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Texas Rule of Evidence 503: Defining Scope of Employment for Corporations Comment.

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TEXAS RULE OF EVIDENCE 503: DEFINING "SCOPE OF EMPLOYMENT" FOR CORPORATIONS

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I. INTRODUCTION

Immediately after a disastrous factory explosion that left one worker dead and two others critically injured, National Tank Company ("National Tank") launched an investigation.[1] The safety and risk coordinator who led the investigation sifted through the wreckage and compiled transcripts of interviews with employees.[2] Later, in the ensuing lawsuit brought against National Tank, the plaintiff requested copies of these interview transcripts as well as other documents compiled by the safety coordinator.[3] Not surprisingly, National Tank asserted the attorney-client privilege to prevent disclosure of the transcripts.[4] The Texas Supreme Court, however, rejected that claim, stating that the employees interviewed were outside the scope of corporate employees covered by the Texas evidence rule governing the attorney-client privilege.[5] Ironically, if National Tank's claim of a privilege had been asserted after March 1, 1998, the company may have been successful in preventing the disclosure of this valuable information because Texas Rule of Evidence 503, which governs the attorney-client privilege, was amended at that time.[6]

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1. *See* National Tank Co. v. Brotherton, 851 S.W.2d 193, 195 (Tex. 1993).

2. *See id.* at 196.

3. *See id.* Other documents included nine interview transcripts compiled by National Tank's insurance company and three accident reports. *See id.*

4. *See id.* National Tank also asserted work-product, witness-statement, and party communication privileges. *See id.*

5. *See id.* at 198-99 (finding that the communications were not protected by the attorney-client privilege because no evidence showed that the employees fell within the control group definition of "representative").

6. *See* TEX. R. EVID. 503 (a)(2)(B) (providing in pertinent part that a representative of a client includes "any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the

Pursuant to statutory authority,[7] the Supreme Court of Texas and the Court of Criminal Appeals ordered the merger of Civil and Criminal Rules of Evidence; the resulting code, which became effective March 1, 1998, is now known as the Texas Rules of Evidence.[8] Although the new rules largely reflect the merging of the criminal provisions into the civil provisions,[9] one monumental change concerns the attorney-client privilege under Rule 503.[10] This new version of Rule 503 significantly alters the mode of analysis that Texas courts must use when determining, in the

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scope of employment for the client"); HULEN D. WENDORF ET AL., TEXAS RULES OF EVIDENCE MANUAL V-29 (5th ed. 1998) (discussing the new Texas unified evidence code). The notes and comments to the rule state that "[t]he addition of subsection (a)(2)(B) adopts a subject matter test for the privilege of an entity, in place of the control group test previously used." TEX. R. EVID. 503 cmt. The privilege prevents disclosure at trial of exchanges between the various parties privy to the attorney-client privilege. *See* TEX. R. EVID. 503(b)(1)(A)-(E) (stating what communications may potentially be protected from disclosure at trial); *see also* TEX. R. EVID. (101)(b) (applying the Rules of Evidence to all proceedings, subject to exceptions).

7. *See* TEX. GOV'T CODE ANN. § 22.004 (Vernon 1988 & Supp. 1999) (conferring upon the Texas Supreme Court the power to make rules for Texas civil courts subject to legislative review); *id.* § 22.109 (delegating power to make rules of evidence in criminal cases to the Court of Criminal Appeals).

8. *See* HULEN D. WENDORF ET AL., TEXAS RULES OF EVIDENCE MANUAL V-29 (5th ed. 1998) (indicating that the merger of the rules of evidence is the result of a combined drafting effort of the Supreme Court of Texas and the Texas Court of Criminal Appeals). *See generally* TEX. R. EVID. 101 (providing the general provisions governing the Texas Rules of Evidence).

9. *See* TEX. R. EVID. 101(b) (stating that the new evidence rules govern both civil and criminal proceedings); *see also* TEX. R. EVID. 404(a)(1)(A) (listing the appropriate uses of character evidence in criminal cases); TEX. R. EVID. 504(b) (incorporating criminal exceptions into the husband-wife privilege); TEX. R. EVID. 509(b) (denying privileged communications between a patient and a physician in criminal cases only).

10. *See* TEX. R. EVID. 503(a)(2)(B) (defining a client's representative for purposes of the attorney-client privilege).

Texas Rule of Evidence 503 provides that:

(a) Definitions. As used in this rule:
  (1) A "client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.
  (2) A "representative of the client" is:
    (A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or
    (B) any other person, who for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.
  (3) A "lawyer" is a person authorized or, reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.
  (4) A "representative of the lawyer" is:

(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or

(B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) Rules of Privilege

(1) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

(2) *Special rule of privilege in criminal cases.* In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

(c) Who may claim the privilege. 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. The person who was the lawyer or lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants through same deceased client.* As to communications relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions;

(3) *Breach of duty by a lawyer or client.* As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) *Document attested by a lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any one of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

corporate context, whether or not a communication between a client's attorney and a client's representative is privileged from testimony at trial.[11]

Under the former Texas rule, the attorney-client privilege applied only to communications between a client's counsel and representatives who were within the client's "control group."[12] Originating in the federal system, this control group test initially applied to communications between corporate counsel and any corporate employee in a position to make decisions for the corporation based upon the attorney's advice.[13] In applying the control group test though, courts generally limited the extent of the control group to individuals who were in the higher tiers of the corporation.[14]

Basically, the control group test placed two constraints on the attorney-client privilege for corporations. First, when a client representative who fell outside the control group possessed the information needed by counsel, any communications between the counsel and that non-control group employee would not be protected by the attorney-client privilege.[15] Second, communications between counsel and representatives with the power to act upon the advice of counsel were not necessarily protected,

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Id.

11. *Compare* TEX. R. EVID. 503(a)(2)(B) (making the subject matter test the standard in Texas with regard to the attorney-client privilege), *with* TEX. R. CIV. EVID. 503(b) (repealed 1998) (indicating the use of the control group in Texas civil cases), *and* TEX. R. CRIM. EVID. 503(b) (repealed 1998) (employing impliedly the control group test in criminal cases).

12. *See* National Tank Co. v. Brotherton, 851 S.W.2d 193, 197 (Tex. 1993) (declaring that because Texas has a codified rule on attorney-client privileges, it must follow that rule, which adopts the control group test); Cigna Corp. v. Spears, 838 S.W.2d 561, 565 (Tex. App.—San Antonio 1992, no writ) (following the control group test in regards to the attorney-client privilege). The previous Texas Rule of Civil Evidence defined a client's representative as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." TEX. R. CIV. EVID. 503(b) (repealed 1998).

13. *See* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa.) (setting the criteria for when a corporation may assert a privilege based on the effect that legal counsel will have on the individual, assuming that the communications is in the context of seeking legal advice), *aff'd sub nom.* General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962). This case extended the control group to include corporate employees with the power to substantially affect corporate decisions. *See id.*

14. *See National Tank*, 851 S.W.2d at 197 (extending the control group only to those in the upper echelon of corporate management).

15. *See* Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) (commenting on how the control group discourages communications between corporate employees and the corporation's attorney); *cf.* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 303-04 (1989) (stating how the inability to make privileged communications makes the attorney's representation difficult).

unless the representative fell within the confines of the control group.[16] Ultimately, both these limitations and the control group test's failure to reflect the realities of the corporate structure[17] led the Texas Legislature to reject the control group mode of analysis.[18] In particular, Texas rewrote its attorney-client privilege and replaced the language that implied the use of the control group analysis with what has been termed the "subject matter" test.[19]

As crafted in the federal system and other jurisdictions, the subject matter test affords a corporate client the opportunity to assert the attorney-client privilege if communications between the client's attorney and the client's representative meet specific criteria.[20] According to the original federal version of the subject matter test, communications could be

16. *See Upjohn*, 449 U.S. at 391 (recognizing that attorney advice may be more important to employees outside the control group); Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 304 (1989) (expressing frustration over the possibility of corporations having to guess which employees could play a significant enough role in acting on advice to be a part of the control group). Although in *Upjohn* the Supreme Court of the United States rejected the control group test, it notably did not adopt its successor, the subject matter test. *See Upjohn*, 449 U.S. at 386 (rejecting the control group test while declining to mandate the subject matter test as the exclusive federal standard).

17. *See* Diversified Indus. v. Meredith, 572 F.2d 596, 608 (8th Cir. 1978) (en banc) (opining that the practical effect of the control group test is not consistent with the nature of contemporary corporate operations); *see also* United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 620-21 (D.D.C. 1979) (indicating that the complex organization of modern corporations makes the control group test unworkable, particularly due to the limits it places on communications); 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5483, at 289-90 (1986) (criticizing the control group test as inconsistent with corporate realities).

