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Arizona ABS Compliance Lawyers and the Attorney-Client Privilege[1]

Arizona's alternative business structure ("ABS") law, which became effective January 1, 2021, requires that each ABS appoint a "compliance lawyer." The CL bears substantial responsibility to monitor and ensure the ABS's and its lawyers' compliance with their obligations under the governing regulation and rules.

The CL has an additional obligation: to report to the State Bar of Arizona any fact or matter reasonably believed to be a substantial breach of these obligations.

This reporting requirement supplies our focus here, for it creates tension with the role often played by CLs in Arizona ABSs — that of inside counsel.[2] We expound on that tension, and analyze ways to address it. Our hope is that this analysis will prove useful not only to Arizona ABSs and their CLs, but generally, as other jurisdictions consider enactment of comparable laws.

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Thanks to Nicole Goodwin, Marty Kaminsky, Doug Richmond, and Pat Sallen for their comments on earlier drafts of this piece.
[2] As a general proposition, a law practice is no less entitled to inside counsel than any other organization. *See* A.R.S. § 12-2234; *see also, e.g., RFF v. Burns & Levinson*, 991 N.E.2d 1066, 1071 (Mass. 2013*); St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 105–06 (Ga. 2013); *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 536 (Ill. App. Ct. 2012). Many of the issues raised here would apply equally to the CL as outside counsel. Playing that dual role raises a number of issues of its own. *See* Andrew F. Halaby, Can Ariz. *Nonlawyer Ownership Create a New Type of Atty?*, LAW360 (Oct. 14, 2021, 4:12 PM), https://www.law360.com/articles/1430691.

I. BACKGROUND

A. Arizona ABSs

"Alternative business structure" is the Arizona regulatory term of art for

- an entity with nonlawyers who have prescribed levels of economic interest or decision-making authority,[3]
- that employs, associates with, or engages lawyers to provide legal services to third parties, and
- that is licensed by the Arizona Supreme Court to provide legal services.[4]

While some jurisdictions inside and outside the U.S. have allowed nonlawyer ownership of law practices for some time, Arizona is the first U.S. state to permit ABSs as such.[5]

Before Arizona adopted its ABS law, Arizona Rule of Professional Conduct 5.4 — like ABA Model Rule 5.4 — prohibited lawyers from

- sharing legal fees with nonlawyers,
- forming a partnership with a nonlawyer if any of the activities of the partnership consisted of the practice of law; or
- practicing with or in a law practicing entity owned in whole or in part by a nonlawyer.[6]

Through this rule, Arizona, like every other state with a substantially similar version of Model Rule 5.4, prevented nonlawyers from owning law firms.

In late 2020, the Arizona Supreme Court announced its decision to abolish Arizona's Rule 5.4, and adopt a suite of related rule changes designed to foster nonlawyer ownership.[7] Chief Justice Robert Brutinel observed:

> The Court's goal is to improve access to justice and to encourage innovation in the delivery of legal services. The [changes] will make it possible for more people to access affordable legal services and for more individuals and families to get legal advice and help. These new rules will promote business innovation in providing legal services at affordable prices.[8]

The court regulates ABSs and their personnel through

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[3] ARIZ. CODE JUD. ADMIN. ("ACJA") § 7-209(A); Ariz. R. Sup. Ct. 31.1(c).
[4] Alternative Business Structure, ARIZ. JUD. BRANCH, https://www.azcourts.gov/Licensing-Regulation/Alternative-Business-Structure. The regulation does not require, or prohibit, any particular form of business entity being licensed as an ABS.
[5] The District of Columbia has, for more than 25 years, permitted nonlawyer ownership of law firms under certain limited circumstances. Utah's Office of Legal Services Innovation's regulatory sandbox was launched in August 2020. Divers foreign jurisdictions have permitted nonlawyer ownership under their own, varied regulatory regimes. *See generally Jason Solomon et al., How Reforming Rule 5.4 Would Benefit Lawyers and Consumers, Promote Innovation, and Increase Access to Justice* 7–10, STAN. CTR. LEGAL PRO. (Apr. 2020); Jayne R. Reardon, *Alternative Business Structures: Good for the Public, Good for the Lawyers*, 7 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 304, 327–35 (2017).
[6] Ariz. R. Sup. Ct., ER 5.4 (abrogated 2020).
[7] Order Amending the Ariz. R. Sup. Ct. and the Ariz. R. Evid. (No. R-20-0034), ARIZ. SUP. CT. (Aug. 27, 2020), www.azcourts.gov/Portals/215/Documents/082720FOrderR-20-0034LPABS.pdf?ver=2020-08-27-153342-037.
[8] News Release, ARIZ. SUP. CT. ADMIN. OFFICE CTS., Arizona Supreme Court Makes Generational Advance in Access to Justice (Aug. 27, 2020).

