y. Sup. Ct. 1803) (stating the privilege is the client's); *Preston v. Carr*, 148 Eng. Rep. 634, 635 (1826) ("I cannot accede to the proposition . . . that the privilege of an attorney is the privilege of the client . . .").

<sup>61</sup> See RICE, *supra* note 52, § 1:3 ("By the time the privilege arose in American case law, it was fully established as belonging to the client.").

<sup>62</sup> For natural persons, the privilege survives death. See *Swidler & Berlin v. United States*, 524 U.S. 399, 405 (1998). See generally Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45 (1992). State privilege law often provides that the personal representative of the client controls the privilege after death; the privilege terminates when the estate of the deceased is concluded. See, e.g., CAL. EVID. CODE § 953(c) (the personal representative of the client controls the privilege); KY. R. EVID. § 503(c) ("The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence.").

<sup>63</sup> See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) ("[F]or solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors."). See also *Grand Canyon Skywalk Dev. LLC v. Cieslak*, 2015 WL 4773585, at \*8 (D. Nev.



communicated to create the privileged communication. The privilege in such a scenario belongs to the entity, not the individual agent of the entity, communicating with counsel and not the individual member of management deciding whether to assert or waive the privilege on behalf of the entity.<sup>64</sup> In the context of transformational transactions involving entities, however, the repose of the right to control the privilege after such a transaction may not be so obvious.

B. *Commodity Futures Trading Commission v. Weintraub: Control of the Privilege Travels with Control of the Entity*

In *Commodity Futures Trading Commission v. Weintraub*,<sup>65</sup> the United States Supreme Court addressed the issue of control of the privilege in the context of an entity's bankruptcy. The entity, a commodity broker, had pursued liquidation in a chapter seven bankruptcy.<sup>66</sup> The Commodity Futures Trading Commission, as part of a fraud and misappropriation investigation of the entity, subpoenaed documents held by the entity's former attorney and sought to depose the attorney.<sup>67</sup> The attorney refused to answer certain questions, claiming the entity's attorney-client privilege.<sup>68</sup> The receiver, as the interim bankruptcy trustee, waived the privilege on behalf of the entity.<sup>69</sup> The Court of Appeals for the Seventh Circuit held that a trustee in bankruptcy did not have control of the entity's privilege.<sup>70</sup> The Second and Eighth Circuits had reached the opposite result.<sup>71</sup>

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Aug. 13, 2015) ("The power to waive the attorney-client privilege rests with the corporation's or entity's governing officers or directors . . .").

<sup>64</sup> Occasionally, the entity agrees to disclose communications between the entity's attorney and an employee. If the interests of the entity and the interests of the employee have diverged, the employee may claim that the attorney represented him or her individually as well as representing the entity. Thus, the employee may claim that he or she controls the privilege regarding the communications between the employee and the attorney. *See, e.g.*, *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009); *Commonwealth v. Schultz*, 133 A.3d 294 (Pa. Super. Ct. 2016). *See generally* Grace M. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. MIAMI L. REV. 109 (2010).

<sup>65</sup> *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985).

<sup>66</sup> *Id.* at 345–46.

<sup>67</sup> *Id.* at 346.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See Commodity Futures Trading Comm'n v. Weintraub*, 722 F.2d 338 (7th Cir. 1984).

<sup>71</sup> *See In re O.P.M. Leasing Servs., Inc.*, 670 F.2d 383 (2d Cir. 1982); *Citibank, N.A. v. Andros*, 666 F.2d 1192 (8th Cir. 1981).

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Justice Marshall, writing for the Court, concluded that the trustee in bankruptcy does indeed control the privilege for the debtor entity.<sup>72</sup> The opinion analogized the situation to a change of control situation for an entity. The opinion noted that the power to waive and thus control the privilege for an entity rested with the entity's management—the officers and directors, who, of course, derive authority from the shareholders and must act in the best interests of the entity.<sup>73</sup> The opinion continued that when control of the corporation shifts to new management, control of the privilege shifts as well. In particular, the Court stated:

The parties also agree that when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.<sup>74</sup>

The Court determined that the trustee was the actor in bankruptcy with the role most like the role of management in a solvent corporation.<sup>75</sup> Thus, control of the privilege for the debtor entity rested with the trustee.<sup>76</sup> In response to the argument that corporate actors might be wary of consulting the entity's counsel if they think that a trustee might waive the privilege for the entity if a bankruptcy occurs, the opinion simply notes that the danger would be no greater than in the situation of successor management outside of the bankruptcy setting.<sup>77</sup> The Court did not delve into a discussion of that danger, however, but rather accepted such an effect.

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<sup>72</sup> *Weintraub*, 471 U.S. at 358 (“[T]he trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications.”).

<sup>73</sup> *Id.* at 348. See also DAVID M. GREENWALD, ROBERT R. STAUFFER & ERIN R. SCHRANTZ, 1 TESTIMONIAL PRIVILEGES § 1:63 (3d ed. 2015) (stating control of an entity's privilege rests with the “controlling management” of the entity).

<sup>74</sup> *Weintraub*, 471 U.S. at 349.

<sup>75</sup> *Id.* at 353 (“[T]he trustee plays the role most closely analogous to that of a solvent corporation's management.”).

<sup>76</sup> *Id.* at 358 (“[T]he trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications.”). See generally RICE, *supra* note 52, §4:42 (trustee in bankruptcy controls the privilege).

<sup>77</sup> *Weintraub*, 471 U.S. at 357.

Thus, *Weintraub* established that control of the attorney-client privilege for the entity's earlier communications passes with control of the entity in bankruptcy and also in transformational transactions.

C. *What Constitutes Transfer of Control of an Entity? What is a Transformational Transaction?*

The *Weintraub* opinion states the federal rule,<sup>78</sup> and states follow the federal principle as well.<sup>79</sup> Courts have looked to it as the definitive word on control of the privilege in the setting of transformational entity changes;<sup>80</sup> control of the privilege for pre-transaction communications passes with control of the entity. In the intervening years, courts have explored how that concept applies in a variety of transactions.

While there is no doubt that a merger results in a change of control of the entity and the control of the attorney-client privilege shifts as well,<sup>81</sup> courts have explored whether control of the privilege shifts in other sorts of transactions such as sales of assets.<sup>82</sup> Courts have held that when the

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<sup>78</sup> See *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 689 F. Supp. 841 (N.D. Ill. 1988) (relying on *Weintraub* and finding that control of the privilege passed with control of a subsidiary entity). See also *In re Optuminsight, Inc.*, No. 3:15-cv-03424, 2017 WL 3096300 (Fed. Cir. July 20, 2017) (applying the rule as federal law); *United States v. Askins*, No. 3:13-cr-00162, 2016 WL 4039204 (M.D. Tenn. July 28, 2016) (same).

<sup>79</sup> See, e.g., KY. R. EVID. 503(c) ("The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence."). See also CAL. EVID. CODE § 953(d) (a holder of the privilege is "[a] successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence"); *In re Cap Rock Elec. Coop., Inc.*, 35 S.W.3d 222, 228 (Tex. Ct. App. 2000) (applying Texas law: privileges follow the change of control in a merger).

<sup>80</sup> See, e.g., *In re Grand Jury Subpoenas*, 734 F. Supp. 1207, 1211 (E.D. Va. 1990), *aff'd in part*, 902 F.2d 244 (4th Cir. 1990) (quoting *Weintraub*, 471 U.S. at 349) ("[T]he principle that emerges from *Weintraub* and the subsequent decisions is that 'when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well.'"); *Am. Int'l Specialty Lines Ins. Co. v. NWI-I, Inc.*, 240 F.R.D. 401, 406 (N.D. Ill. 2007) ("we see no reason to deviate from the well-established principle that the right to assert or waive a corporation's attorney-client privilege is an incident of control of the corporation"); *NCL Corp. v. Lone Star Bldg. Ctrs., Inc.*, 144 B.R. 170, 174 (Bankr. S.D. Fla. 1992) (control of the attorney-client privilege is an incident of control of the corporation).

<sup>81</sup> See, e.g., *Girl Scouts-W. Okla. v. Barringer-Thomson*, 252 P.3d 844-49 (Okla. 2011) (stating successor in merger transaction controlled the privilege with regard to the regular business; the court noted that the privilege with regard to communications surrounding the merger were not at issue).

<sup>82</sup> See, e.g., *Gary Friedrich Enters., LLC v. Marvel Enters., Inc.*, No. 08-cv-1533, 2011 WL 2020586, at \*5 (S.D.N.Y. May 20, 2011) (the privilege passes through various reiterations of the business); *M-I LLC v. Stelly*, No. 4:09-cv-1552, 2010 WL 2196281, at \*4 (S.D. Tex. May 26, 2010) (the privilege passes through several transactions including an asset purchase); *Coffin v. Bowater Inc.*, No. 03-cv-227, 2005 WL 5885367, at \*2 (D. Me. May 13,

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substance, the “practical consequences”<sup>83</sup> of the transaction, is transformational, even if the transaction is a sale of assets, control of the privilege passes along with control of the entity.<sup>84</sup> If the transaction results in the transfer of a business, even if the business is only a part of an entity, courts sometimes find that control of the business has shifted and so control of the privilege has shifted as well.<sup>85</sup>

For example, in *Soverain Software LLC v. Gap, Inc.*,<sup>86</sup> the court noted that there are “myriad ways control of a corporation or a portion of a corporation can change hands.”<sup>87</sup> The court stated that sale of some of a corporation’s assets or a patent does not trigger transfer of the right to control the attorney-client privilege, but “if the practical consequences of the transaction result in the transfer of control of the business and the continuation of the business under new management, the authority to assert or waive the attorney-client privilege will follow as well.”<sup>88</sup> In *Soverain*, two corporations operated a business which was the “commercial embodiment” of three patents that were the subject of the dispute.<sup>89</sup> After the two corporations filed for bankruptcy, an intermediary purchased the assets of the companies including the particular business related to the patents.<sup>90</sup> The intermediary eventually sold the business to another entity which continued to operate it.<sup>91</sup> The court declined to find that this scenario

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2005) (sale of assets was transfer of control).