18. *See* TEX. R. EVID. 503 cmt. (stating that the new rule replaces the control group test by adopting the subject matter test).

19. *See id.* (referring specifically to the subject matter standard). The Advisory Committee attempted to change Rule 503 in 1996, but was unsuccessful. *See* Cullen M. Godfrey, *The Revised Attorney-Client Privilege for Corporations in Texas*, 30 TEX. TECH. L. REV. 139, 147 (1999) (indicating that the committee fell one vote short of modifying Rule 503). The Texas Senate considered a similar amendment, but nothing ever came to fruition. *See id.* at 150-51 (stating the proposal never passed committee and resulted in no legislative action).

20. *Compare Diversified Indus.*, 572 F.2d at 609 (granting privilege if the employee's communication is made explicitly for legal advice, is directed by superiors to secure legal advice for the corporation, is within their scope of employment, and is intended to be confidential), *with* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (per curiam) (requiring association with the corporation, communication under the direction of supervisors when the company is seeking legal advice, and the subject matter to relate to the employee's duties in order to permit the attorney-client privilege to cover communications between an employee and the corporation's attorney), *aff'd by an equally divided court*, 400 U.S. 348 (1971).

privileged if: (1) the employee made a communication with the corporate attorney pursuant to a request from supervisors, and (2) if the subject matter of the attorney's advice related to the employee's responsibilities to the employer-corporation.[21] To narrow the scope of the subject matter test, modifications arose that required an explicitly confidential element and that the communication arise during legal representation of the corporation.[22]

Although largely consistent with other jurisdictions and the federal courts, Texas' version of the subject matter test differs slightly.[23] First, the federal system uses a two- to five-part definition of a client's representative,[24] whereas Texas' attorney-client privilege rule contains only a three-part definition.[25] Specifically, Texas eliminated the supervisor involvement requirement, which the federal version requires.[26] In addition, Texas' reference to scope of employment appears to be broader than that used in the federal system, which refers only to *corporate* duties.[27] These differences create a level of uncertainty about the exact scope of Texas' attorney-client privilege.

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21. *See Harper & Row Publishers*, 423 F.2d at 491-92 (listing the original requirements of the subject matter test).

22. *See Diversified Indus.*, 572 F.2d at 609 (reducing the scope of the *Harper & Row Publishers* subject matter test to prevent shielding information from the discovery process).

23. *Compare* TEX. R. EVID. 503(a)(2)(B) (focusing on the representative), *with Diversified Indus.*, 572 F.2d at 609 (focusing its modified subject matter test on the communication), *and Harper & Row Publishers*, 423 F.2d at 491-92 (concentrating on the subject matter of the communication rather than the person speaking).

24. *See Diversified Indus.*, 572 F.2d at 609 (employing five criteria with the subject matter test); *Harper & Row Publishers, Inc.*, 423 F.2d at 491-92 (utilizing only two criteria with the subject matter test). Modern cases continue to use these formulations. For example, the Eighth Circuit reviewed the *Diversified* criteria in *In re Bieter Co.* and applied the privilege to an independent contractor who was the functional equivalent of an employee. *See In re* Bieter Co., 16 F.3d 929, 939-40 (8th Cir. 1994). Before applying the privilege, the court analyzed all five of the *Diversified* elements. *See id.* at 938-40 (listing each factor and how the applied to the situation).

25. *See* TEX. R. EVID. 503(a)(2)(B) (listing only three elements to qualify as a client's representative: (1) act in the scope of employment; (2) make or receive a confidential communication; (3) for the purpose of advancing the corporation's legal matters).

26. *Compare* TEX. R. EVID 503(a)(2)(B) (requiring confidentiality, purpose, and scope of employment to satisfy the subject matter test), *with Diversified Indus.*, 572 F.2d at 609 (applying the subject matter test where the employee's supervisor requested the communication and the employee spoke at the direction of superiors), *and Harper & Row Publishers,* 423 F.2d at 491 (allowing privileged communications when the employee speaks at the direction of superiors).

27. *Compare* TEX. R. EVID. 503(a)(2)(B) (referring to scope of employment for a client's representative), *with Diversified Indus.*, 572 F.2d at 609 (stating that the subject matter of the communication must "be within the scope of the employee's corporate duties"), *and Harper & Row Publishers*, 423 F.2d at 491-92 (stating the subject matter must be related to "the performance by the employee of the duties of his employment").

One undeveloped problem with applying Texas' subject matter test concerns the resolution whether a representative's communications involve matters within the scope of the representative's employment.[28] To resolve this underlying issue, two questions must be answered. The first question, although seemingly simple, is not easily settled in today's complex corporate environment: Does a valid employment relationship exist? This question is particularly difficult because employment relationships arise through a variety of interactions, including under contract, through the borrowed-servant doctrine, or simply by exerting a certain degree of control over an individual.[29] The second question involves the issue of whether an employee is acting within the proper bounds of his employment so as to warrant application of the attorney-client privilege. This inquiry focuses on whether an employee is acting to personify the corporation,[30] or alternatively, whether the matter communicated relates to an employee's specific duties.[31] The answer to this inquiry lies in

28. *See* TEX. R. EVID. 503(a)(2)(B) (listing the standards a representative must meet in order to attain a privileged status for a communication, including communicating "while acting within the scope of employment for the client").

29. *See* Farrell v. Greater Houston Transp. Co., 908 S.W.2d 1, 3 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (explaining that the degree of control determines if an employment relationship exists); Aguilar v. Wenglar Constr. Co., 871 S.W.2d 829, 831 (Tex. App.—Corpus Christi 1994, no writ) (explaining that the borrowed-servant doctrine must pass several steps before being attaining employment relationship status); Northwestern Nat'l Life Ins. Co. v. Black, 383 S.W.2d 806, 809 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.) (defining a Texas employment relationship as contractual).

30. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990) (suggesting that the privilege should be to corporations if an employee acts or speaks as a part of the corporate machine); *see also* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 303 (1989) (analyzing *Upjohn*'s rejection of the control group as a signal that employees beyond the control group may personify the corporation).

31. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990). Under the Texas rule, more attention is paid to the person than to the communication. *See* TEX. R. EVID. 503(a)(2)(B) (defining a client's representative, not a communication). Gergacz asks a related question as to whether "the matter communicated [was] a part of the work the employee was paid or hired to perform . . . or was the matter something developed on the employee's 'own time.'" JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990). This Comment omits discussion of this latter question but addresses its concerns in the implied agency section of the analysis, which requires a court to determine how broadly to interpret specific tasks.

the doctrine of respondeat superior,[32] which reflects the nature of a corporation as a fictional legal entity that can act only through its agents.[33]

This Comment attempts to examine these questions, particularly in light of the fundamental policy that privileges must be construed narrowly to prevent blocking access to important information—a hindrance that may interfere with promoting justice and rendering fair verdicts.[34] Part II begins by examining the history of the attorney-client privilege and its application to corporate clients. Part II also explores the evolution and development of the control group and subject matter tests in the federal and Texas court systems. Part III then discusses when an employment relationship exists in Texas, relying upon the common-law and statutory definitions of an employment relationship. Part IV analyzes when an employee can act so as to personify the corporation. Finally, Part V suggests answers to the questions concerning employment, agency, and corporate personification raised by Texas' adoption of the subject matter test. In particular, this Comment proposes an interpretation of the attorney-corporate client privilege that would follow Texas's shift to the subject matter test in the new Rules of Evidence. This Comment concludes, therefore, that the attorney-client privilege should be construed to apply not only along the corporate hierarchy line, but within substantive agency and employment law parameters as well. Doing so would maintain the interest of construing the privilege as narrowly as is necessary in order to

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32. *See* Pilgrim v. Fortune Drilling Co., Inc., 653 F.2d 982, 986-87 (5th Cir. 1981) (using Texas law to define respondeat superior based on scope of employment); Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569 (Tex. 1972) (imparting liability onto the master when the servant acts within the scope of his employment); Southwest Dairy Prod. Co. v. DeFrates, 132 Tex. 556, 558, 125 S.W.2d 282, 283 (1939) (denying liability of the master where the employee was returning to work from dinner at home and was in an automobile accident).

33. *See, e.g.*, Vaughan & Sons, Inc. v. State, 737 S.W.2d 805, 811 (Tex. Crim. App. 1987) (en banc) (recognizing that a corporation can be held criminally liable where an offense defines a person to include a corporation); Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc. 906 S.W.2d 218, 228 (Tex. App.—Texarkana 1995) (referring to a corporation as a legal fiction); Horne Motors, Inc. v. Latimer, 148 S.W.2d 1000, 1003 (Tex. Civ. App.—Dallas 1941, writ dism'd judgm't cor.) (explaining that "a corporation is a juristic person, having legal entity, separate and apart from its officers and members").