- Arizona Supreme Court Rules 31 through 31.3, which together authorize the practice of law by licensed ABSs,
- Arizona Code of Judicial Administration ("ACJA") § 7-209, which establishes the conditions for licensure of the ABS and ongoing regulatory compliance by the ABS and its personnel, and
- other rules of the Supreme Court, including Rule 42 which contains Arizona's rules of professional conduct, known locally as "Ethics Rules" or "ERs," and Rule 43 which governs trust accounts.

As of September 23, 2022,

- the Arizona Supreme Court has issued 25 ABS initial licenses[9];
- one additional licensee surrendered its initial license;
- beyond these, more than 20 partial or complete ABS initial license applications have been submitted10; and
- one application was withdrawn after the Arizona Committee on Alternative Business Structures declined to recommend its approval to the Arizona Supreme Court.[11]

B. The Compliance Lawyer

Pivotal to the Arizona ABS regulatory scheme is the CL. Section 7-209 requires each ABS to appoint a CL, who must be admitted to practice in Arizona.[12] The CL "is responsible for ensuring compliance with the rules governing ABSs,[13] Supreme Court Rule 42, and the regulatory requirements of §7-209."[14]

Section 7-209 imposes extensive requirements on CLs. These include "tak[ing] all reasonable steps" to "ensure"

- ABS lawyers' compliance with their ethical and professional responsibilities;[15]
- compliance by the ABS's authorized persons, i.e., persons having requisite levels of ownership interest or control in the ABS;[16] and
- that others employed, associated with or engaged by the ABS do not cause or substantially contribute to a breach of section 7-209 or the ethical and professional obligations of lawyers.[17]

C. CL Reporting Obligations, and Related Regulatory Risk

As noted at the outset, the CL also bears reporting responsibilities.[18] In particular, a CL must "take all reasonable steps" to "[e]nsure that a prompt report is made to the state bar of any facts or matters reasonably believed to be a substantial breach of the regulatory requirements of this code or the ethical

[9] *See Alternative Business Structures Program Directory,* ARIZ. JUD. BRANCH (last visited Sept. 22, 2022).
[10] This number is based on comments by Certification & Licensing Division staff at the September 13, 2022, Committee on Alternative Business Structures regular meeting.
[11] See Meeting Mins., ARIZ. BUS. STRUCTURES COMM. (Nov. 9, 2021)
[12] ACJA § 7-209(G)(3).
[13] Particularly, Arizona Supreme Court Rules 31 and 31.1(c).
[14] ACJA § 7-209(A).
[15] § 7-209(G)(3)(b)(1).
[16] § 7-209(G)(3)(b)(2).
[17] § 7-209(G)(3)(b)(3).
[18] § 7-209(G)(3)(b)(4)-(5).

and professional obligations of lawyers."[19] The CL also must "take all reasonable steps" to "ensure that the state bar is promptly informed of any fact or matter that reasonably should be brought to its attention in order that the state bar may investigate whether a breach of regulatory or ethical requirements has occurred."[20]

In short, the regulation imposes on the CL legal responsibility to report, or "rat out," the ABS and its constituents in certain circumstances. The potential consequences of failing to do so are severe. According to section 7-209(G)(3)(c),