<sup>83</sup> This often-used phrase was coined in *Tekni-Plex, Inc. v. Meyner & Landis*, 674 N.E.2d 663, 668 (N.Y. 1996). The court stated: “When ownership of a corporation changes hands, whether the attorney-client relationship transfers as well to the new owners turns on the practical consequences rather than the formalities of the particular transaction.” *Id.*

<sup>84</sup> See, e.g., *MacKenzie-Childs LLC v. MacKenzie-Childs*, 262 F.R.D. 241, 252–53 (W.D.N.Y. 2009) (the privilege passed with the transfer of “substantially all of the assets”; the purchaser continued the business of the seller of the assets); *Postorivo v. AG Paintball Holdings, Inc.*, Nos. 2991-VCP, 3111-VCP, 2008 WL 343856, at \*2 (Del. Ch. Feb. 7, 2008) (sale of “substantially all of the assets”); *Am. Int’l Specialty Lines Ins. Co. v. NWI-I, Inc.*, 240 F.R.D. 401, 408 (N.D. Ill. 2007) (sale of “substantially all” of the assets). *But see* *Applied Asphalt Techs. v. Sam B. Corp.*, No. 2:14-cv-00800, 2016 WL 427070, at \*5 (D. Utah Feb. 3, 2016) (transfer of patent did not cause a transfer of control of the privilege).

<sup>85</sup> See, e.g., *USI Ins. Servs., LLC v. Ryan & WDCK, LLC*, No. 1:14-cv-151, 2014 WL 3054278 (N.D. Ind. July 7, 2014) (the insurance business transferred from Wells Fargo though Wells Fargo continued to conduct other businesses).

<sup>86</sup> 340 F. Supp. 2d 760 (E.D. Tex. 2004).

<sup>87</sup> *Id.* at 763.

<sup>88</sup> *Id.* The *Soverain* court was following *Tekni-Plex* with this “practical consequences” test. Other courts have applied the “practical consequences” test as well. See, e.g., *USI Ins. Servs., LLC v. Ryan*, No. 1:14-cv-151, 2014 WL 3054278, at \*4 (N.D. Ind. July 7, 2014) (quoting this statement from *Soverain*); *John Crane Prod. Sols., Inc. v. R2R & D, LLC*, No. 3:11-cv-3237, 2012 WL 3453696, at \*3 (N.D. Tex. Aug. 14, 2012) (quoting this statement from *Soverain*).

<sup>89</sup> *Soverain*, 340 F. Supp. 2d at 762.

<sup>90</sup> *Id.* at 763.

<sup>91</sup> *Id.*

was a “mere transfer of assets.”<sup>92</sup> Rather, the court viewed the last entity operating the business to be the successor management of the business and so was the successor to the control of the privilege for that business.<sup>93</sup>

In *John Crane Production Solutions, Inc. v. R2R and D, LLC*,<sup>94</sup> the court explained the “practical consequences” analysis as follows:

In determining whether the “practical consequences” of a given transaction result in the “transfer of control,” courts consider such factors as the extent of the assets acquired, including whether stock was sold, whether the purchasing entity continues to sell the same product or service, whether the old customers and employees are retained, and whether the same patents and trademarks are used.<sup>95</sup>

The *John Crane* court concluded that although the situation before it involved an asset purchase agreement, the “practical consequences” were that the asset purchaser continued to run the original business, simply with new management.<sup>96</sup> The transaction involved most of the assets of the business. Thus, the privilege passed with the assets transferred.<sup>97</sup>

Several courts have focused on the business unit, not simply the entire entity, when deciding whether control of the privilege passed. For example, in *USI Insurance Services, LLC v. Ryan*,<sup>98</sup> USI acquired its insurance business from Wells Fargo in an asset purchase transaction that included all of the “assets, information, and goodwill” of the insurance business though what was acquired was certainly not all of the assets of Wells Fargo.<sup>99</sup> After the transaction, USI conducted the same type of insurance business in the same locations as Wells Fargo did before the transaction.<sup>100</sup> The court held that control of the insurance business passed in the transaction to the purchaser and thus that control of the attorney-client privilege passed as well.<sup>101</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* See also *UTStarcom, Inc. v. Starent Networks, Corp.*, No. 07-civ-2582, 2009 WL 4908579 (N.D. Ill. Feb. 20, 2009) (privilege transferred with transfer of business unit); *Parus Holdings, Inc. v. Banner & Witcoff, Ltd.*, 585 F. Supp. 2d 995 (N.D. Ill. 2008) (privilege transferred; transfer of patent was transfer of business).

<sup>94</sup> *John Crane Prod. Sols., Inc. v. R2R & D, LLC*, No. 3:11-cv-3237, 2012 WL 3453696, at \*3 (N.D. Tex. Aug. 14, 2012).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at \*4.

<sup>97</sup> *Id.* The privilege issue arose as part of a motion to disqualify counsel. *Id.* at \*1.

<sup>98</sup> No. 1:14-cv-151, 2014 WL 3054278 (N.D. Ind. July 7, 2014).

<sup>99</sup> *Id.* at \*1.

<sup>100</sup> *Id.* at \*5. The court stated: “[t]he same type of insurance business is conducted from the same geographic location, serving[] the same clients, and employing most of the same employees. In short, the practical consequences of the transaction is that the Fort Wayne Business has simply continued under new management.” *Id.*

<sup>101</sup> *Id.* (“For these reasons, the Court concludes that USI is Wells Fargo’s successor to the

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Likewise, in *UTStarcom, Inc. v. Starent Networks, Corp.*,<sup>102</sup> a court, applying the “practical consequences” test,<sup>103</sup> determined that the purchaser of assets of a business unit gained control of the attorney-client privilege with regard to the unit as well.<sup>104</sup> The court stated: “[w]here the new owner not only acquires certain assets, but also continues to operate the business enterprise, the practical consequence of the transaction is that control of the enterprise has passed to the new owner along with the attorney-client privilege incident to it.”<sup>105</sup> The purchaser had not purchased all of the assets of the business unit much less all of the assets of the entity,<sup>106</sup> yet the court determined that the buyer used the purchase of “substantially all” of the assets of a business unit and continued to operate a distinct business unit.<sup>107</sup> The purchaser of the assets thus controlled the attorney-client privilege for that business unit.<sup>108</sup>

In contrast, in *Applied Asphalt Technologies v. Sam B. Corp.*,<sup>109</sup> the court rejected a claim that the entirety of a business, and therefore control of a business, transferred with the transfer of a patent.<sup>110</sup> The court noted that the transferring entity continued to exist and was not controlled by the entity to whom the patent was transferred. Thus, the court concluded that control of the attorney-client privilege likewise did not transfer.<sup>111</sup>

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Fort Wayne Business for purposes of the attorney-client privilege.”). The privilege issue arose as part of USI’s motion to disqualify counsel for the opposition. *Id.* at \*1. *See also* *SimpleAir, Inc. v. Microsoft Corp.*, No. 2:11-cv-416, 2013 WL 4574594, at \*3 (E.D. Tex. Aug. 27, 2013) (purchaser of almost all of the assets passing through bankruptcy proceeding, including the patents important to the business, controlled the privilege).

<sup>102</sup> No. 07-c-2582, 2009 WL 4908579 (N.D. Ill. Feb. 20, 2009).

<sup>103</sup> *Id.* at \*3.

<sup>104</sup> *Id.* at \*5.

<sup>105</sup> *Id.* at \*3.

<sup>106</sup> *Id.* at \*4.

<sup>107</sup> *Id.* at \*5.

<sup>108</sup> *UTStarcom, Inc. v. Starent Networks, Corp.*, No. 07-2582, 2009 WL 4908579, at \*5 (N.D. Ill. Feb. 20, 2009). *See also* *Parus Holdings, Inc. v. Banner & Witcoff, Ltd.*, 585 F. Supp. 2d 995, 1002–03 (N.D. Ill. 2008) (purchaser of patents continued the operation of the division of the business related to those patents and thus controlled the attorney-client privilege regarding that division).

<sup>109</sup> No. 2:14-cv-00800, 2016 WL 427070 (D. Utah Feb. 3, 2016).

<sup>110</sup> *Id.* at \*5.

<sup>111</sup> *Id.* *See also* *Lynx Servs. Ltd. v. Horstman*, No. 3:14-cv-01967, 2016 WL 4565895 (N.D. Ohio Sept. 1, 2016) (involving an asset sale of “substantially all” of the sellers’ assets but not a transfer of control; the privilege did not travel with the assets); *R.G. Egan Equip., Inc. v. Polymag Tek, Inc.*, 758 N.Y.S.2d 763 (N.Y. Sup. Ct. 2002) (specific assets, a patent and the entity name, transferred but not control of the entity or privilege); *Yosemite Inv., Inc. v. Floyd Bell, Inc.*, 943 F. Supp. 882 (S.D. Ohio 1996) (purchase of the rights to a patent does not transfer control of the attorney-client privilege).

As these cases illustrate, courts make fact-specific determinations as to whether the transaction that has occurred has been transformational—whether control of the entity has passed to another. If a court determines that the result of a transaction or group of transactions is that control of the entity has passed, then the court must conclude that the right to assert or waive the attorney-client privilege for the current and prior entity has passed to the successor as a matter of law. Control of the privilege transfers, but only by operation of law as an incident of control of the entity. Because the analysis is fact-specific, at the time of some transactions, the parties may not be clear whether control of the entity and thus control of the privilege passes in a transaction.