34. *See* United States v. Nixon, 418 U.S. 683, 710 (1974) (stating that privileges are neither created lightly nor construed expansively because they hinder the search for truth); Deborah Stavile Bartel, *Drawing Negative Inferences Upon a Claim of the Attorney-Client Privilege*, 60 BROOK L. REV. 1355, 1358 (1995) (noting that various evidentiary privileges exist despite the fact that the legal system maintains truth as a primary goal); *see also* Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1725, 1729 (1988) (explaining that because the effect of privileges is to inhibit discovery of the truth, the privileges should be narrowly constructed).

allow only communications between corporate employees and corporate counsel to be protected from disclosure.

II. The Attorney-Corporate Client Privilege

A. *Development of the Attorney-Corporate Client Privilege in Federal Courts*

1. Utilizing the Attorney-Client Privilege in the Corporate Context

As applied to corporations, the origins of the attorney-client privilege are somewhat uncertain.[35] However, the case most often credited with

35. *Compare* Thomas D. Anthony, Note, 13 St. Mary's L.J. 409, 411 n.12 (1981) (stating that *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963) cites an extensive list of cases allowing the attorney-client privilege to corporations), *with* R. David White, Radiant Burners *Still Radiating: Attorney-Client Privilege for the Corporation*, 23 S. Tex. L. Rev. 293, 293 (1982) (expressing surprise that during the original litigation of *Radiant Burners*, the parties could cite to no British or American case explicitly extending the privilege to corporations).

The attorney-client privilege dates back to ancient Rome, where it prevented an attorney from testifying as a witness for his client in order to reduce the possibility of collusion and deception. *See* John William Gergacz, Attorney-Corporate Client Privilege ¶ 1.02[1] (2d ed. 1990) (stating that fears of deception between an attorney and his client prevented the attorney from testifying); Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 Cal. L. Rev. 487, 488 (1928) (discussing Roman mistrust of allowing an attorney to testify for his client); Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 Notre Dame L. Rev. 157, 160 (1993) (relating that the roots of the attorney-client privilege are based on the Roman concept of loyalty). The English version of the privilege sought to advance the notion that lawyers, as gentlemen, should not reveal information given to them in confidence. *See* 8 John Henry Wigmore, Evidence in Trials at Common Law § 2290, at 543-45 (1961) (describing the privilege as part of the attorney's oath and honor, not as a legal device to comfort the client); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1070 (1978) (noting that British reasoning concluded that barristers were gentlemen who did not divulge information given to them in confidence); Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 Notre Dame L. Rev. 157, 160 (1993) (indicating that lawyers may have sworn themselves to confidence in a vow of secrecy). During the late 1700s and early 1800s, this privilege arose in the United States, although the policy underlying the privilege had changed. *See* 8 John Henry Wigmore, Evidence in Trials at Common Law § 2291, at 545 (1961) (discussing the evolution in policy that justified the change in the attorney-client privilege from objective social policy to subjective considerations of the client's fears about disclosure); *see also* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1087-90 (1978) (tracing the attorney-client privilege in America and stating that the privilege exists for the benefit of the client). American courts had realized that attorneys would be more effective if their clients knew that their communications would be protected from disclosure. *See* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 St. John's L. Rev. 191, 217 (1989) (describing client candor as the new theory of the privilege); Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client*

originating the privilege in the corporate context is *United States v. Louisville & Nashville Railroad Co.*[36] In *Louisville*, the railroad was undergoing an inspection by the Interstate Commerce Commission.[37] The Commission sought to review records of Nashville Railroad's activities, including some records made before the passage of the law upon which the inspection was based.[38] When the Interstate Commerce Commission demanded the records, however, the railroad refused to hand them over.[39] The Interstate Commerce Commission then sought a writ of mandamus against the company to force access to the records.[40] The district court refused the writ and dismissed the Commission's petition.[41] Subsequently, the Supreme Court of the United States agreed with the district court's decision not to compel inspection.[42] In its reasoning, the Court explained that protection of confidential communications between attorneys and clients was well-known and that examination of such communications would essentially inhibit professional assistance and advice.[43] Following the *Louisville* decision, corporations were assumed to be capable of asserting the attorney-client privilege as legal persons.[44] This assumption remained unchallenged until 1962.[45]

Privilege, 69 NOTRE DAME L. REV. 157, 160-61 (1993) (attributing the modern attorney-client privilege to the utilitarian theory of client protection).

36. *See* United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915) (discussing concern over legal representation of corporations if they could not claim the attorney-client privilege).

37. *See id.* at 326.

38. *See id.*

39. *See id.* (indicating that the company refused to grant inspections to records, memoranda, and accounts dating before August 29, 1906, the day the Hepburn Act took effect).

40. *See id.* (relating that the Commission sought a writ of mandamus to compel the railroad to open its records).

41. *See id.* at 338.

42. *See id.* at 337-38 (deciding that the demand to require inspection of the company's records before the passage of the Hepburn Act was abusive).

43. *See id.* at 336 (discussing the policy of why Congress could not intrude in all aspects of a railroad company's operations).

44. *See id.* (stating that confidential correspondence between the attorney and client was beyond the scope of the Act and revealing such correspondence would essentially prohibit professional assistance and advice); *see also* Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 745 & n.42 (dating the attorney-corporate client privilege to 1915 and referencing *Louisville*).

45. *See* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 317 (7th Cir. 1963) (referring to the trial court's decision in 1962 that recommended that a corporation not receive the protection of the attorney-client privilege, while conceding no precedential support); *see also* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 220-22 (1989) (indicating that the trial court's conclusion in *Radiant Burners* was against case law dating back to 1833). Subse-

In the landmark case of *Radiant Burners, Inc. v. United Gas Association*,[46] the Seventh Circuit applied the attorney-client privilege to corporations.[47] In the original *Radiant Burners* proceeding, the trial judge likened the attorney-client privilege to the privilege against self-incrimination.[48] He reasoned that because both privileges are personal and intimate in nature, an artificial entity could not assert either privilege.[49] Basically, the trial judge concluded that problems with confidentiality inherent in the corporate form of business destroy the notion of intimacy, which otherwise serves as the foundation for the privilege.[50]

The appellate court reversed the trial court's decision, extending the privilege to corporations.[51] In reaching this conclusion, the appellate court stated that analogizing the attorney-client privilege to the privilege against self-incrimination was improper.[52] The court's rationale for this conclusion hinged partially on the trial judge's failure to consider small, family-operated corporations.[53] In addition, the appellate court addressed the difference between the two privileges by citing a case from the Supreme Court of the United States that described the privilege against self-incrimination as personal, and thus, applicable only to natural persons and not statutory persons such as corporations.[54] With this distinction in mind, the court concluded that the attorney-client privilege applies to any client, regardless of whether the client is a corporation.[55]

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quent cases allowed corporations as clients to assert the attorney-client privilege if all necessary requirements of the privilege were met. *See* United States v. United Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) (allowing the privilege where a corporation was, or sought to, become a client and communicated with a lawyer or subordinate in confidentiality without waiver).

46. 320 F.2d 314 (7th Cir. 1963).

47. *See Radiant Burners*, 320 F.2d at 324 (reversing the lower court and applying the attorney-client privilege to corporations).

48. *See* Radiant Burners, Inc. v. American Gas Ass'n., 209 F. Supp. 321, 324 (N.D. Ill. 1962) (using the analogy to explain why the attorney-client privilege is inapplicable to corporations), *rev'd*, 320 F.2d 314 (7th Cir. 1963).

49. *See id.* at 324-25 (explaining the analogy between the self-incrimination and attorney-client privileges).

50. *See id.* at 324 (referring to the openness of corporate records to shareholders and the state as contrary to a reasonable intention between the attorney and the client to preserve secrecy).

51. *See Radiant Burners*, 320 F.2d at 324 (reversing the lower court's decision).

52. *See id.* at 322.

53. *See id.* (noting the lack of consideration for the "small, family or one-man corporation").

54. *See id.* at 322-23 (citing United States v. White, 322 U.S. 694 (1944)).