> Any compliance lawyer who fails to comply with this section [7-209], including any failure to report any facts or matters reasonably believed to amount to a substantial breach of the regulatory requirements of this code or the ethical and professional obligations of lawyers, in addition to other possible sanctions, may be suspended on an interim basis pursuant to Rule 61, Rules of Supreme Court.[21]

II. THE CL'S PRIVILEGE DILEMMA

A. Overview

The CL provisions of Arizona's ABS law can be read as evincing a policy sense that potential loss of investor capital is not sufficient to manage the risk an ABS will fail to discharge its responsibilities, and that *personal disciplinary risk* must be pinned on someone associated with the enterprise, beyond the constituent lawyers, in order to ensure its compliance. Under the regulatory scheme, that someone is the CL, and the risk imposed is that the CL can be disciplined for failure to discharge her obligations.

The CL's reporting requirement has no analog in individual lawyer regulation in Arizona.[22] This is a good thing; a contrary rule would reek of mandatory self-incrimination.[23]

The reporting requirement creates a dilemma for the CL because, in practice if not in title, many (if not all) CLs function as inside counsel to their ABSs.[24] The question then becomes how to reconcile the ABS's attorney-client privilege[25] with the CL's regulatory responsibilities.

B. The Attorney-Client Relationship

[19] § 7-209(G)(3)(b)(4).
[20] § 7-209(G)(3)(b)(5).
[21] That said, we are aware of no instance so far in which a CL's discharge of the CL's duties has drawn lawyer regulation scrutiny.
[22] Individual lawyers in Arizona must report themselves to the Bar only in very narrow circumstances involving conviction of a crime, see Ariz. R. Sup. Ct. 61(c)(1), or reciprocal discipline. *See* Ariz. R. Sup. Ct. 57(b).
[23] *See Wohlstrom v. Buchannan*, 884 P.2d 687, 689 (Ariz. 1994) (citing with approval *Spevack v. Klein*, 385 U.S. 511, 519 (1967), as holding "an attorney could not be disbarred for refusing, on Fifth Amendment grounds, to produce evidence or testify at a disciplinary hearing").
[24] Theoretically, an ABS could employ both inside counsel and a CL. Having reviewed dozens of ABS initial license applications, we are aware of very few that have — primarily, we suspect, for economic reasons.
[25] We leave aside discussion of the somewhat-parallel ethical duty of confidentiality the CL owes to the client ABS. As becomes apparent, any reporting obligation imposed by law on the CL likely falls within ER 1.6(a)'s "impliedly authorized" exception to the broad ethical duty of confidentiality, ER 1.6(d)(5)'s "to comply with other law" exception, or both.

Perhaps obviously, the privilege is implicated only where there exists an attorney-client relationship.[26] An attorney-client relationship is formed where a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person, and the lawyer manifests consent to do so.[27]

Accepting the role of CL with an ABS appears to us tantamount to forming an attorney-client relationship — the CL as attorney, with the ABS as client. In the ABS context, the CL's regulatory duties include taking measures to ensure the organization's compliance with the law. Satisfying that duty surely involves giving the ABS legal advice, which "involves the interpretation and application of legal principles to guide future conduct or to assess past conduct."[28]

C. The Privilege

If the relationship between the CL and the ABS is an attorney-client relationship, communications between the CL and the ABS are eligible for protection by the attorney-client privilege.[29] Notionally, the privilege protects communications (1) made to or by the lawyer for the purpose of securing or giving legal advice, (2) made in confidence, and (3) treated as confidential.[30] In the organizational context, the privilege covers any confidential communication made between an organization's constituents, such as employees, and the organization's lawyer, when the communication is made for the purpose of giving or securing legal advice.[31]

The privilege exists "to encourage free exchange of information between the attorney and the client and to promote administration of justice."[32] In particular, "[t]he 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."[33] The United States Supreme Court recognized years ago, in its eminent *Upjohn* decision, that this policy interest is especially compelling for representation of business organizations. In rejecting the "control group" test for application of the privilege in the entity representation context, the Court observed,

> The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem, but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter.[34]