#### IV. CONTROL OF THE PRIVILEGE IN TRANSFORMATIONAL TRANSACTIONS

##### A. *The Setting*

The logic of the basic *Weintraub* rule places it above reproach with regard to pre-transaction communications not related to the transformational transaction itself. When the question is control of the privilege for transaction-related, pre-transaction communications, the logic of the rule still wins out, but it is a closer question. The controllers of the surviving or purchasing entity, those corporate actors who are charged with fiduciary responsibility to act in the best interest of the entity, should be the ones deciding whether to waive or assert the privilege on behalf of the entity.<sup>112</sup> But the situation presents some uncomfortable results. After a merger of corporation Alpha and Beta with Alpha as the surviving entity, Alpha controls the privilege as to all privileged communications between Beta and its counsel that occurred before the merger, including communications about the transaction. Alpha has access to and use of those communications to establish claims of wrongdoing on the part of the pre-transaction representatives of Beta.<sup>113</sup>

This result is bothersome in that it effectively gives Alpha, the surviving entity, access to and control over attorney-client privileged communications involving parties who were arguably adversarial at the time

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<sup>112</sup> See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348–49 (1985) (“The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.”); *Grand Canyon Skywalk Dev. LLC v. Cieslak*, No. 2:15-cv-01189, 2015 WL 4773585 at \*8 (D. Nev. Aug. 13, 2015) (“The power to waive the attorney-client privilege rests with the corporation’s or entity’s governing officers or directors who must exercise the privilege in a manner consistent with their fiduciary duties to the corporation or entity.”).

<sup>113</sup> See, e.g., *Newspring Mezzanine Capital II, L.P. v. Hayes*, No. 14-1706, 2014 WL 6908058 (E.D. Pa. Dec. 9, 2014) (applying federal privilege law, the court found that the parties did not allocate the privilege by agreement and that the privilege passed with control of the entity).

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of the communications. If the representatives of Beta are aware of this possibility at the time of the pre-transaction communications, those actors may not access legal advice for Beta. Those representatives might fear that the purchaser might later use those communications against them. In not obtaining legal counsel and advice, the Beta representatives would perhaps, violate fiduciary duties owed to the entity. In addition, the rationale of the privilege, encouraging full consultation with counsel, would be thwarted.

The Supreme Court in *Weintraub* addressed this issue with regard to the bankruptcy context, but determined that the balance was properly struck by placing control of the privilege squarely in the hands of the surviving entity. The court accepted the awkward result as the proper balance of the policies and goals at issue.<sup>114</sup> Since the *Weintraub* opinion, two approaches have emerged for pre-transaction, transaction-related communications. One approach, crafted by a New York court, may (or may not) be read to craft an exception for transaction-related communications such that control of the privilege for these communications does not travel with control of the entity.<sup>115</sup> Another approach, adopted in Delaware, makes no exception and holds that the privilege for pre-transaction communications, even those relating to the transaction, travels to the surviving entity or asset purchaser.<sup>116</sup> Both approaches embrace the use of contractual privilege allocation provisions.

B. *The New York Approach: Tekni-Plex, Inc. v. Meyner & Landis*

In *Tekni-Plex, Inc. v. Meyner & Landis*,<sup>117</sup> the New York Court of Appeals addressed the question of control of the privilege after a transformational transaction for pre-transaction communications. Tekni-Plex, Inc. transferred all assets, rights, and liabilities to a new entity in exchange for the purchase price.<sup>118</sup> The agreement contained representations

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<sup>114</sup> *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 357 (1985). The Supreme Court stated:

[R]espondents argue that giving the trustee control over the attorney-client privilege will have an undesirable chilling effect on attorney-client communications. According to respondents, corporate managers will be wary of speaking freely with corporate counsel if their communications might subsequently be disclosed due to bankruptcy. . . . But the chilling effect is no greater here than in the case of a solvent corporation, where individual officers and directors always run the risk that successor management might waive the corporation's attorney-client privilege with respect to prior management's communications with counsel.

*Id.* (citation omitted).

<sup>115</sup> See discussion *infra* Part IV.B.

<sup>116</sup> See discussion *infra* Part IV.C.

<sup>117</sup> 674 N.E.2d 663 (N.Y. 1996).

<sup>118</sup> *Id.* at 665.



and warranties of the sole shareholder that Tekni-Plex was in compliance with all environmental laws and regulations and possessed all necessary permits for the operation of the business. The agreement also provided that the sole shareholder would indemnify for any misrepresentations or breaches of warranties. After the transaction, the new entity changed its name to “Tekni-Plex, Inc.” and carried on the business that Tekni-Plex had engaged in before the merger.<sup>119</sup>

The surviving Tekni-Plex later pursued the sole shareholder of the pre-transaction Tekni-Plex in arbitration for misrepresentations related to environmental issues.<sup>120</sup> In addition to disqualifying the firm that had previously represented the target from representing the shareholder in the later litigation, the court held that the surviving corporation controlled the attorney-client privilege regarding communications between the target and counsel before the merger if those communications did not relate to the merger, the transformational transaction.<sup>121</sup>

With regard to transaction-related, pre-transaction communications between counsel and the target, the court took a different approach, holding that the surviving entity did not control the privilege with regard to those communications. The court stated:

New Tekni-Plex, however, does not control the attorney-client privilege with regard to discrete communications made by either old Tekni-Plex or [the former sole shareholder] individually to [the members of the law firm] concerning the acquisition—a time when old Tekni-Plex and [the former sole shareholder] were joined in an adversarial relationship to [the new entity].<sup>122</sup>

The court noted that the claims the surviving entity was pursuing “did not derive from the rights it inherited from old Tekni-Plex but from the rights retained by the buyer . . . with respect to the transaction.”<sup>123</sup> The court refused to allow the surviving entity to “pursue the rights of the buyer . . . and simultaneously assume the attorney-client rights that the buyer’s adversary (old *Tekni-Plex*) retained regarding the transaction.”<sup>124</sup> Such “would thwart, rather than promote, the purposes underlying the privilege.”<sup>125</sup>

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 666, 670. The court noted that “*Weintraub* establishes that, where efforts are made to run the pre-existing business entity and manage its affairs, successor management stands in the shoes of prior management and controls the attorney-client privilege with respect to matters concerning the company’s operations.” *Id.* at 668.

<sup>122</sup> *Id.* at 666.

<sup>123</sup> *Tekni-Plex*, 674 N.E.2d at 671.

<sup>124</sup> *Id.*

<sup>125</sup> *See Orbit One Commc’ns v. Numerex Corp.*, 255 F.R.D. 98, 105 (S.D.N.Y. 2008). *See*

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The true reach of this decision is unclear. The *Tekni-Plex* opinion can be read broadly to say that in any change of control transaction, the control of the attorney-client privilege for the target entity passes to the surviving entity except for the privilege relating to communications about the transaction. In effect, an exception to the *Weintraub* rule is created which applies to transformational transaction communications.

Yet, the opinion may be more limited. The *Tekni-Plex* court was dealing with a target entity that had a sole shareholder who was also the president, chief executive officer, and sole director.<sup>126</sup> Without providing the exact document language, the court noted that the former sole shareholder of the target and the target had “expressly provided that [the community between the selling shareholder and his corporation] be preserved in any subsequent dispute regarding the acquisition.”<sup>127</sup> Further, the court twice conditioned its holding on the fact that the parties had agreed that in any dispute arising from the transaction, the parties would remain adverse to each other.<sup>128</sup> The court provided no agreement language to

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also *Safeco Ins. Co. of Am. v. M.E.S., Inc.*, 289 F.R.D. 41 (E.D.N.Y. 2011). In *Safeco*, the court applied New York law in a case involving indemnity agreements. One party was granted several interim remedies including the right to an assignment of certain of the defendants’ claims against others and the right to access the defendants’ books and records. *Id.* at 45. That party then claimed that it controlled the attorney-client privilege with regard to communications relating to those assignments, books, and records. *Id.* The court noted that in *Tekni-Plex* the court refused to find that control of the privilege for transformational transaction communications passed to the survivor because the effect “would significantly chill attorney-client communication during such transactions.” *Id.* at 53 (quoting *Tekni-Plex*, 89 N.Y.2d at 135–36). The *Safeco* court concluded that the situation before it was the same and so denied the party control of the privilege and access to the communications, noting that the parties could have expressly agreed otherwise. *Safeco*, 289 F.R.D. at 53.

<sup>126</sup> *Tekni-Plex*, 674 N.E.2d at 665.

<sup>127</sup> *Id.* at 671.

<sup>128</sup> The court stated:

Where the parties to a corporate acquisition agree that in any subsequent dispute arising out of the transaction the interest of the buyer will be pitted against the interests of the sold corporation, corporate actors should not have to worry that their privileged communications with counsel concerning the negotiations might be available to the buyer for use against the sold corporation in any ensuing litigation. Such concern would significantly chill attorney-client communication during the transaction.

*Id.* at 671–72. At another point the court stated:

Thus, while generally “parties who negotiate a corporate acquisition should expect that the privileges of the acquired corporation would be incidents of the sale,” the agreement between the parties here contemplated that, in any dispute arising from the merger transaction, the rights of the acquired corporation, old *Tekni-Plex*, relating to the transaction would remain independent from and adverse to the rights of new *Tekni-Plex*.

*Id.* at 672 (quoting *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 689 F. Supp. 841,

support this qualification. Perhaps the qualification simply arose from the fact that the parties included indemnity provisions in the merger documents or from the general nature of the transaction itself. In any event, these qualifications make it unclear whether the *Tekni-Plex* court intended to state a rule for all transformational transactions or only those whose documents contain certain provisions.<sup>129</sup> While both interpretations would create an exception to the *Weintraub* rule, the latter interpretation creates a much more limited one. What is clear, however, is that the *Tekni-Plex* court was amenable to parties allocating control of the privilege by contract.