55. *See id.* (establishing the attorney-client privilege for corporations); *see also* R. David White, Radiant Burners *Still Burning: Attorney-Client Privilege for the Corporation*, 23 S. TEX. L. REV. 293, 294 (1982) (discussing the Seventh Circuit's extension of the attor-

2. The Struggle with the Application of the Attorney-Corporate Client Privilege

Although *Radiant Burners* was the seminal case that permitted the general application of the privilege to corporations, federal courts struggled with how broadly to apply the privilege in the corporate context.[56] Eventually, two lines of analysis emerged: the control group test and the subject matter test.[57] In *Upjohn Co. v. United States*,[58] however, the Supreme Court rejected the control group test as a possible method for determining corporate beneficiaries of the privilege.[59] Yet, the Court did not exclude the possibility of utilizing the subject matter test to ascertain the extent of the attorney-client privilege in the corporate context.[60]

a. The Control Group Test

Within months of the original *Radiant Burners* trial, a federal district court in Pennsylvania ruled on the issue of which communications between an attorney and a corporate client were privileged.[61] In *City of Philadelphia v. Westinghouse Electric Corp.*,[62] the court determined that communications were privileged if they were made by individuals in the company, regardless of rank, who could control or participate in the decision-making process based upon the attorney's advice, or if they were

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ney-client privilege to corporations as based on satisfaction of a general test of confidentiality and a cost-benefit analysis).

56. *See* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa.) (listing a series of rhetorical questions where the judge ponders how to allow a corporation to invoke the privilege), *aff'd sub. nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d. Cir. 1962); *see also* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 490-91 (7th Cir. 1970) (reevaluating how to apply the attorney-corporate client privilege), *aff'd by an equally divided court*, 400 U.S. 348 (1971).

57. *See* Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 748-52 (1997) (comparing and contrasting the history and application of the control group and subject matter tests).

58. 449 U.S. 383 (1981).

59. *See* Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (rejecting the control group mode of analysis).

60. *Cf. id.* at 396 (omitting discussion of the subject matter test but reasoning that any test is ill advised because "[a]ny such approach would violate the spirit of Federal Rule of Evidence 501").

61. *See City of Philadelphia*, 210 F. Supp. at 485 (explaining the issue as determining when corporate employees speak so as to seek advice on the corporation's behalf); Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 481-82 (1987) (noting that the original *City of Philadelphia* decision was rendered only a few months after the trial court's decision in *Radiant Burners*).

62. 210 F. Supp. 483 (E.D. Pa.), *aff'd sub. nom.* General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962).

made by individuals with the authority to communicate with the corporate attorney.[63] This decision subsequently formed the basis for the control group test.[64]

As it evolved, the control group test generally extended the privilege only to those situations where the representative communicating with counsel was an officer or director of the corporation[65] because such individuals were the only employees who were capable of speaking on behalf of the corporate entity.[66] As a result, the attorney-client privilege in practice rarely extended below the top level of the corporation; the privilege only applied to lower-level personnel if they were able to act upon the advice of counsel.[67] The control group test, thus, drew a very definite dividing line as to the application of the attorney-client privilege: officers, directors, and upper management fell within the control group, and their communications with corporate counsel were protected from forced disclosure; all other corporate employees' communications with counsel

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63. *See City of Philadelphia*, 210 F. Supp. at 485 (delineating which corporate personnel can make confidential communications with the corporation's attorneys); Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 297 (1989) (stating that the court in *City of Philadelphia* "fashioned what has come to be known as the control group test as a means of distinguishing between qualified corporate spokespersons and employees who are mere witnesses").

64. *See* Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 748 (1997) (attributing the control group test to Judge Kirkpatrick, who presided over *City of Philadelphia*); Thomas D. Anthony, Note, 13 ST. MARY'S L.J. 409, 412 (1981) (citing *City of Philadelphia* as the origin of the control group test).

65. *See* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 297-98 (1989) (indicating that the control group extends to individuals who personify the corporation, such as top management and lower managers who are involved in the decisions of the particular advice); Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 749 (1997) (recognizing that the control group includes the board of directors and the highest management levels); *cf.* Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 481-84 (1987) (discussing the advantage that a small control group has in determining whether or not privileges apply based on the position in the company).

66. *See* Diversified Indus. v. Meredith, 572 F.2d 596, 608 (8th Cir. 1978) (en banc) (analyzing the criticism of the control group standard as an attempt to equate individual and corporate clients); Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 484 (1987) (allowing senior level personnel to speak as the corporate client).

67. *See* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 297-98 (1989) (limiting extension of the control group to lower level management only when they are affected by the legal advice).

were unprotected from disclosure because these employees were not part of the control group.[68]

Eventually, problems with the effectiveness of the control group test developed.[69] One problem concerned the situation in which an employee outside the control group had information that counsel needed to represent the corporate client effectively.[70] Another problem arose when someone outside the control group was the one who would ultimately act on the advice given to the company.[71] In both situations, no privilege would attach by virtue of the control group test.[72] Fear of future disclosure led many corporations to risk inadequate representation at trial due to the restrictions on communications between the client's representatives and counsel.[73]

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68. *See* Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 749 (1997) (limiting control group membership to the board of directors and highest management levels); Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 484 (1987) (noting the limitation of the control group to senior managers).

69. *See* Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (concluding that protection should extend to lower level employees to allow adequate representation); *Diversified Indus.*, 572 F.2d at 608-09 (refusing to accept the control group test because it has the potential to frustrate counsel's efforts at representing the client); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (per curiam) (opining that the control group is not adequate for purposes the attorney-corporate client privilege), *aff'd by an equally divided court*, 400 U.S. 348 (1971); *see also* Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 750 (1997) (describing the problem corporations and their lawyers will face in making investigations due to the control group test); Alvin K. Hellerstein, *A Comprehensive Survey of the Attorney-Client Privilege and Work-Product Doctrine* (arguing against the control group test because any employee, regardless of rank, may get the corporation into legal problems), *in* CURRENT PROBLEMS IN FEDERAL PRACTICE 1994, at 579, 603 (PLI Litig. & Admin. Practice Course Handbook Series No. H-498); Thomas D. Anthony, Note, 13 ST. MARY'S L.J. 409, 412 (1981) (stating that limited protection may be one reason courts became dissatisfied with the control group test).

70. *See Upjohn*, 449 U.S. at 391 (recognizing the constraints placed on communications by the control group test between corporate employees and corporate counsel); *see also* Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, ANN. SURV. AM. L. 629, 649-50 (1999) (analyzing the *Upjohn* Court's refusal to accept a "bright-line" rule by adopting the control group test).

71. *See* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 297-98 (1989) (indicating that the control group extended only to lower-level management when involved in the decision-making process, but not to employees in general).

72. *See Upjohn*, 449 U.S. at 392 (stating that the control group test discourages communication and hinders the flow of advice from attorneys to corporate employees who will execute corporate policy).

73. *See id.* (explaining the major basis for rejection of the control group test).

Despite these drawbacks, the drafters of the current Federal Rules of Evidence initially suggested the codification of the control group test in preliminary drafts of the rules governing privileges.[74] After reconsideration, the Advisory Committee removed the control group test from the version submitted to Congress.[75] Congress, however, chose not to establish any specific privileges,[76] instead passing only one rule that left the determination of evidentiary privileges to the federal courts "in the light of reason and experience."[77] As a common-law doctrine within the spirit of Federal Rule 501, the control group test remained one possible mode of analysis for applying the attorney-corporate client privilege, at least until the Supreme Court rejected it in 1981.[78]

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74. *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE § 5483, at 293 (1986) (developing the history of the Federal Rules of Evidence); *see also* Revised Draft of Proposed Rules of Evidence for United States Courts and Magistrates, 51 F.R.D. 315, 361 (1971) (adopting a control group standard for a client's representative). The note on Proposed Rule 503 specifically references *City of Philadelphia* in explaining what a client's representative includes. *See id.* at 363.

75. *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE § 5483, at 293 (1986) (quoting a member of the Advisory Committee who stated that the Committee removed the control group test on the grounds "'that the matter is better left to resolution by decision on a case-by-case basis'"). As Wright and Graham indicate, accounts regarding the development of the ultimately rejected attorney-client privilege rule in the Federal Rules of Evidence are confusing and inconsistent. *See id.* at 293-94.

76. *See* RONALD L. CARSON ET AL., EVIDENCE: TEACHING FOR AN AGE OF SCIENCE AND STATUTES 662 (4th ed. 1997) (asserting that Congress passed a solitary statute rather than the 12 detailed statutes). Part of the reason for the rejection of the specific privileges rules was that the rules were submitted to Congress shortly after the Watergate crisis. *See id.* at 16 (indicating the Supreme Court approved and transmitted the rules to Congress in November 1972). The granting of privileges and presidential immunity left Congress feeling that its power had been weakened. *See id.* (stating the Watergate break-in and use of evidentiary doctrines to block the congressional investigation left Congress jealous as to the executive and judiciary branches). To ensure that Congress would have continuing supervisory power over the Federal Rules of Evidence, Congress passed a law granting itself power to review and approve court rules passed under the Rules Enabling Act. *See id.* at 16-17 (discussing Congress' grant of supervisory power); *see also* 28 U.S.C. § 2072 (1994) (granting the Supreme Court power to prescribe rules of evidence and procedure for United States district courts). With regard to evidentiary privileges, Congress specifically stated, "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074(b) (1994). The title of that statute refers to rules of procedure and evidence. *See id.* § 2074.