[26] *See Grassmueck v. Ogden Murphy Wallace, P.L.L.C.*, 213 F.R.D. 567, 571 (W.D. Wash. 2003) ("[T]here can be no assertion of attorney-client privilege if there is no attorney-client relationship."); *Roehrs v. Minn. Life Ins. Co.*, 228 F.R.D. 642, 646 (D. Ariz. 2005) ("[T]here must be an attorney-client relationship before the privilege exists.").
[27] *See* Restatement (Third) of the Law Governing Lawyers Â§ 14 (2000).
[28] Dylan L. Ruffi, *Attorney-Client Privilege in Corporate Administration: A New Approach*, 9 BROOK. J. CORP. FIN. & COM. L. 640, 646 (2015) (quoting In re Cnty. of Erie, 473 F.3d 413, 419–20 (2d Cir. 2007)).
[29] *See Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (holding privilege attaches where corporate counsel's legal advice is sought); A.R.S. § 12-2234 (codifying attorney-client privilege).
[30] *Roehrs*, 228 F.R.D. at 646.
[31] *See Upjohn*, 449 U.S. at 390; A.R.S. § 12-2234(b).
[32] *State v. Holsinger*, 601 P.2d 1054, 1058 (Ariz. 1979); see also Upjohn, 449 U.S. at 389.
[33] *Upjohn*, 449 U.S. at 389.
[34] *Id.* at 392 (cleaned up).

D. The Dilemma Exists

As attorney-client privilege generally is understood, then, the CL's regulatory reporting duties plainly conflict with the ABS's privilege. As privilege generally is understood, any confidential communication between a constituent of the ABS, such as an employee lawyer or nonlawyer, and the ABS's CL, for purposes of determining compliance with or advising on section 7-209's application, or the ABS's or the constituent's ethical or professional obligations, would seem to fall squarely within the privilege's ambit.[35]

Thus, where a CL learns of a potential breach of an ABS's or ABS constituent's ABS-related legal obligations, through a confidential communication from an ABS constituent,[36] revealing the breach to the Bar would, as privilege generally is understood, reveal privileged information.

E. The Dilemma Is Real

One searches in vain for an analytically rigorous way to avoid the conclusion that the ABS regulatory framework pins on the CL this apparently intractable privilege dilemma.

One might argue, first, that the regulation doesn't require the CL *in particular* to make the report to the Bar, only that the report be made.[37] As follows, one might argue, the CL can avoid entirely the dilemma by having the ABS or the constituent self-report the violation. But the regulation's language on this point is equivocal. True, parts refer in the abstract to a report, without specifying who has to make it.[38] But section 7-209(G)(3)(c) provides, "Any compliance lawyer who fails to comply with this section, including *any failure to report* any facts or matters reasonably believed to amount to a substantial breach of the regulatory requirements of this code or the ethical and professional obligations of lawyers . . . may be [sanctioned]."[39] Textually, one might argue, this provision suggests CLs *themselves* owe a duty to report. In any event, forcing the client to do the reporting isn't a practical answer. Clients usually want their lawyers not only to counsel them, but to speak for them, in part because lawyers often do a better job of it. To make ABSs and their constituents speak for themselves, just to avoid the dilemma, seems like an impractical —indeed, inappropriate — solution.

Second, assuming the CL needs to be the one who reports to the Bar, one might invoke the truism that facts themselves are not privileged.[40] But it does not follow that the lawyer may reveal the facts just because they are facts.[41] To the contrary, where the lawyer knows the facts from a client communication, revealing the facts reveals the communication.

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[35] *Id.* at 389–91; *see also Samaritan Found. v. Goodfarb*, 862 P.2d 870, 874 (Ariz. 1993) ("[C]ommunications directly initiated by an employee to corporate counsel seeking legal advice on behalf of the corporation are privileged . . . regardless of position within the corporate hierarchy."). The privilege also attaches to communications between an entity's attorney and an independent contractor of the entity, so long as the independent contractor's role in the company is that of a functional employee. *See United States v. Graf*, 610 F.3d 1148, 1159 (9th Cir. 2010).

[36] An organization being an artificial entity, all such communications must come from ABS constituents. *See* ER 1.13.