The ambiguity of the *Tekni-Plex* opinion about the import of express contract language on the issue of privilege control is illustrated by the way other courts have interpreted the opinion. For example, one court has read the decision to not be dependent on the contract language before the *Tekni-Plex* court, while another federal court has done just the opposite. In *Orbit One Communications, Inc. v. Numerex Corporation*,<sup>130</sup> the parties to an asset sale were litigating various issues surrounding the transaction.<sup>131</sup> The court interpreted *Tekni-Plex* as holding that the privilege with regard to transaction communications did not travel to the surviving entity because to hold otherwise would “chill attorney-client communication during such transactions.”<sup>132</sup> The court noted that the *Tekni-Plex* court “found further support” for its holding in the language of the agreement but stated that the language “was not central to the court’s legal analysis.”<sup>133</sup> The *Orbit One* court stated that allowing the survivor to control the privilege for transaction communications would create a “fundamentally unfair result.”<sup>134</sup> However, the court then posited that agreement language supported the conclusion as it had in *Tekni-Plex*.<sup>135</sup>

In contrast, in *In re Hechinger Investment Company of Delaware, Inc.*,<sup>136</sup> the court was persuaded that the agreement language in *Tekni-Plex* had been dispositive. The court determined that control of the privilege for transaction communications passed to the trustee of a liquidating trust and did not remain with the original control group of the entity that had entered

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842 (N.D. Ill. 1988)).

<sup>129</sup> See also Henry Sill Bryans, *Business Successors and the Transpositional Attorney-Client Relationship*, 64 BUS. LAW. 1039, 1046 (2009) (“It is not clear exactly what the Merger Agreement actually provided on this issue, nor is it clear how much the provision referred to affected the result reached by the court on [the law firm’s] advice to [the shareholder] on the transaction itself.”).

<sup>130</sup> 255 F.R.D. 98 (S.D.N.Y. 2008).

<sup>131</sup> *Id.* at 101.

<sup>132</sup> *Id.* at 105.

<sup>133</sup> *Id.* at 105 n.6.

<sup>134</sup> *Id.* at 106–07.

<sup>135</sup> *Id.* at 106 n.9.

<sup>136</sup> 285 B.R. 601 (Bankr. D. Del. 2002).

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the bankruptcy process.<sup>137</sup> After noting that *Tekni-Plex* did not deal with the bankruptcy setting,<sup>138</sup> the court distinguished the situation before it from that in *Tekni-Plex* by noting that the *Tekni-Plex* court relied on the transaction agreement for its holding while the matter before the *Hechinger* court had no such agreement language.<sup>139</sup> The court stated that the *Tekni-Plex* court's reasoning "strongly suggests that, absent the parties' acknowledgement in the merger documents, the privilege transferred would have included the pre-merger information."<sup>140</sup>

While these subsequent cases highlight the lack of clarity of the *Tekni-Plex* holding, they also explicitly or implicitly accept the premise that contracting parties have the ability to allocate control of the privilege by contract. Similarly, the court in *Postorivo v. AG Paintball Holdings, Inc.*<sup>141</sup> placed emphasis on the terms of the contract between the parties. The Delaware court applied New York law<sup>142</sup> to a sale of "substantially all" of the assets of a business.<sup>143</sup> The court followed the teachings of *Tekni-Plex*, confirming that control of the privilege passed to the buyer in the transformational transaction generally<sup>144</sup> but not with regard to communications relating to the transaction itself.<sup>145</sup> The *Postorivo* court noted that the communications surrounding the transaction occurred when the parties were in an adversarial posture<sup>146</sup> and that the transaction document did not transfer control of the privilege regarding the transaction to the buyers.<sup>147</sup> The court also determined that the privilege relating to communications relevant to a particular piece of litigation was controlled by the sellers because the transformational transaction agreement allocated

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<sup>137</sup> *Id.* at 613.

<sup>138</sup> *Id.* at 611.

<sup>139</sup> *Id.* at 611–12 ("The *Tekni-Plex* court did not address, since the facts did not call upon it to do so, the ownership of the attorney-client privilege regarding pre-merger information after completion of a merger transaction in the *absence* of such language.").

<sup>140</sup> *Id.* at 612. The reasoning related to the *Tekni-Plex* court's holding regarding disqualification of counsel. *Id.*

<sup>141</sup> Nos. 2991-VCP, 3111-VCP, 2008 WL 343856 (Del. Ch. Feb. 7, 2008).

<sup>142</sup> *Id.* at \*4. The parties selected New York law in the transactional document. The court noted that Delaware follows the approach of Section 145 of the Restatement (Second) of Conflict of Laws (1997) with regard to choice of law and that "Delaware courts also generally honor contractually designated choice-of-law provisions so long as the jurisdiction selected bears some material relationship to the transaction." *Id.*

<sup>143</sup> *Id.* at \*1.

<sup>144</sup> *Id.* at \*5.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at \*6.

<sup>147</sup> The court pointed to the following provision of the transaction agreement dealing with "Excluded Assets" which stated: "All rights of the Sellers under this Agreement and all agreements and other documentation relating to the transactions contemplated hereby . . ." *Postorivo*, 2008 WL 434856, at \*6 n.25.

ownership of that litigation and related privileges to the sellers.<sup>148</sup> In all of these cases the courts assumed that the parties could allocate control of the attorney-client privilege by contract.

C. *The Delaware Approach: Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*

The Delaware Court of Chancery had occasion to address the issue of post-transaction control of the privilege for pre-transaction, transaction-related communications in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*.<sup>149</sup> After a merger, the surviving entity sued the former representatives of the target entity claiming that former shareholders and other representatives had fraudulently induced the merger.<sup>150</sup> The surviving entity sought to rely on communications it had in its possession as a result of taking possession of the computer systems of the target in the merger—communications that had occurred at the time of the negotiation of the merger and which were between the former representatives of the target and counsel for the target.<sup>151</sup> The former representatives of the target claimed that those communications were protected by the attorney-client privilege and that they, not the surviving entity, controlled the privilege as to those transformational transaction communications.<sup>152</sup>

The court noted that the applicable Delaware statute provided that after a merger, “all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation.”<sup>153</sup> Despite the urging of the former representatives of the target to apply the *Tekni-Plex* approach, the *Great Hill* court stated that it must follow the applicable Delaware statute. The court thus held that the privilege passed to the survivor entity as a result of the transformational transaction and that the survivor entity then controlled the privilege for all communications involving the target, even those relating to the transformational transaction itself.<sup>154</sup> This result is consistent with the view of control of the privilege stated in the *Weintraub* opinion.

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<sup>148</sup> *Id.* at \*7–8.

<sup>149</sup> 80 A.3d 155 (Del. Ch. 2013).

<sup>150</sup> *Id.* at 155–56.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* (quoting DEL. CODE ANN., tit. 8, § 259).

<sup>154</sup> *Id.* at 158–60. The court refused to create a judicial exception to the statute. “That sort of micro-surgery on a clear statute is not an appropriate act for a court to take.” *Id.* at 160.

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The *Great Hill* court then noted that the rule that control of the privilege travels with control of the entity can be modified by the parties to the transaction by contract.<sup>155</sup> In other words, in the court's opinion the statutory rule relied upon by the court is a default rule if the parties have not otherwise allocated control of the privilege.<sup>156</sup> While refusing to make an exception to the statute on the basis of the relationship of the communications to the transaction, the court, in effect, made an exception to the statute by recognizing the ability of the parties to transactions to modify the statute's reach.

Noting that parties to transactions already commonly provide for control of the privilege to reside somewhere other than with the surviving entity,<sup>157</sup> the *Great Hill* court stated: "Thus, the answer to any parties worried about facing this predicament in the future is to use their contractual freedom . . . to exclude from the transferred assets the attorney-client communications they wish to retain as their own."<sup>158</sup> Because the former representatives of the target in the *Great Hill* matter had not provided for control of the privilege in the transaction documents, the court refused to create such a result. The court stated: "Seller did not carve out from the assets transferred to the surviving corporation any pre-merger attorney-client communications, and this court will not unilaterally read such a carve out into the parties' contract."<sup>159</sup> Because control of the privilege passed to the survivor entity, there was no waiver as the result of the survivor having access to the communications.<sup>160</sup>

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<sup>155</sup> *Great Hill*, 80 A.3d at 161.

<sup>156</sup> *See id.* at 162 ("Absent such an express carve out, the privilege over all pre-merger communications—including those relating to the negotiation of the merger itself—passed to the surviving corporation in the merger, by plain operation of clear Delaware statutory law under § 259 of the DGCL.").

<sup>157</sup> *Id.* at 161. The court noted that in *Postorivo v. AG Paintball Holdings, Inc.*, Nos. 2991-VCP, 3111-VCP, 2008 WL 343856 (Del. Ch. Feb. 7, 2008), the transformational transaction documents stated that control of the privilege for communications relating to the transaction did not pass to the surviving entity with the completion of the transaction. *Id.* The *Great Hill* court referred to the *Postorivo* asset purchase agreement which identified "Excluded Assets" as "all rights of the Sellers under this Agreement and all agreements and other documentation relating to the transactions contemplated hereby." *Id.* at 161 n.27.

<sup>158</sup> *Great Hill*, 80 A.3d at 161.

<sup>159</sup> *Id.* at 162. Armed with the communications between the former representatives of the target and counsel relating to the transformational transaction, the surviving corporation's claims of fraudulent misrepresentation survived a motion to dismiss for failure to state a claim. *See Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, No. 7906-VCG, 2014 WL 6703980 (Del. Ch. Nov. 26, 2014). *See also NewSpring Mezzanine Capital II, L.P. v. Hayes*, No. 14-1706, 2014 WL 6908058, at \*4 (E.D. Pa. Dec. 9, 2014) (applying federal privilege law, the court found that the parties did not allocate the privilege by agreement and that the privilege passed with control of the entity).