77. FED. R. EVID. 501.

78. *See Upjohn*, 449 U.S. at 386-402 (addressing the dimensions of the attorney-client privilege and rejecting the control group test for corporations); *cf.* Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (establishing another standard of awarding privilege based on the subject matter of the communication). The standard established in *Diversified* is the subject matter test, which has stood as another possible stan-

b. The Subject Matter Test

In 1970, eight years after *City of Philadelphia*, the United States Court of Appeals for the Seventh Circuit declined to follow the control group test.[79] *Harper & Row Publishers, Inc. v. Decker* involved a book price inflation scheme wherein Harper & Row Publishers, Inc. was one of several defendants.[80] After a grand jury investigation of the publishing industry, Harper & Row Publishers debriefed employees who had given testimony.[81] In a civil suit filed by several libraries and public school districts, the plaintiffs sought discovery of the debriefing reports.[82] After reviewing the reports *in camera*, the trial court denied application of the attorney-client privilege to almost all of the reports.[83] Harper & Row Publishers appealed and the Seventh Circuit rejected the control group test; instead, the court adopted what is now known as the subject matter test.[84] Specifically, the court had found that some of the employees involved were not within the control group, but that they had acted on attorney advice and possessed policy-making responsibilities.[85] Accordingly, the court concluded that the control group test protected corporations inadequately and that the privilege should extend beyond the defined control group.[86]

As developed in *Harper & Row Publishers*, the subject matter test essentially conferred privileged status to communications based upon the communication's contents rather than the corporate position of the repre-

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dard for the attorney-corporate client privilege during and following the *Upjohn* case. *See Upjohn*, 449 U.S. at 391-92.

79. *See* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970) (per curiam) (declining to follow the control group test and formulating other criteria for corporations asserting the attorney-client privilege to meet), *aff'd by an equally divided court*, 400 U.S. 348 (1971); Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 750 (1997) (describing *Harper & Row Publishers* as the case that diverged from the control group theory).

80. *See Harper & Row Publishers*, 423 F.2d at 489-90 (relating that there were twenty-three defendants and over forty separate actions brought alleging a conspiracy to inflate book prices).

81. *See id.* at 490.

82. *See id.*

83. *See id.* (holding that in all but two instances, neither the attorney-client privilege nor any status as work-product excused discovery of the memoranda).

84. *See id.* at 491-92 (concluding "that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group," and thus, making the control group test inadequate).

85. *See id.* at 491.

86. *See id.* (discussing how non-control group members, such as the policy-making employees in this case, should be able to make privileged communications to corporate counsel).

sentative responsible for the communication.[87] The subject matter test also required that the communication be made under a superior's orders and that the subject matter of the communication between the employee and the corporation's attorney relate to the employee's duties within the company.[88] After satisfying this standard, a corporation could then assert a privilege over communications occurring between any corporate employee and the attorney representing the corporation.[89]

The subject matter test was later modified in *Diversified Industries, Inc. v. Meredith*.[90] In *Diversified*, a proxy fight revealed possible bribery among Diversified Industries and other companies.[91] In regard to this matter, Diversified Industries hired a law firm to prepare a report of the company's business practices.[92] In a memorandum, the firm outlined its proposed investigation and the report's potential immunity from discovery.[93] Specifically, the report contained a detailed compilation of employee interviews relevant to the bribery case.[94] Eventually, because both the memorandum and the report were sought through discovery, Diversified Industries claimed that the documents were protected by the attorney-client privilege.[95]

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87. *See id.* at 491-92 (granting the privilege to communications made by corporate employees corporate legal counsel if: (1) the communication was made under orders from superiors; (2) when the subject matter was sought for legal advice and was within the employee's scope of duties); Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 750-51 (1997) (expanding the corporate privileges test beyond employees to include the subject matter of the communication); *see also* Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 484 (1987) (describing the subject matter test as broader than the control group test).

88. *See Harper & Row Publishers*, 423 F.2d at 490-92 (listing what is required for a communication to fall under the attorney-client privilege); Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 750 (1997) (requiring for the subject matter test to grant a privilege to a communication by a corporate employee to corporate counsel that the communication be at the direction of superiors and that the subject matter be sought by the corporation and relate to the employee's duties).

89. *See Harper & Row Publishers*, 423 F.2d at 491-92 (requiring satisfaction of the entire privileges description before protecting a communication).

90. *See* Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977) (en banc) (enumerating five distinct requirements for invoking the attorney-client privilege to cover an employee's communication).

91. *See id.* at 600 (stating that Diversified's alleged use of a slush fund to bribe purchasing agents prompted the lawsuit).

92. *See id.* at 600.

93. *See id.* at 600-01.

94. *See id.*

95. *See id.* at 599.

After an en banc hearing, the Eighth Circuit endorsed a new version of the subject matter test to determine whether the attorney-client privilege could protect Diversified Industries' written communications with its legal counsel.[96] The new elements of the test, as determined by the Eighth Circuit, required that: (1) the communication be made for securing legal advice; (2) the employee communicated with the attorney at the behest of a superior; (3) the superior requested that the communication occur as part of resolving the corporation's legal dispute(s); (4) the subject matter of the communication was within the employee's scope of employment; and (5) the communication was kept as confidential as reasonably possible.[97] This modified version of the subject matter test essentially added two requirements to the *Harper & Row Publishers* standard: that the purpose of the communication must relate to the corporation's legal matters and that the communication must be kept confidential.[98] Furthermore, *Diversified* may be read as requiring advice that relates to a specific *legal* matter, not just to any matter involving the corporation.[99] The court added such a requirement due to the fear that corporations would purposefully involve counsel in a broad range of communications in order to prevent disclosure of non-legal matters.[100] By modifying the subject matter test, the court prevented the extension of the privileges to routine, widely available communications.[101] Thus, in adding to the criteria necessary to assert the privilege, the Eighth Circuit

96. *See id.* at 609 (modifying the *Harper & Row Publishers* test for the attorney-client privilege in regards to corporate communications).

97. *See id.* (requiring all five elements be met in order to grant a privilege).

98. *See id.* (detailing the additional requirements of the modified subject matter test); *see also* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 301 (1989) (referring to *Diversified* as adopting a modified subject matter test); Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 752 (1997) (noting that *Diversified* was an opinion made without guidance from the Federal Rules of Evidence, although it further altered the subject matter test); Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 486 (1987) (describing *Diversified* as the best-known modified subject matter test); Thomas D. Anthony, Note, 13 ST. MARY'S L.J. 409, 413 (1981) (stating that *Diversified* added the purpose of legal advice and confidentiality requirements to the preservation of the privilege).

99. *See Diversified Indus.*, 572 F.2d at 609 (requiring that the purpose of the advice be for the corporation's *legal* matters).

100. *See id.* (discussing *Harper & Row Publishers* fears).

101. *See* Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 486-87 (1987) (explaining how *Diversified Indus.* improved on the *Harper & Row Publishers* test).

effectively narrowed the attorney-corporate client privilege[102] from that which was established in *Harper & Row Publishers*.[103]

3. *Upjohn Co. v. United States*

In 1981, the Supreme Court of the United States addressed the problem of applying the attorney-client privilege to the corporate context in *Upjohn Co. v. United States*.[104] In *Upjohn*, independent auditors discovered that one of Upjohn's foreign subsidiaries had made illegal payments to foreign governments to acquire a greater share of business opportunities.[105] As a result of this finding, Upjohn sent a confidential questionnaire to foreign managers to ascertain whether anyone had knowledge of any of these illegal payments.[106] The company later submitted information about the payments to the Securities & Exchange Commission, which then sent a copy to the Internal Revenue Service ("IRS").[107] Based upon the information submitted, the IRS immediately commenced an investigation as to the tax consequences of the payments.[108] The IRS demanded production of the questionnaires, and because the company refused to release them, the IRS then audited the company.[109] In the suit that was subsequently filed, Upjohn claimed that the questionnaires were privileged because they were prepared under the direction of the company's attorney for future litigation.[110] The trial court, however, denied extending the privilege to the questionnaires, and the appellate court agreed, stating, "To the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . the communications were not the 'client's.'"[111]

Upjohn appealed to the Supreme Court, again claiming that the attorney-client privilege protected the questionnaires.[112] In their briefs to the

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102. *See Diversified Indus.*, 572 F.2d at 609 (noting that these restrictions will "better protect the purpose underlying the attorney client privilege").

103. *Compare id.* (requiring legal purpose as a means of restricting which communications may be privileged), *with* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (per curiam) (affording privilege to a communication if it was given under orders from superiors and it dealt with the performance of the employee's duties, regardless of whether it was for a specific legal matter), *aff'd by an equally divided court*, 400 U.S. 348 (1971).