[37] ACJA § 7-209(G)(3)(b)(4) (emphasis added).

[38] *Id. ("[e]nsure that a prompt report is made* to the state bar of any facts or matters reasonably believed to be a substantial breach of the regulatory requirements of this code or the ethical and professional obligations of lawyers") (emphasis added); ACJA § 7-209(G)(3)(b)(5) ("*ensure that the state bar is promptly informed* of any fact or matter that reasonably should be brought to its attention in order that the state bar may investigate whether a breach of regulatory or ethical requirements has occurred") (emphasis added).

[39] ACJA § 7-209(G)(3)(c) (emphasis added).

[40] *Samaritan Found.*, 862 P.2d at 874; *Upjohn*, 499 U.S. at 395 ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . .") (emphasis added).

[41] *See Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1387 n.17 (Fla. 1994) ("We emphasize that the employee may testify to any information about which they have knowledge, except that which they learned solely from communication that emanated from counsel.").

Third, one might argue that in the ABS regulatory context, the ABS constituent who communicates with the CL isn't necessarily doing so for purposes of obtaining legal advice. We would argue, to the contrary, that given the CL's role as legal ethics and legal regulatory advisor to the ABS, as well as the inherently complex nature of that subject matter, a communication about the ABS's work from an ABS constituent to the CL inherently calls for the (actual or potential) rendering of legal advice to the ABS.

Given that the CL must disclose to the Bar the substance of at least some ABS constituent communications[42] — communications that fall within the rubric of what traditionally would be understood to be privileged communications — what is the CL to do?

III. RESOLVING THE DILEMMA

The most rigorous answer — though, as explained subsequently, an unsatisfactory one — is that, to the extent a communication by an ABS constituent to the CL reveals substantive information the regulation requires be disclosed, that information falls *outside the privilege*. Call this information "Reportable Information." As noted above, a communication must be made *in confidence* to the CL for the privilege to attach. Given the regulatory framework, a communication to the CL of information that *must be reported* cannot, as a matter of law, have been made in confidence.

On this line of reasoning, the ABS does not waive the privilege when the CL makes a required report. The privilege must attach in order to be waived.

Analytically, in short, the attorney-client privilege does not attach to Reportable Information at all.

IV. PRACTICAL ISSUES AND SUGGESTIONS

While rigorous as an analytical matter, this resolution is unsatisfactory.

First, the degree to which the ABS constituent's communication with the CL includes Reportable Information may not be clear, from the outset of the communication or ever. After all, "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."[43]

Suppose the constituent — say, "Junior Lawyer" at the ABS — contacts the CL and says, "I think we have a conflict of interest between current client X and a new client I just brought to the firm, Y." Further suppose the CL and the junior lawyer then engage in colloquy, from which the CL concludes there is in fact a conflict in violation of ER 1.7. Further suppose that the conflict cannot be promptly cured consistent with the ethics rules and thus cannot be fairly characterized as an insubstantial breach,[44] giving rise to an obligation to report.

We think the prudent course is to define narrowly the scope of Reportable Information under the regulation, as limited to the bare factual minimum necessary in the particular circumstances to convey notice of an issue. Limiting the scope of Reportable Information — and the corresponding disclosure — to the extent feasible is not inconsistent with the regulation. Importantly, it also honors the privilege, by retaining confidentiality as to the remainder of the colloquy between Junior Lawyer and the CL — which

[42] ACJA § 7-209(G)(3)(b)(4)–(5).
[43] *Upjohn*, 449 U.S. at 390–91.
[44] *See* ACJA Â§ 7-209(G)(3)(b)(4).

may itself include privileged analysis or advice — as well as any related communication between the CL and the ABS on how to deal with the situation.