<sup>160</sup> *Great Hill*, 80 A.3d at 162. In transformational transactions, the surviving entity often takes possession of the communications history of the target, in hard or virtual form, including

V. THE RESPONSE TO UNCERTAINTY: CONTRACTUAL PROVISIONS  
DEALING WITH CONTROL OF THE ATTORNEY-CLIENT PRIVILEGE

The *Great Hill* court openly encouraged parties in transformational transactions to allocate control of the attorney-client privilege by contract. Other courts such as the *Tekni-Plex* court seem to accept contractual privilege allocation. Commentators have likewise encouraged the use of contractual provisions allocating control of the attorney-client privilege apart from control of the entity.<sup>161</sup>

Indeed, transacting parties, or at least their attorneys, have responded. Many transactional documents now address the issue of control of the privilege.<sup>162</sup> For example, a recent equity purchase agreement attempts to

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the communications between the target and counsel regarding the transformational transaction. *See, e.g.*, *Lynx Servs. Ltd. v. Horstman*, No. 3:14-cv-01967, 2016 WL 4565895 (N.D. Ohio Sept. 1, 2016). In *Lynx*, “substantially all” of the assets of two entities were transferred including servers containing otherwise privileged emails. *Id.* at \*2. The court, however, refused to find that the sale of assets created a shift of control of the entity and so control of the privilege did not shift to the purchaser. *Id.* Because the purchaser did not control the privilege but had possession of the communications, the privilege was waived. *Id.* at \*3. *See also* *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, No. 01-c-4366, 2003 WL 21911066 (N.D. Ill. Aug. 7, 2003) (communications transferred with assets to the purchaser but the asset purchase did not effect a change of control of the entity and so control of the privilege did not travel with the assets; disclosure of the communications to the purchaser waived the privilege); *In re In-Store Advertising Secs. Litig.*, 163 F.R.D. 452 (S.D.N.Y. 1995) (communications transferred to purchaser of assets but control of the privilege did not pass to the purchaser so the privilege was waived). *But see* *Postorivo v. AG Paintball Holdings, Inc.*, Nos. 2991-VCP, 3111-VCP, 2008 WL 343856, at \*4 n.13 (Del. Ch. Feb. 7, 2008) (parties argued that to the extent communications passed to the asset purchaser on servers which passed to the asset purchaser, any privilege for those communications was waived; court refused to find waiver because the seller did not “deliberately and voluntarily relinquish the right to assert their claims of privilege”); *Orbit One Commc’ns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 107–08 (S.D.N.Y. 2008) (the court applied the New York approach to find that the privilege did not travel to the surviving entity yet the court did not find a waiver though the communications were on computers that the survivor controlled after the transaction but remote from the survivor’s true access).

<sup>161</sup> *See, e.g.*, Edna Selan Epstein, *Acquisition and Merger: Whose Privilege is it Now?*, 42 LITIG. 8, 9 (Winter 2016) (“What can companies in these situations do to eliminate any uncertainty surrounding which entity can claim the privilege or to circumvent the default rule? Address the issue in the transactional documents[.]”); W. Brantley Phillips, Jr. & Joseph B. Crace, Jr., *Preserving the Attorney-Client Privilege in Change-of-Control Transactions*, 19 M&A LAWYER 2 (Oct. 2015) (“[T]he parties should . . . clearly define the scope of any retention of control by the seller and its controlling shareholders.”); Roxanne L. Houtman, *Delaware Insider: Great Hill: To the Survivor Goes the Privilege?*, BUS. L. TODAY 1, 2 (Mar. 2014) (“In light of the *Great Hill* decision, where a merger transaction involves a Delaware corporation, practitioners should consider whether it would be prudent to include in the merger agreement language that excludes pre-merger attorney client communications from the assets being transferred to the surviving corporation.”); Henry Sill Bryans, *Business Successors and the Transpositional Attorney-Client Relationship*, 64 BUS. LAW. 1039, 1046 (Aug. 2009) (“drafting against a contrary result may be prudent”).

<sup>162</sup> *See, e.g.*, Xylem Inc., Share Purchase Agreement, § 10.17 (Form 8-K, Ex. 2.1) (Aug. 15, 2016); Isle of Capri Casinos Inc., Equity Purchase Agreement, § 12.17 (Form 8-K, Ex.

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recreate the *Tekni-Plex* result by clarifying that the seller controls the attorney-client privilege for communications relating to the transformational transaction. The provision states:

Buyer . . . agrees and . . . agrees to cause its Affiliates (including, after the Closing, the Company); . . . to agree that, as to all privileged communications between or among [law firm] and Seller and any of its Affiliates (including, prior to the Closing, the Company) that relate in any way to this Agreement, the transactions contemplated hereby or the Company, its Affiliates or any of its respective operations for the period ending at the Closing, the attorney-client privilege and the expectation of client confidence belongs to, and may be controlled by, Seller and will not pass to or be claimed by Buyer or its Affiliates (including, after the Closing, the Company).<sup>163</sup>

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2.1) (Aug. 22, 2016).

An article by several attorneys who practice in the area suggests the following provision:

From and after the Effective Time, (i) the direct and indirect holders of Company Shares immediately prior to the Effective Time (the “Former Shareholders”) shall be the sole holders of the attorney-client privilege with respect to the engagement of [Seller Counsel] by the Company, and neither the Surviving Corporation nor its Affiliates shall be a holder thereof, (ii) to the extent that files of [Seller Counsel] in respect of such engagement constitute property of the client, only the Former Shareholders and their respective Affiliates (and none of Parent, the Surviving Corporation or their respective Affiliates) shall hold such property rights and (iii) [Seller Counsel] shall have no duty whatsoever to reveal or disclose any such attorney-client communications or files to Parent, the Surviving Corporation or any of their Affiliates by reason of any attorney-client relationship between [Seller Counsel] and the Company or any of its respective Affiliates or otherwise. This Section is irrevocable, and no term hereof may be amended, waived or modified, without the prior written consent of [Seller Counsel].

Lawrence Friedman, Paul Shim, & Anderson Heston, *Lessons in Preserving the Attorney-Client Privilege in M&A*, LAW360 (Apr. 7, 2015), <https://www.law360.com/articles/640166/lessons-in-preserving-the-atty-client-privilege-in-m-a>.

<sup>163</sup> Isle of Capri Casinos Inc., Equity Purchase Agreement, § 12.17 (Form 8-K, Ex. 2.1) (Aug. 22, 2016).



A recent transaction agreement does the same,<sup>164</sup> but also includes a more explicit and complete covenant that the buyer, after the transaction, will not seek access to those communications. The provision states that the neither the buyer nor the acquired entity “will seek to obtain such communications, whether by seeking a waiver of the attorney-client privilege or through other means.” The agreement further states that neither the buyer nor the acquired entity “may use or rely on any such Privileged Communications . . . .” In addition, the provision included a waiver by the buyer of any privilege with regard to the transaction-specific communications. The waiver provision states: “Acquiror waives and will not assert, and agree to cause its Affiliates (including any Acquired Entity) to waive and not to assert, any attorney-client privilege with respect to such Privileged Communication.”<sup>165</sup>

Another recently-used provision is more specific about exactly who has control of the privilege after the transaction occurs.<sup>166</sup> The provision states that after the transaction the privilege and the expectation of client confidence “belong to the Securityholders and may be controlled by the Representative on behalf of the Securityholders . . . .”<sup>167</sup> “Securityholders” is defined as stockholders, option holders, and warrant holders, and the representative is identified as a particular individual.<sup>168</sup>

## VI. IS CONTROL OF THE ATTORNEY-CLIENT PRIVILEGE A PROPER SUBJECT FOR CONTRACT ALLOCATION?

### A. *The Privilege Should Not Be Alienable by Contract*

Several circumstances of the current deal climate bring to the fore the very basic question of whether control of the attorney-client privilege is a proper subject of contract allocation. The first circumstance is that parties,

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<sup>164</sup> Equinix Inc., Transaction Agreement Section 4.08 states in part:

As to all communications among counsel for Seller and/or its Affiliates (including Jones Day and in-house counsel of Seller and/or its Affiliates), Seller and any Affiliate of Seller that relate in any way to this Agreement or the transactions contemplated by this Agreement or to any Excluded Assets, Excluded Liabilities or Excluded Business (collectively, the “Privileged Communications”), the attorney-client privilege and the expectation of client confidence belongs to Seller and may be controlled by Seller and will not pass to or be claimed by Acquiror, any Acquired Entity or any of their respective Affiliates.

Equinix Inc., Transaction Agreement, § 4.08 (Form 8-K, Ex. 2.1) (Dec. 6, 2016).

<sup>165</sup> *Id.*

<sup>166</sup> Stamps.com Inc., Agreement and Plan of Merger Section 9.18 (Form 10-Q, Ex. 10.1) (Aug. 9, 2016).

<sup>167</sup> *Id.*

<sup>168</sup> Stamps.com Inc., Agreement and Plan of Merger Section 1.1 (Form 10-Q, Ex. 10.1) (Aug. 9, 2016).

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with some frequency, are including contractual provisions that purport to allocate control of the attorney-client privilege. The second circumstance is that some courts assume that parties to transformational transactions may allocate control by contract. It is easy to understand how parties and attorneys, dealing with transactions in which clients' assets, tangible and intangible, are allocated, might assume that the privilege is something that can be allocated along with the other assets of the target on lists of included and excluded assets in the transaction. Yet, the nature of the privilege is different, and its alienability should be viewed differently as well.