104. 449 U.S. 383 (1981).

105. *See* Upjohn Co. v. United States, 449 U.S. 383, 386 (1981).

106. *See id.* at 386-87.

107. *See id.* at 387.

108. *See id.*

109. *See id.*

110. *See id.* at 388.

111. *Id.*

112. *See id.* at 387.

Court, both parties characterized the essence of the dispute as a choice between the control group and subject matter tests.[113] The Court disagreed with that framing of the issue, stating that "we sit to decide concrete cases and not abstract propositions of law."[114] The Court, however, rejected the control group test without endorsing the subject matter test as a viable alternative.[115] Although the Court acknowledged that its reasoning added to the uncertainty surrounding the attorney-client privilege, the Court supported its reasoning by stating that this uncertainty forces a case-by-case determination of the applicability of the privilege that complies with the spirit of Federal Rule of Evidence 501.[116]

The elimination of the control group test as a possible mode of analysis for applying the attorney-corporate client privilege as defined by the Federal Rules of Evidence is a noteworthy effect of the *Upjohn* decision.[117] However, perhaps more important is the fact that the Court implicitly allowed the subject matter test to stand as an alternative standard in federal courts for deciding when the attorney-client privilege applies in the corporate context.[118] Thus, when Texas codified its rules of evidence for civil cases in 1983[119] and criminal cases in 1985,[120] there is little surprise that both the control group and the subject-matter tests were potential modes of analysis for determining the scope of the attorney-corporate client privilege.[121]

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113. *See id.* at 386 (referring to party and amicus curiae attempts to frame the attorney-client privilege into two "tests," presumably the control group and subject matter tests).

114. *Id.*

115. *See id.* at 402. The Court concluded that because the control group test conflicted with Federal Rule of Evidence 501, it should no longer guide the corporate privilege in federal courts. *See id.* at 397.

116. *See id.* at 396-97 (offering a reason as to why a bright line test is not advisable).

117. *See id.* at 396 (reasoning that any test is ill advised because "[a]ny such approach would violate the spirit of Federal Rule of Evidence 501").

118. *See id.* (offering no solution, but narrowing the issue by eliminating of the control group test).

119. *See* Supreme Court Order of Nov. 23, 1982, eff. Sept. 1, 1983 (adopting rules of evidence for Texas civil trials), *reprinted in* TEX. R. ANN. (Vernon Special Pamphlet 1998); HULEN D. WENDORF ET AL., TEXAS RULES OF EVIDENCE MANUAL xxi (5th ed. 1998) (stating that the Texas Civil Rules of Evidence were promulgated in November 1982 and became effective in 1983).

120. *See* Court of Criminal Appeals Order of Dec. 18, 1985, eff. Sept. 1, 1986 (adopting rules of evidence for Texas criminal trials), *reprinted in* TEX. R. ANN. (Vernon Special Pamphlet 1998); HULEN D. WENDORF ET AL., TEXAS RULES OF EVIDENCE MANUAL xxii (5th ed. 1998) (stating that the Texas Rules of Criminal Evidence were promulgated in 1985 and became effective in 1986).

121. *See Upjohn Co.*, 449 U.S. at 383 (predating the Texas codes of evidence by two and four years, respectively); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 487 (7th Cir. 1970) (dating the subject matter test to 1970), *aff'd by an equally divided court,*

B. *Texas and the Attorney-Corporate Client Privilege*

1. *Cigna Corp. v. Spears*

Initially, Texas Rule 503 was patterned after the Uniform Rules of Evidence; as such, its focus was originally on the control group test.[122] The first major case to address former Rule 503 was *Cigna Corp. v. Spears*.[123] In *Cigna*, an insurance agent had sued Cigna Corporation ("Cigna") for breach of contract, claiming that he was an exclusive agent for Cigna under the agreement.[124] To support his contention, the plaintiff requested access to various memoranda and in-house correspondence.[125] Cigna responded by asserting that these documents were privileged, but the trial court denied that claim, prohibiting the documents from being protected from disclosure.[126]

On appeal, the San Antonio court of appeals attempted to determine exactly who was considered a corporate client's representative under the attorney-client privilege.[127] Ultimately, the court decided that a corporate client's representative referred to someone with the authority to seek or act on the legal advice for the corporation.[128] Although it did not refer to the test by name, the *Cigna* opinion nevertheless adopted the sub-

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400 U.S. 348 (1971); City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 483 (E.D. Pa.) (dating the control group test to 1962), *aff'd sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962). At the very least, the drafters of the Texas Evidence Code had thirteen years of case law to aid their efforts. *See* Supreme Court Order of Nov. 23, 1982, eff. Sept. 1, 1983 (post-dating the subject matter test by 13 years and the control group test by 21 years based on the dates of the cases creating each test), *reprinted in* TEX. R. ANN. (Vernon Special Pamphlet 1998).

122. *See* National Tank Co. v. Brotherton, 851 S.W.2d 193, 197 (Tex. 1993) (explaining that the Texas evidence rules governing the attorney-corporate client privilege clearly adopted the control group test); MURL A. LARKING & ERWIN S. MCGEE, TEXAS RULES OF EVIDENCE SOURCEBOOK 83 (1983) (suggesting that the drafters drew the Texas rule subdivision regarding a client's representative from the Uniform Rules of Evidence); UNIF. R. EVID. 503(a)(2) (limiting client's representatives to those who may seek or act on legal advice for the client).

123. 838 S.W.2d 561 (Tex. App.—San Antonio 1992, no writ).

124. *See* Cigna Corp. v. Spears, 838 S.W.2d 561, 563 (Tex. App.—San Antonio 1992, no writ).

125. *See id.*

126. *See id.*

127. *See id.* at 564-68 (determining who was a corporate representative for purposes of the attorney-client representative).

128. *See id.* at 565. The *Cigna* court explained that the party attempting to assert the privilege should have the burden of proving privileges because privileges are not presumed. *See id.* Thus, to prevail, the corporation would have to show that the employee could seek or act on legal advice. *See id.*

stance of the control group test for the purpose of Texas Rule 503.[129] The result is that the court held that the privilege protected only communications between the attorney and employees who could seek out or act upon the corporation's legal advice.[130]

2. *National Tank Co. v. Brotherton* and the Call for Change

With the *Cigna* foundation as a guide, the Supreme Court of Texas considered the efficacy of the *Upjohn* decision in *National Tank Co. v. Brotherton*.[131] Following a manufacturing plant explosion, a victim's widow sued National Tank.[132] In this case, the Texas Supreme Court considered whether to allow the plaintiff access to National Tank's reports that were created after the accident.[133] Specifically, National Tank sought to prevent access to interview transcripts that recollected communications with employees by contending that the control group analysis was flawed.[134]

After reviewing Rule 503, the Texas Supreme Court decided that because the Texas legislature passed a privileges rule adopting the control group test, it must follow the control group standard rather than the subject matter test.[135] According to the court, it was "not free to choose one over the other."[136] Thus, because the employees interviewed did not fall within the control group, the court deemed their post-accident communications to counsel to be unprivileged.[137]

After the decision in *National Tank*, the movement to change the application of the attorney-client privilege gained momentum. In 1997, in *Valero Transmission v. Dow*,[138] the control group test's inadequacy prompted Justice Owen, in her dissent to a denial of a request for a writ

129. *Compare id.* at 567-68 (requiring under Rule 503 that a client's representative be in a position to act on advice or be authorized to obtain legal advice), *with* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa.) (permitting corporate employee communications to be privileged if the employee controls or participates in decisions based upon legal advice), *aff'd sub. nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962).

130. *See Cigna*, 838 S.W.2d at 567-68 (adopting the language of the control group test for Rule 503).

131. 851 S.W.2d 193 (Tex. 1993).

132. *See* National Tank Co. v. Brotherton, 851 S.W.2d 193, 195-96 (Tex. 1993).

133. *See id.* at 195 (determining that the issue was whether the reports were privileged from discovery).

134. *See id.* at 197 (explaining how National Tank tried to characterize the employees as client representatives under Rule 503 to privilege their communications).

135. *See id.* at 197-98 (stating that the court was not free to choose between the control group and subject matter tests).

136. *Id.* at 198.

137. *See id.* at 199.