Of course, minimizing the amount of information reported is not the same thing as reporting nothing at all. And this raises a second problem — a deep, practical problem — inherent in the current regulatory framework: Forcing the lawyer (here, the CL) to reveal (to the Bar) information damaging to the client (here, the ABS, through Junior Lawyer) diminishes the likelihood that the client will seek the lawyer's advice in the first place. The privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, *which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure*."[45] Much as we might like to discount the possibility that Junior Lawyer will withhold, human nature is what it is. If Junior Lawyer knows information brought to the CL's attention may be reported to the Bar, Junior Lawyer may well be less likely to bring it to the CL's attention. This is hardly a recipe for fostering compliance. As the United States Supreme Court observed of the rejected "control group" test in *Upjohn*, it might also be observed of the reporting requirement here: that it "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client."[46]

A final, closely-related problem is the extent to which the ABS's constituents understand the CL is the ABS's lawyer, and not *their* lawyer. "When a corporate employee or agent communicates with corporate counsel to secure or evaluate legal advice for the corporation, that agent or employee is, by definition, acting on behalf of the corporation and not in an individual capacity."[47] But if Junior Lawyer believes her communications with the ABS are made in confidence, then Junior Lawyer may be unpleasantly surprised to learn the CL must rat her out.

Accordingly, we think it good practice for the ABS to take reasonable measures to ensure that its constituents understand the CL's role, and that some (or all) information shared by the constituent with the CL may ultimately be shared with the Bar. Warning constituents in this way may ultimately discourage disclosures, for reasons explained above. But better that, we think, than allowing constituents to make the mistake of thinking the entirety of their communications with the CL are made in confidence.[48]

V. A POLICY SUGGESTION

We think the foregoing analysis shows that the ABS law would be enhanced were the reporting requirement abrogated. This obligation is a structural flaw in the regulatory framework. Taking the minimalist approach to the scope of Reportable Information, as suggested above, helps manage the challenges created by this flaw, but it does not eliminate them.

[45] *Upjohn*, 449 U.S. at 389 (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)) (emphasis added).
[46] *Id.* at 392.
[47] *Samaritan Found.*, 862 P.2d at 876.
[48] Of course, it is possible that a constituent might take the position that, because the constituent thought the communication with the CL was privileged, it is. *Cf. Evanston Ins. Co. v. Murphy*, No. CV-19-04954-PHX-MTL, 2020 WL 6869292, *at 4 (D. Ariz. Nov. 23, 2020) (finding communications privileged because they were "performed confidentially, with an expectation of confidentiality"). However that argument might turn out in a particular case, the prospect that the constituent might make it does not alter the CL dilemma addressed here.

A. History Teaches that Requiring Affirmative Disclosure of Privileged Information Is a Bad Idea.

Indeed, development of the law in other contexts shows that forcing revelation of what should be privileged information, for the sake of accomplishing a substantive policy objective, tends to founder in application.

One example comes from patent law. In the early 1980s, to combat what was perceived as an onslaught of patent infringement, the United States Court of Appeals for the Federal Circuit contrived a duty of "due care" to avoid infringement,[49] which could be satisfied by obtaining an opinion of counsel that the challenged activity did not constitute infringement of a valid patent. The problem was that the infringement defendant's offering such an opinion was tantamount to selective privilege waiver which, in turn, opened the door to discovery of the client's other privileged communications under basic "sword and shield" principles.[50] It took the courts a quarter century to dispose of this problem, by dispensing with the duty of due care to avoid infringement.[51]

Another example comes from federal law enforcement. In the early 2000s, the SEC and DOJ published memoranda indicating that one criterion to be used in deciding whether to take action against a company was its voluntary disclosure of otherwise privileged information, as a component of general cooperation with an investigation.[52] These policies largely eroded the attorney-client privilege in that context, and led to a broad "culture of waiver."[53] Both agencies have since adopted policies disclaiming that cooperation is conditioned on disclosure of privileged information.[54]

B. The Upside of Eliminating the Reporting Requirement Exceeds the Downside.

We think the Arizona Supreme Court should, at the earliest opportunity, eliminate the reporting requirement.