Control of the attorney-client privilege may pass with control of the entity and thus is alienable as a part of transfer of control of an entity. But control of the privilege should not be viewed as an asset that can be transferred by contract separate from the transfer of control of the entity. The attorney-client privilege should not be an asset that can be bought and sold or transferred at the whim of private parties. As one commentator has stated when addressing transfer of the privilege for natural persons, a transfer of the privilege "is more than a purely private transaction []" and "privileges are not mere private 'commodities.'"<sup>169</sup> Rather, in any transaction involving the privilege, there is a third party, the public, whose interests must be considered. The public's interest in the justice system itself must be weighed. As Justice Arthur H. Goldberg stated in congressional testimony regarding privilege law in the 1970s, privilege law "is the concern of the public at large. . . . [Privileges] relate to the fundamental rights of citizens."<sup>170</sup>

The justice system has as its goal, ultimately, justice by a system that reliably ferrets out the truth in the adversarial arena of the courts. It is in the public interest that the court system achieves that overarching public benefit. Though the attorney-client privilege hinders the truth-finding mission of the courts, the privilege is recognized as a needed obstacle in the process. The

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<sup>169</sup> Edward J. Imwinkelried, *The Alienability of Evidentiary Privileges: Of Property and Evidence, Burden and Benefit, Hearsay and Privilege*, 80 ST. JOHN'S L. REV. 497, 511–12 (2006).

<sup>170</sup> Testimony of Arthur H. Goldberg, Rules of Evidence, Special Subcom. On Reform of Fed. Crim. Laws, H. Comm. On the Judiciary, H.R. Rep., 93 Cong., 1<sup>st</sup> Sess. 142, 143–44 (1973) (quoted in EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* §1:1 (3d Ed. 2017)). See also 120 CONG. REC. 93-650 (daily ed. Dec. 18, 1974), where Representative Hungate stated in the discussion of the proposed Federal Rules of Evidence:

Rules of privilege keep out of litigation relevant and material information. They do so because of a substantive policy judgment that certain values—such as preserving confidential relationships—outweigh the detrimental effect that excluding the information has on the judicial truthfinding process. In short, rules of privilege reflect a substantive policy choice between competing values, and this policy choice is legislative in nature.

privilege exists because of the recognized value of every person having access to the best advice of an attorney so that the person may adapt the person's conduct to abide by the law. It is a right created and bestowed for this societal goal. The motivational purpose shows respect for the client as an individual actor in control of his, her, or its own path but is ultimately in the service of the modern rationale of the privilege: encouraging the client to disclose all to the attorney so that the attorney may provide the best possible representation to the client within the truth-finding process, and so the client may then understand how to abide within the law and interact with the justice system because society is made better in that instance. The attorney-client privilege is thus a delicate balance of several policies. Its definition and application set that balance.

Because of this *pas de deux* involving the policy behind the privilege and the larger-scoped public policy of a truth-finding justice system, any decision regarding control of the privilege should not be the creature of contractual allocation but rather should be fully-recognized as a policy decision, which should be the result of careful judicial or legislative contemplation. For example, in *Weintraub*, the United States Supreme Court evaluated the policies at play and concluded that the control of the privilege should travel with control of the entity. While the entity continues to exist, though with different management, it has a confidentiality interest to be protected even though the continuing of the privilege in time means that the truth-finding mission of the courts continues to be hindered. But the *Weintraub* court determined that recognizing the transfer of the privilege along with the transfer of control was the correct balance of the interests.<sup>171</sup>

Logically, the entity that continues the existence of the target or asset seller should be the controller of the privilege for privileged communications that involved the target or asset seller before the transaction. The management team of that survivor or asset purchaser should make decisions regarding privilege with consideration for what is best for the entity just as that team should make decisions regarding all issues with consideration for what is best for the entity.<sup>172</sup> Linking control of the entity and control of the privilege is logical.

Parties to transactions should not have the power to reset the balance set by courts and legislatures as those bodies have defined the privilege and its parameters. In *Zenith Electronics Corporation v. WH-TV Broadcasting*

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<sup>171</sup> See discussion *supra* Part III.B.

<sup>172</sup> *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348–49 (1985) (“The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.”).

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*Corporation*,<sup>173</sup> the United States District Court for the Northern District of Illinois agreed that the privilege should not be alienable by contractual provision.<sup>174</sup> The court faced a situation in which Zenith sold certain assets relating to a division of its business and transferred the documents relating to the business division to the buyer. Later, in litigation with a third-party, the buyer claimed attorney-client privilege protection for the documents transferred to it and related to the acquired business division.<sup>175</sup> The court determined that control of the corporation did not pass in the asset transaction and so control of the privilege related to the assets did not pass to the buyer as a matter of law.<sup>176</sup> The buyer argued that even so, the parties had, by contract, agreed that control of the privilege was transferred to the buyer in that the asset purchase agreement stated that the buyer was purchasing “[a]ll intangible personal property to the extent used or held for use in the conduct of the Business (including, without limitation, . . . all rights, *privileges*, claims, causes of action and options relating to or pertaining to the Business or the Assets) . . . .”<sup>177</sup> The court refused to give any weight to the contractual provision, stating: “[t]he court concludes that Zenith’s attorney-client privilege simply was not a property right that could be sold.”<sup>178</sup>

The confidentiality requirement and its related waiver concept accentuate the inherent utilitarian impossibility of contractual alienability of the privilege. The definition of the privilege carries with it a requirement that the client intend the communication to be confidential. The waiver doctrine links to this confidentiality requirement so that any disclosure of an otherwise privileged communication to a stranger to the communication acts as a waiver of the privilege. In such a situation, the disclosing party has indicated that confidentiality is not needed and so the ill effects of the privilege on the truth-finding mission of the justice system can be avoided by finding a waiver of the privilege. When a transformational transaction occurs, control of the entity, the original client, passes to the surviving entity controlled by new and different management. That new management controls the privilege on behalf of the entity. If, as part of the transaction, the control of the privilege is given to former shareholders of the target or some other representative of the pre-transaction entity who was not a part of

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<sup>173</sup> No. 01-c-4366, 2003 WL 21911066 (N.D. Ill. Aug. 7, 2003).

<sup>174</sup> *Id.* at \*2.

<sup>175</sup> *Id.* at \*1.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (quoting the Asset Purchase Agreement).

<sup>178</sup> *Id.* at \*2. In *UTStarcom, Inc. v. Starent Networks, Corp.*, No. 07-c-2582, 2009 WL 4908579 (N.D. Ill. Feb. 20, 2009), the court agreed that the attorney-client privilege is not an asset that can be sold. *Id.* at \*3. Because the court determined that the privilege transferred with the change of control of the entity, its holding did not rely on its conclusion about the transferability of the privilege by contract. *Id.* at \*5.

the management team of the target entity, the privileged communications are being shared outside of the bounds of the privilege's definition; those former shareholders, for example, were never within the bounds of the privilege. The privilege is waived. With regard to representatives of the target who were part of the managing control group of the target, one might argue that even though those individuals were privy to the entity's privileged communications in which they were involved, allowing them access to the communications after those representatives are no longer acting for the entity is waiver. After the transaction those individuals are strangers to the communications and the entity.<sup>179</sup>

The *Zenith* court noted the interplay of the waiver doctrine in the midst of the attempted contractual allocation of the privilege. The *Zenith* court was unwilling to allow the parties to thwart the protection to the system of justice provided by the waiver doctrine by contractually transferring control.<sup>180</sup>

In addition, a system in which control of the privilege can be separated not only from control of the entity but also allocated to others in pieces and parts is an impossible system for courts to administer. In *American International Specialty Lines Insurance Company v. NWI-I, Inc.*,<sup>181</sup> the court reviewed a situation in which two documents granted to two different parties control of the privilege as it related to the assets transferred to those entities.<sup>182</sup> The court reasoned that control of the privilege was "an incident of control of the corporation."<sup>183</sup> While acknowledging that a transfer of

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<sup>179</sup> The communications involving a member of management of the target and counsel about the transaction are communications of the target entity and counsel. The individual has no protected interest in them or control over them. See *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3d Cir. 1986) (the entity controls the privilege: the individual has no control unless the attorney represented the individual as such). See generally Grace M. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. MIAMI L. REV. 109 (2010) (discussing the fact that the entity controls the privilege, not the individual employee).

<sup>180</sup> *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, No. 01-c-4366, 2003 WL 21911066, at \*2 (N.D. Ill. Aug. 7, 2003).

<sup>181</sup> 240 F.R.D. 401 (N.D. Ill. 2007).

<sup>182</sup> *Id.* at 404. The documents were specific with regard to the privilege. Both documents stated:

In connection with the rights, claims and causes of action that constitute the [Successor Liquidation Trust Assets or the Custodial Trust Assets], any attorney-client privilege, work-product privilege, or other privilege or immunity attaching to any documents or communications (whether written or oral) transferred to the [SLT or CT] shall vest in the [SLT or CT] and its representatives, and the Parties are authorized to take all necessary actions to effectuate the transfer of such privileges.

*Id.*

<sup>183</sup> *Id.* at 406.

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assets can effectuate a change of control of an entity,<sup>184</sup> the court determined that despite the contractual allocation, neither of the entities was a successor of the old entity's business and so neither controlled the privilege for any communications related to the assets transferred.<sup>185</sup>

The privilege is not an incident of an asset, nor is it an asset unto itself. Rather, the privilege is an incident of the relationship of counsel with the entity and passes when control of an entity passes. As long as the entity continues, the privilege stays with the entity—even though those in control of the entity may change. Courts that allow parties to allocate control of the privilege by contract apart from control of the entity are protecting the parties to the transaction and their freedom to contract at the expense of the public interest in the privilege.<sup>186</sup> A more appropriate approach is to find such

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 407 (“Absent control of the corporation, this Court finds that the attorney-client privilege does not pass to a successor entity, even with respect to the assets that were transferred to that successor.”). The court denied control of the privilege that a third successor to the original entity claimed as well because that entity did not emerge from bankruptcy with control of the old entity's business. *Id.* at 408.