Eliminating the reporting requirement need not alter any other CL duties imposed by the regulation. The CL still would have to monitor and take reasonable steps to ensure the ABS's compliance with its regulatory and professional obligations. The ABS and its constituents would not, though, suffer the Hobson's choice of communicating with the organization's lawyer, knowing the lawyer might share the

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[49] *Underwater Devices v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1389-90 (Fed. Cir. 1983).
[50] *See In re Echostar Commc'ns Corp.*, 448 F.3d 1294 (Fed. Cir. 2006) (*en banc*).
[51] *See generally* Andrew F. Halaby, *Explaining* Broadcom v. Qualcomm: *Adverse Inferences in Inducement of Infringement Cases* (2009), available at gtlaw.com/en/events/2009/08/aba-annual-meeting.
[52] *See* Priscilla L. Walton, *Waiving the Attorney-Client Privilege Goodbye: The Erosion of the Privilege by Federal Financial Regulatory Agencies*, 10 N.C. BANKING INST. 397, 401-03 (2006).
[53] *Id.*
[54] *See* David E. Keltner, *Disclosure to the Government: Waiver of the Work-Product Doctrine and the Attorney-Client Privilege*, 47 ADVOC. (TX) 74, 74–75 (2009); United States Dep't of Justice, *Justice Manual* § 9-28.710 (last visited Sept. 25, 2022) ("The Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system. What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so."); United States Securities & Exchange Comm'n, Division of Enforcement, *Enforcement Manual* § 4.3 (last visited Sept. 25, 2022) ("The staff must respect legitimate assertions of the attorney-client privilege and attorney work product protection. As a matter of public policy, the SEC wants to encourage individuals, corporate officers and employees to consult counsel about the requirements and potential violations of the securities laws. . . . Voluntary disclosure of information need not include a waiver of privilege to be an effective form of cooperation and a party's decision to assert a legitimate claim of privilege will not negatively affect their claim to credit for cooperation.").

information with the regulator, or *not* communicating with the organization's lawyer, thereby depriving the ABS and its constituents of the legal advice they need.

The CL no longer would be forced into the unpleasant position of, in practical effect, warning the ABS's constituents against revealing information the ABS needs to know, in order to receive the counsel the CL is there to supply.

And, eliminating the reporting requirement would avoid a potentially thorny Arizona-specific issue: Whether the reporting requirement violates state constitutional separation of powers. A full exposition of this issue falls beyond our space constraints here. But in a nutshell, Arizona's attorney-client privilege, which originated at common law, later was codified as A.R.S. § 12-2234.[55] The statute provides (with some limitations) that "an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment."[56] The statute's application generally has not been confined to its narrow facial context of "examin[ation]" of an attorney, but rather has been construed to broadly protect the privilege.[57]

From there, one can readily discern arguments that the ABS CL reporting requirement is inconsistent with the statute. To the extent the Arizona Legislature rather than the Court is entitled to set the contours of the attorney-client privilege, that inconsistency would render the regulatory reporting requirement a nullity.

All that remains is whether abrogating the reporting requirement would create undue systemic risk. We think not. Neither individual lawyers nor conventional law firms have such a requirement. We are aware of no evidence that justifies imposing it in this context.

VI. CONCLUSION

Arizona's ABS CL reporting requirement is difficult to reconcile with the attorney-client privilege enjoyed by other Arizona clients — individuals, and organizations — as the privilege is generally understood. Given the cards the regulation has given ABSs and their CLs to play, the best current course, in the event an obligation to report arises, is to narrowly construe the scope of Reportable Information and report only that.

As a policy matter, it would be better were the reporting requirement eliminated entirely. Perhaps, in the future, it will be.

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[55] *Grubaugh v. Blomo*, 359 P.3d 1008, 1011 (Ariz. Ct. App. 2015).
[56] In full, the statute provides, "A. In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. An attorney's paralegal, assistant, secretary, stenographer or clerk shall not, without the consent of his employer, be examined concerning any fact the knowledge of which was acquired in such capacity. B. For purposes of subsection A, any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either: 1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member. 2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member. C. The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney."
[57] *See, e.g., Nguyen v. Am. Com. Ins. Co.*, No. 1 CA-CV 12-0826, 2014 WL 1381384, at *4 ¶ 19 (Ariz. Ct. App. 2014) (applying statute to privilege claim over insurer's claim file).

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