<sup>186</sup> For example, the court in *Postorivo v. AG Paintball Holdings, Inc.*, Nos. 2991, 3111, 2008 WL 343856 (Del. Ch. Feb. 7, 2008), disagreed on the question of whether control of the privilege can be chopped into segments and transferred by contract apart from control of the entity. In a sale of “substantially all” of the assets of an entity, the sellers retained the right to a particular piece of litigation. The asset buyers later claimed control of the privilege with regard to pre-transaction communications related to that litigation even though the transaction agreement allocated that control to the asset sellers. The buyers argued that control of the privilege cannot be allocated by contract in parts but rather passes with control of the entity. The *Postorivo* court refused to hold that the privilege cannot be allocated in parts by contract. First, the court determined that the practical problem of sorting out privilege questions when the privilege has been divided and allocated to many parties was not present in the situation before it. In addition, the court reasoned that “it makes more sense” that the privilege for communications related to particular litigation should be controlled by the party controlling the litigation. Also, the court was reticent not to enforce the contract of the parties. In this regard, the court stated: “This Court generally eschews mandating actions contrary to the intent explicitly reflected in freely negotiated contracts among sophisticated, well-represented parties.” The court noted that guidance in the form of judicial decisions on this issue was scarce. Interestingly, the *Postorivo* court focused on interests of the parties in controlling their own destiny by contract, but did not consider the public interest at play as well in these situations.

Likewise, the court in *In re Flag Telecom Holdings, Ltd.*, Nos. 02-civ-3400, 04-civ-1019, 2009 WL 5245734 (S.D.N.Y. Jan. 14, 2009) refused to adopt the position that control of the attorney-client privilege cannot be transferred by contract in segments. *Id.* at \*10. The parties argued that though the document transferred the attorney-client privilege,

such transfer would be unenforceable and void as a matter of law. The individual defendants aver that the Litigation Trust Agreement could not effectively provide for the transfer of the attorney-client privilege because FTHL, a private party, “[did] not have the right to decide on [its] own how the legal principles governing attorney-client privilege should be applied in a court of law.”

*Id.* at \*6 (alterations in original) (quoting Defs. Mem. Supp. Mot. Protective Order at 13). As a result of a bankruptcy proceeding, a new entity continued the business of the old entity while

provisions unenforceable as contrary to public policy.<sup>187</sup>

One commentator has suggested that judicial opinions which hold that the privilege travels by operation of law as a result of a sale of assets support the position that the attorney-client privilege is an asset, a right that can be sold.<sup>188</sup> However, as the commentator acknowledges, the story is not so simple.<sup>189</sup> When courts that recognize that a sale of assets results in a change of control of the entity, those courts concomitantly are recognizing that the privilege moves with the change of control. So, in a sense, the privilege can be sold if the seller is willing to sell enough so as to sell control of the entity. This is because courts have determined that the privilege, as a matter of policy, should travel with entity control. These court determinations in no way suggest that control of the privilege can be separated from control of the entity by the contractual provisions at the whim of the parties to a transaction.

#### B. *Support from Common Interest Jurisprudence*

Refusing to honor contractual privilege allocation provisions is a stance in accord with treatment of the common interest doctrine that is a part of privilege jurisprudence. Courts have recognized that communications between a client and lawyer and another party and that party's lawyer can be privileged if the two parties have a sufficient common interest.<sup>190</sup> Relatedly, otherwise privileged communications between the client and the lawyer can

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a Litigation Trust Agreement gave to the Trustee of the Litigation Trust the right to litigate the debtor's pre-bankruptcy causes of action, collect all related documents, and control any attorney-client privileges related to those communications. *Id.* at \*2. While acknowledging that the *Weintraub* principle would indicate that the new successor entity would control the privilege for the entity, the court noted that there was no agreement allocating control of the privilege in *Weintraub*. *Id.* at \*7. In addition, the court stated that the case law suggested that the court should "engage in a practical consideration of the consequences of" transfer of control of the privilege. *Id.* at \*9. Because the court believed that the best practical effect was to have the entity controlling the litigation to also control the privilege, the court enforced the agreement that awarded control of the litigation and the privilege to the entity that was not the successor to the old entity's business. *Id.* at \*9. The court stated: "[w]e find it improper to deprive an entity, in which the duty to sue officers and directors is assigned pursuant to the Reorganization Plan, of control over the attorney-client privilege." *Id.*

<sup>187</sup> Courts have found a variety of contractual provisions to be unenforceable as contrary to public policy. See generally GRACE McLANE GIESEL, 15 CORBIN ON CONTRACTS: CONTRACTS CONTRARY TO PUBLIC POLICY § 79:1 (Joseph M. Perillo, ed. 2003); David Adam Friedman, *Bringing Order to Contracts Contrary to Public Policy*, 39 FLA. ST. U. L. REV. 563 (2012).

<sup>188</sup> Bryans, *supra* note 129, at 1056 ("Although courts sometimes assert that the attorney-client privilege is not a property right that can be sold, decisions such as *Soverain* suggest that it can, so long as enough assets and attributes of an ongoing business are transferred.").

<sup>189</sup> Bryans, *supra* note 129, at 1056 (emphasis added) ("[I]t can be argued that *Soverain*, and other decisions like it, implicitly accept the notion that the privilege is but one of the sticks in the bundle, provided the bundle is large enough and the buyer uses the sticks to conduct the same business that had been conducted by the seller.").

<sup>190</sup> See PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35 (2016).

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be shared with this other party and lawyer without causing a waiver of the privilege if the two parties have a sufficient common interest.<sup>191</sup> These groups often enter into agreements in which they assert a common interest and establish their desire to work together and share information.<sup>192</sup> Yet, courts do not find a legally sufficient common interest solely because the parties, by contract, agree that they share a common interest.<sup>193</sup> The agreement of the parties is but one reference point courts consider when deciding whether, in fact, the parties share a legally sufficient common interest.<sup>194</sup> As the court stated in *Cohen v. Cohen*,<sup>195</sup> when dealing with the application of the common interest doctrine, “the fact that private parties agree that something is privileged does not make it so.”<sup>196</sup> Likewise, in

<sup>191</sup> See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (Am. Law Inst. 2000). Section 76 states:

(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68–72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (Am. Law Inst. 2000). See also Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 MARQ. L. REV. 475 (2011-2012) (discussing the common interest doctrine).

<sup>192</sup> These agreements can carry many names such as joint defense agreements, common interest agreements, and confidentiality agreements. See generally Stephen A. Messer & Scott J. Seagle, *Combining Forces: A Primer on the Joint Defense Agreement in Civil Litigation*, 30 TR. ADVOCATE Q. 7 (2011); Thomas G. Pasternak & R. David Donoghue, *Making Joint Defense Agreements Work*, 34 LITIG. 26 (2008).

<sup>193</sup> See, e.g., *Cohen v. Cohen*, No. 09-civ-10230, 2015 WL 745712, at \*4 (S.D.N.Y. Jan. 30, 2015); *Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC*, 753 N.Y.S.2d 343, 345 (Sup. Ct. 2002); *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd’s London*, 676 N.Y.S.2d 727, 733 (Sup. Ct. 1998). See also DAVID M. GREENWALD, ROBERT R. STAUFFER, & ERIN R. SCHRANTZ, 1 TESTIMONIAL PRIVILEGES § 1:105 (3d ed. 2015) (“[T]he mere existence of a written agreement documenting a common legal interest will not, on its own, establish such an interest.”); Katharine Taylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 82 (2005) (“[C]ourts will evaluate the existence of a common legal interest independently from the agreement. Courts will not allow two entities to conspire to protect non-privileged documents from disclosure to a third party simply by entering into a confidentiality agreement.”).

<sup>194</sup> See GREENWALD ET AL., *supra* note 193 (“[d]ocumenting a joint defense arrangement increases the parties’ ability to meet their burden of proving that they were acting jointly”).

<sup>195</sup> No. 09-civ-10230, 2015 WL 745712 (S.D.N.Y. Jan. 30, 2015).

<sup>196</sup> *Id.* at \*4 (quoting *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props. LLC*, No. 01-civ-9291, 2002 WL 1455346, at \*5 (S.D.N.Y. July 3, 2002)).



*Aetna Casualty & Surety Company v. Certain Underwriters at Lloyd's London*,<sup>197</sup> the court stated: "The law is well settled that the mere existence of . . . cooperation agreements . . . cannot create a privilege that otherwise does not exist. A private agreement by the parties to protect communications cannot create a privilege."<sup>198</sup>

A very good example of this principle exists in the midst of a discovery dispute in *Waymo LLC v. Uber Technologies, Inc.*<sup>199</sup> Waymo claimed an employee took thousands of documents containing trade secrets with him when he left Waymo and started his own competing business, Ottomotto. Ottomotto passed the trade secrets to Uber when Uber purchased Ottomotto.<sup>200</sup> In the discovery phase of the litigation the court had the opportunity to determine whether a due diligence report, prepared in anticipation of Uber's purchase of Ottomotto, is protected by the attorney-client privilege or the work product doctrine.<sup>201</sup> Pointing to a "Joint Defense, Common Interest and Confidentiality Agreement,"<sup>202</sup> the defending parties argued that the parties shared a common interest and that the documents were privileged.<sup>203</sup> The magistrate judge determined that the attorney-client privilege did not apply<sup>204</sup> and that the parties did not share a common interest at the time the document at issue was shared<sup>205</sup> and so any otherwise applicable work product protection was waived.<sup>206</sup> The magistrate judge stated, "[P]arties cannot create a common legal interest where none exists merely by entering into a joint defense agreement."<sup>207</sup> The District Court for the Northern District of California agreed.<sup>208</sup>

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<sup>197</sup> 676 N.Y.S.2d. 727 (Sup. Ct. 1998).

<sup>198</sup> *Id.* at 733.

<sup>199</sup> No. 17-cv-00939, 2017 WL 2485382 (N.D. Cal. June 8, 2017) [hereinafter *Waymo I*]. See also *Waymo LLC v. Uber Techs., Inc.*, No. 17-cv-00939, 2017 WL 2694191 (N.D. Cal. June 21, 2017) (Order Denying Motions for Relief from Judge Corley's Nondispositive Pretrial Order Re Due Diligence Report) [hereinafter *Waymo II*].

<sup>200</sup> *Waymo I*, 2017 WL 2485382, at \*1.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at \*3.

<sup>203</sup> *Id.* More distilled versions of the arguments can be found in *Waymo II*, 2017 WL 2694191.

<sup>204</sup> *Id.* at \*8.

<sup>205</sup> *Id.* at \*9-11.

<sup>206</sup> *Waymo I*, 2017 WL 2485382, at \*13. In reviewing this determination, the court in *Waymo II* noted that "Judge Corley made extensive factual findings that . . . [the parties] had adverse rather than common interests . . . and that Uber therefore waived any work-product privilege it may have had over the due diligence report by disclosing the contents of that report to adversaries." *Waymo II*, at \*6.

<sup>207</sup> *Waymo I*, 2017 WL 2485382, at \*12.

<sup>208</sup> *Waymo II*, 2017 WL 2694191.

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Just as the *Waymo* court and other courts have found that parties cannot create a common interest and avoid the policy-based bounds of the attorney-client privilege by contract, so too parties should not be able to shift control of the privilege by contract to achieve results in contradiction to the policy and parameters of the privilege. The attorney-client privilege is a creature of the justice system and, in particular, the relationship of attorney and client; it is not an asset owned by contracting parties.

*C. An Argument by Analogy: Contractual Extensions of Statutes of Limitations Are Not Enforceable*

Contractual allocation of control of the attorney-client privilege should be treated as courts and legislatures treat contractual extension of statutes of limitations. Courts have recognized that statutes of limitations protect the justice system and defendants from being required to deal with fraudulent claims or simply old claims supported with stale evidence.<sup>209</sup> Courts have refused to honor contractual agreements whose effect is to extend statutes of limitations when those agreements were entered into before any cause of action accrued.<sup>210</sup> These courts recognize that in extending the statute of

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<sup>209</sup> “The principal purpose of statutes of limitations is to eliminate stale or fraudulent claims.” *W. Gate Vill. Ass’n v. Dubois*, 761 A.2d 1066, 1071 (N.H. 2000) (citing *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1192 (N.H. 1988)). The *West Gate* court also stated:

Absent such statutes, a dilatory plaintiff might burden a defendant with suits of which he was not timely informed, and clog dockets, interfering with the “orderly administration of justice.” Statutes of limitations reflect the fact that it becomes more difficult and time-consuming both to defend against and to try claims as evidence disappears and memories fade with the passage of time. Such statutes thus represent the legislature’s attempt to achieve a balance among State interests in protecting both . . . courts and defendants generally against stale claims and in insuring a reasonable period during which plaintiffs may seek recovery on otherwise sound causes of action.

*Id.* at 1070 (quoting *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1192 (N.H. 1988)). See also *John J. Kassner & Co. v. City of New York*, 389 N.E.2d 99, 103 (N.Y. 1979) (quoting *Flanagan v. Mount Eden Gen. Hosp.*, 248 N.E.2d 871, 872 (N.Y. 1969)) (“Although the Statute of Limitations is generally viewed as a personal defense ‘to afford protection to defendants against defending stale claims,’ it also expresses a societal interest or public policy ‘of giving repose to human affairs’”); *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384, 386 (Del. Super. Ct. 1978) (quoting *Boston v. Bradley’s Ex’r*, 4 Del. 524, 526 (Del. Super. Ct. 1847)) (stating statutes of limitations “afford a security against the prosecution of claims where, from lapse of time, the circumstances showing the true nature or state of the transaction, may have been forgotten; or may be incapable of explanation by reason of the uncertainty of human testimony, the death or removal of witnesses, or the loss of receipts, vouchers, or other papers”).

<sup>210</sup> See, e.g., *Xerox State & Local Solutions, Inc. v. Xchanging Solutions (USA) Inc.*, 216 F. Supp. 3d 355 (S.D.N.Y. 2016) (applying New York law; contractual provisions valid only if made after the cause of action accrues); *In re Slaey*, 539 B.R. 500 (Bankr. E.D. Va. 2015) (applying Virginia law; agreements not to plead the statute of limitations are void); *Wirth v. Seitz*, C.A. No. N14C-07-013, 2016 WL 1591052 (Del. Super. Ct. Mar. 15, 2016) (provision

limitations by contract the two parties to the contract are acting in their own interest. No party to the contract however, is considering the interest of the public and the effect of the agreement on the public policy of the state as manifested by the legislature in the statute of limitations.<sup>211</sup> The legislature has considered the various interests involved and has set the appropriate balance with the statute of limitations.<sup>212</sup> As the Delaware Superior Court stated in *Shaw v. Aetna Life Insurance Company*<sup>213</sup> with regard to a contractual extension of the statute of limitations, “[t]wo parties contracting between themselves cannot agree to circumvent the law as mandated by the legislature in its attempt to protect the public interests.”<sup>214</sup>

Similarly, the New York court stated in *John J. Kassner & Company v. City of New York*<sup>215</sup> that an agreement entered into before a cause of action accrues and whose effect is to extend a statute of limitations “is unenforceable because a party cannot ‘in advance, make a valid promise that a statute founded in public policy shall be inoperative.’”<sup>216</sup> And in refusing a contractual extension made before the accrual of a cause of action, the New Hampshire Supreme Court in *West Gate Village Association v. Dubois*<sup>217</sup> noted that the party was “seeking to circumvent the legislature’s declaration of public policy.”<sup>218</sup>

Some states go so far as to bar contractual extension of statutes of limitations by statute.<sup>219</sup> Every state that has adopted Uniform Commercial Code section 2-725(1) bars such extension regarding the sale of goods. That provision states in part: “By the original agreement the parties may reduce

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lengthening statute contrary to public policy); *Munday v. Mayfair Diagnostic Lab.*, 831 S.W.2d 912 (Ky. 1992) (applying Kentucky law; contractual provisions valid only if made after the cause of action accrues).

<sup>211</sup> See *John J. Kassner & Co.*, 389 N.E.2d at 103 (“Because of the combined private and public interests involved, individual parties are not entirely free to waive or modify the statutory defense.”).

<sup>212</sup> See, e.g., *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384, 386–87 (Del. Super. Ct. 1978) (legislature adopted statute of limitations “in its attempt to protect the public interest”).

<sup>213</sup> 395 A.2d 384 (Del. Super. Ct. 1978).

<sup>214</sup> *Id.* at 387.

<sup>215</sup> 389 N.E.2d 99 (N.Y. 1979).

<sup>216</sup> *Id.* at 103 (quoting *Shapley v. Abbott*, 42 N.Y. 443, 452 (1870)).

<sup>217</sup> 761 A.2d 1066 (N.H. 2000).

<sup>218</sup> *Id.* at 1071.

<sup>219</sup> See, e.g., MISS. CODE ANN. § 15-1-5. That provision states:

The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contracts stipulation whatsoever shall be absolutely null and void, the object of this section being to make the period of limitations for the various causes of action the same for all litigants.

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the period of limitation to not less than one year but may not extend it.”<sup>220</sup>

Courts should take the same approach with contractual attempts to allocate control of the attorney-client privilege. Any such provisions should be found unenforceable as contrary to public policy.<sup>221</sup>

## VII. CONCLUSION

In the context of entity transactions such as mergers and sales of assets, parties to those transformational transactions seek to control their own destiny with regard to many issues. In these transactions the question of control of the attorney-client privilege for communications between the target or asset seller and counsel that occurred before the transformation is an important one and is even more important with regard to transaction-related communications. Parties to transformational transactions have begun to allocate control of the privilege in their deal agreements. Some courts have accepted this and some have even encouraged such action.

Honoring these provisions disrespects the attorney-client privilege. The privilege represents a balance of policies that has been set by courts and legislatures. These are institutions capable of balancing the interests of individual entities as well as the interests of the public in a just and fair justice system. Parties to a transaction, motivated by their own self-interest and without regard for the public interest, should not be allowed to define the parameters or application of the privilege. Control of the privilege should not be alienable by contract apart from control of the entity. Indeed, the waiver concept itself, a part of the privilege parameters, is inconsistent with allowing parties to a transaction to allocate control of the privilege by contract. Practically, allowing parties to transactions to allocate the privilege apart from control of the entity opens the door to parsing the privilege into as many pieces as the parties might desire. Such a system of privilege control is surely unworkable.

Refusing to allow parties to allocate control of the privilege by contract is consistent with judicial holdings in which courts refuse to view agreements that state that the parties share a common interest as dispositive of the question. Indeed, the law occasionally recognizes doctrines of the justice system and law that are not the proper subject of private contracts because those doctrines carry with them interests greater than the interests of the parties to the contract. For example, courts have held that parties to a contract, even one that is part of a transformational transaction, cannot agree that the statute of limitations for a dispute that has yet to arise between the

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<sup>220</sup> U.C.C. § 2-725(1).

<sup>221</sup> See GRACE MCLANE GIESEL, 15 CORBIN ON CONTRACTS: CONTRACTS CONTRARY TO PUBLIC POLICY § 83:8 (Joseph M. Perillo, ed. 2003) (discussing courts' treatment of contractual provisions extending statutes of limitations).

parties is a longer time than that set by law. The attorney-client privilege, like the statute of limitations, is a doctrine whose *raison d'être* is larger than the interests of the parties to a particular contract or transaction. Control of the privilege should not be alienable by contract apart from control of the entity. Any such provisions should be unenforceable as contrary to public policy.