138. 960 S.W.2d 642 (Tex. 1997).

of mandamus, to express frustration with the state of confusion surrounding the test; Justice Owen contended that the attorney-client privilege in Texas was, at the time, still misunderstood.[139] She also discussed application of the party-communication privilege where an event may give rise to liability in court.[140] She closed her opinion with a plea to "review . . . our rules of procedure and evidence to resolve the questions raised by this petition."[141]

Four months later, in *Osborne v. Johnson*,[142] the Waco court of appeals echoed similar frustration, stating that the plain language of Rule 503 conflicted with the *National Tank* interpretation of Rule 503.[143] The dispute in *Osborne* arose out of alleged misconduct by a Baylor professor.[144] During discovery, the professor sought documents from the investigating committee, but the defendants asserted the attorney-client privilege.[145] The appellate court then was charged with determining whether the committee members were client representatives for the purposes of Rule 503.[146] In examining Texas precedent, the court noted possible confusion between the *National Tank* holding and Rule 503.[147] In particular, the court pointed to a statement in *National Tank*, in which the Supreme Court had stated that "[u]nder Rule 503(a)(2), the qualifying employees must be those actually having authority to hire counsel *and* to act on counsels advice."[148] The Waco court of appeals, however, dismissed this statement as isolated and determined that the trial judge was not incorrect in ordering the production of the documents.[149]

3. The Merging of the Evidence Codes

Partially in response to the increasing number of complaints, a new Rule 503 materialized with the 1998 merging of the civil and criminal

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139. *See* Valero Transmissions, L.P. v. Dowd, 960 S.W.2d 642, 642-43 (Tex. 1997) (Owens, J., dissenting) (considering the petitioner's arguments and explaining why the court should review the case).

140. *See id.* at 644-45 (suggesting that a party-communication privilege should not depend on whether a party can predict who will be involved in the suit).

141. *Id.* at 649.

142. 954 S.W.2d 180 (Tex. App.—Waco 1997, no pet. h.).

143. *See* Osborne v. Johnson, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet. h.) (stating that the limitations regarding the authority to hire counsel and to act on legal advice created in *National Tank* conflicted with the plain language of Rule 503).

144. *See id.* at 182.

145. *See id.* at 182-83.

146. *See id.* at 183-84 (explaining the Rule 503 issue in the case).

147. *See id.* at 184.

148. *Id.* (quoting *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 199 (Tex. 1993) (emphasis added)).

149. *See id.* at 184, 191.

evidence rules; this new rule expressly adopted the subject matter test.[150] Although the new section defining a client's representative preserves the previous control group test, it also expands the definition by including representatives who make confidential communications for the purpose of the client's legal matters "while acting in the scope of employment for the client."[151] This latter language modifies the subject matter test developed in federal case law, which focuses more on the subject matter of the *communication* rather than on the *person* making it.[152] Yet, aside from stating that Texas adopted the subject matter test, the drafters of the new evidence code provided no further definition for the term "scope of employment," leaving a question as to the exact breadth of the attorney-corporate client privilege in Texas.[153]

Incidentally, other states that shifted away from the control group test have indicated that such a change was made to broaden the scope of the attorney-client privilege. For example, Vermont took the same action as Texas and adopted a similar definition.[154] In an application of its new test, the Supreme Court of Vermont stated that the change broadened the privilege for entities.[155] Similarly, Oregon adopted a client representative definition that includes officers, directors, principals, and employees who, because of their relationship with the client, apply or receive legal advice from the client's lawyer.[156] In interpreting the applicability of this definition, the Oregon Supreme Court opined that the broader wording suggests a movement "away from the control group test."[157]

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150. *See* TEX. R. EVID. 503 cmt. (stating that the new rule adopts the subject matter test).

151. TEX. R. EVID. 503(a)(2)(B).

152. *Compare id.* (excluding a requirement that information be given under request from superiors and inserting a requirement that the employee act within the scope of employment when making the communication), *with* Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (modifying the original subject matter test by adding purpose and confidentiality requirements), *and* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (establishing guidelines for the subject matter test), *aff'd by an equally divided court*, 400 U.S. 348 (1970).

153. *See* TEX. R. EVID. 503 cmt. (explaining that the rule adopted the subject matter test, although not explaining what "scope of employment" means).

154. *See* Baisley v. Missisquoi Cemetery Ass'n, 708 A.2d 924, 930 (Vt. 1998) (requiring for purposes of the attorney-corporate client privilege that the client representatives communicate in the scope of their employment, for the client, and maintain confidentiality).

155. *See id.* at 931 (stating that the change increases the privilege's scope in the entity setting).

156. *See* OR. EVID. CODE 503(d) (defining a client's representative in terms that may include corporate personnel).

157. State *ex rel.* Oregon Health Sciences Univ. v. Haas, 942 P.2d 261, 269 (Or. 1997).

To resolve the breadth issue and define the scope of the privilege in Texas, two questions warrant further examination. The first question is whether a valid employment relationship exists, as Rule 503 appears to require an employment relationship for those representatives outside the control group.[158] The second query delves into the circumstances that place an employee within the proper scope of employment so as to satisfy the privilege.

III. When Does a Valid Employment Relationship Exist?

An examination of Texas employment relationships serves as the starting point in defining the "scope of employment" language contained in Rule 503. Because Rule 503 requires that the party making the statement be acting "[with]in the scope of employment"[159] for the privilege to attach, the plain language of the rule necessarily calls for the existence of an employment relationship.[160] Correspondingly, the first step in classifying an employment relationship involves identifying the parties, specifically the employer and the employee.

A. *Statutory and Common-Law Employers*

An employer is typically defined as one who engages the services of someone else and pays wages or salaries for such service.[161] Generally, courts qualify a person or an entity as an employer using one of two methods.[162] The first method requires an examination of the relevant statutes that define the term "employer" in such a way as to accomplish the legislative purpose.[163] The second method comprehends the instance

158. *See* Tex. R. Evid. 503(a)(2)(B) (implying that an employment relationship must exist in order to satisfy the third part of the subject matter standard in Texas).

159. *Id.*

160. *See id.* (allowing for the deduction that if a person is making a statement to counsel while acting in their scope of employment, they must be an employee to warrant the privilege).

161. *See* Black's Law Dictionary 525 (6th ed. 1990).

162. *Compare* 29 U.S.C. § 152(2) (1994) (defining an employer for purposes of the National Labor Relations Act), *and* 42 U.S.C. § 2000e(b) (1994) (defining an employer as one who has a minimum of 15 employees working a least 20 weeks per year for purposes of equal opportunity employment laws and civil rights), *and* Tex. Lab. Code Ann. § 401.011(18) (Vernon 1996) (defining an employer for purposes of Texas worker's compensation laws), *with* Newspapers, Inc. v. Love, 380 S.W.2d 582, 586 (Tex. 1964) (conferring employer status to a business based on the right to control the employees), *and* Ackley v. State, 592 S.W.2d 606, 608 (Tex. Crim. App. 1980) (explaining that an employer is the master for whom a servant works).

163. *See* 42 U.S.C. § 2000e(b) (1994) (explaining that an employer is a person whose business affects commerce, but excluding government agencies); Spirides v. Reinhardt, 613 F.2d 826, 829-30 (D.C. Cir. 1979) (using the statutory language to conclude that a foreign

of a common-law employer, an employer whose status is determined by using an analysis known as the economic realities test.[164] Either of these two methods could be used to determine whether a client is an employer for purposes of the attorney-corporate client privilege. Basically, if a client is an employer, then the client may be entitled to have certain employee communications with the client's counsel protected from disclosure.[165]

1. The Statutory Employer

Under the statutory employer method, defining an individual or an entity as an employer depends on whether the employer satisfies a statutory definition.[166] The Texas Labor Code provision governing employment discrimination provides one example of such a statutory employer:

> (A) a person who is engaged in an industry affecting commerce and who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year;
> (B) an agent of a person described by Paragraph (A);
> (C) an individual elected to public office in this state or a political subdivision of this state; or
> (D) a county, municipality, state agency, or state instrumentality, including a public institution of education, regardless of the number of individuals employed.[167]

Although a limited number of cases interpreting this provision exist, *Guerrero v. Refugio County*[168] provides an example of how a court regards statutory definitions of an employer.

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radio service is an employer within the scope of 42 U.S.C. § 2000e(b), which was amended to include the government as an employer); Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344, 347 (S.D.N.Y. 1984) (looking to a civil rights statute to determine who may be an employer under 42 U.S.C. § 2000e(b)), *aff'd*, 770 F.2d 157 (2d Cir. 1985); Smith v. Dutra Trucking Co., 410 F. Supp. 513, 515-16 (N.D. Cal. 1976) (attempting to resolve a common-law definition of employer with the legislative intent of 42 U.S.C. § 2000e(b)), *aff'd*, 580 F.2d 1054 (9th Cir. 1978).

164. *See* Cobb v. Sun Papers, Inc., 673 F.2d 337, 340 (11th Cir. 1982) (enumerating eleven factors that determine whether an employment relationship exists).

165. *See* TEX. R. EVID. 503(a)(2)(B) (implying an employment relationship through use of the term "scope of employment" in defining a client representative).

166. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 502.003 (Vernon 1999) (defining employers under the Hazard Communication Act); TEX. LAB. CODE ANN. § 21.002(8) (Vernon 1996) (defining an employer for the purpose of employment discrimination); TEX. TRANSP. CODE ANN. § 522.003 (Vernon Pamph. 1999) (defining employers for the purpose of commercial driver's licenses).

167. TEX. LAB. CODE ANN. § 21.002 (8) (Vernon 1996).

168. 946 S.W.2d 558 (Tex. App.—Corpus Christi 1997, no writ).

Adhering to the Texas Labor Code, the Corpus Christi court of appeals in *Guerrero* first concluded that a county was a political subdivision that could potentially be an employer under the code's definition.[169] The question then shifted to whether the county was, in fact, the plaintiff's employer.[170] The plaintiff had been a county auditor for twenty-two years, although each individual term of his appointment spanned only a two-year period.[171] At the expiration of his last term, the judges who filled the position through appointment decided to seek other applicants.[172] In response, the plaintiff brought suit against the county, alleging age discrimination.[173] The court, however, found that no employment relationship existed because no agent of the county ever exercised control over the plaintiff as the county auditor.[174] As a result of this lack of control, the court concluded that the plaintiff had no employer and could not, therefore, recover damages under the statute.[175]

Like *Guerrero*, other cases interpreting a statutory definition of an employer have also turned on whether the alleged employer bore the requisite control over the alleged employee.[176] For example, in *Rennels v. NME Hospital, Inc.*,[177] the El Paso court of appeals held that a hospital employing an independently contracted doctor could be sued under the Texas retaliatory dismissal statute due to the hospital's control over the doctor's business opportunities.[178] In that case, the court essentially concluded that, despite the fact that the doctor at issue was an independent

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169. *See* Guerrero v. Refugio County, 946 S.W.2d 558, 566 (Tex. App.—Corpus Christi 1997, no writ) (determining that a county can be an employer).

170. *See id.* at 565.

171. *See id.* at 562.

172. *See id.* at 562-63.

173. *See id.* at 563.

174. *See id.* at 566-67 (explaining a two-prong test for determining whether a county was an employer for purposes of the employment discrimination statute based on the statute's language and a common law right-of-control analysis). Because the requisite control was missing, the second prong of the court's analysis was unsatisfied, and the county was not deemed an employer for purposes of the statute. *See id.* at 567.

175. *See id.* at 568 (holding that no employment relationship existed).

176. *See, e.g.*, Rodriguez v. Martin Landscape Management, Inc., 882 S.W.2d 602, 605-06 (Tex. App.—Houston [1st Dist.] 1994, no writ) (applying a statutory definition of contract and payment to the scheme of compensation to determine whether a party is an employer, and concluding that the party at issue was on employer); Thompson v. City of Austin, 979 S.W.2d 676, 682 (Tex. App.—Austin 1998, no pet. h.) (stating how the Austin City Council's limited control over municipal judges negated its status as an employer under the Texas Labor Code).

177. 965 S.W.2d 736 (Tex. App.—El Paso 1998, pet. granted)

178. *See* Rennels v. NME Hosp., Inc., 965 S.W.2d 736, 739 (Tex. App.—El Paso 1998, pet. granted) (allowing a claim against an employer because of its control over business opportunities).

contractor, the hospital could be deemed to be her employer under the statute simply because the hospital controlled her business opportunities.[179]

2. The Common-Law Employer

The second primary method courts use to define an employer involves a common-law analysis that, like the two statutory examples, focuses in part on the employer's right to control the employee.[180] This common-law analysis is generally referred to as the economic realities test.[181] In essence, this test examines the totality of the circumstances to ascertain the existence of an employment relationship.[182] A dominant, but not determinative, factor considered is the right of an employer to control the employee.[183] The other factors courts typically consider include the nature of the occupation, the skill required, who furnishes the tools and

179. *See id.* at 739-40 (incorporating business opportunities into an employee control test).

180. *See* Newspapers, Inc. v. Love, 380 S.W.2d 582, 586 (Tex. 1964) (using case law to define an employer's right to exercise control over an employee); Ross v. Texas One Partnership, 796 S.W.2d 206, 210-11 (Tex. App.—Dallas 1990) (distinguishing an independent contractor based upon an employer's involvement in the supervision of the employee, supply of materials and tools, right to control progress and end result, length of employment, and method of payment), *writ denied per curiam*, 806 S.W.2d 222 (Tex. 1991); *see also* Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344, 346-47, 349 (S.D.N.Y. 1984) (stating that defendant-employer controlled plaintiff's work, hours, training, and termination, which satisfied all the common-law criteria for determining when a party is an employer), *aff'd*, 770 F.2d 157 (2d Cir. 1985); James E. Holloway, *A Primer on Employment for Contingent Work: Less Employment Regulation Through Fewer Employer-Employee Relations*, 20 T. MARSHALL L. REV. 27, 40-42 (1994) (recommending that courts apply the master-servant doctrine for joint employers, which means using the right to control work as a guide to such a determination).

181. *See* Cobb v. Sun Papers, Inc., 673 F.2d 337, 340 (11th Cir. 1982) (listing the components of the economic realities test as occupation, skill required, furnishing of equipment, time, method of payment, manner of termination, awarding of leave, integration into employer's business, retirement benefits, payment of social security taxes, and intention of the parties); *Amarnare*, 611 F. Supp. at 349 (stating that Merrill Lynch, the possible employer in the case, controlled Amarnare's assignments, hours, and various other aspects of her employment); *Ross*, 796 S.W.2d at 210-11 (applying similar economic reality criteria); *see also* James E. Holloway, *A Primer on Employment for Contingent Work: Less Employment Regulation Through Fewer Employer-Employee Relations*, 20 T. MARSHALL L. REV. 27, 40-42 (1994) (referring to the test in *Amarnare* as an economic realities test).

182. *See Amarnare*, 611 F. Supp. at 349 (considering numerous factors to conclude that, given the totality of circumstances, the defendant qualified as an employer).

183. *See Cobb*, 673 F.2d at 340 (listing several factors but giving the most weight to the employer's right to direct and control the employee); *Love*, 380 S.W.2d at 586 (stating that the power to control a worker's action is an indication of an employment relationship). Although the right to control is indicative of an employer-employee relationship, it is not the only consideration. *See Amarnare*, 611 F. Supp. at 349. *Amarnare* signifies that

equipment necessary to complete the job, the length of employment, the method of payment (by job or by hour), the method of termination, the granting of annual leave, the integration of work into the employer's business, retirement benefits, whether the employer pays social security taxes for the employee, and the intentions of the parties involved.[184]

Through case law, Texas has simplified its version of the economic realities test, focusing on the right to control the work's details, progress methods, and end result.[185] The law in Texas also further defines the right-to-control factor as an employer's power to influence an employee's starting and stopping of work (hours), regularity of hours (schedule), time spent on various tasks, tools used, or physical manner of the work.[186] *Darensburg v. Tobey*[187] provides an example of how Texas courts have applied this version of the economic realities test.

In *Darensburg*, the Dallas court of appeals ruled that a corporation was the employer of an in-house physician because of the amount of control it exercised over the physician.[188] The physician's employment as in-house physician for the corporate employer embodied his entire medical practice and his sole means of income.[189] According to the court, the corporation controlled the physician's hours, benefits, patient load, and business opportunities.[190] The corporation's control over these factors was sufficient to allow the court to hold that the corporation was the physician's employer.[191] As a result, the worker who suffered injury because of the physician's misdiagnosis was limited in recovery to the worker's compensation statutes and could not sue the physician as an independent contractor.[192]

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the analysis should be based on the circumstances of the entire relationship, not just one factor. *See id.*

184. *See Cobb*, 673 F.2d at 340 (relating the factors relevant to the determination of an employee's status).

185. *See* Darensburg v. Tobey, 887 S.W.2d 84, 88-89 (Tex. App.—Dallas 1994, no writ) (distinguishing between an employee and an independent contractor based on the employer's right to control the employee).

186. *See id.* (listing examples of the aspects an employer can control). *Darensburg* narrows the focus of the economic realities test. *Compare id.* (focusing on hours, time spent on specific tasks, equipment, and manner of the work), *with Cobb*, 673 F.2d at 340 (including intention, benefits, termination manner, method of payment, equipment, and nature of the work under employment factors).

187. 887 S.W.2d 84 (Tex. App.—Dallas 1994, no writ).

188. *See Darensburg*, 887 S.W.2d at 89 (concluding that the corporation's right to control substantial parts of the doctor's work made the doctor an employee).

189. *See id.* at 89-90.

190. *See id.* at 89.

191. *See id.*

192. *See id.* The injured worker, Darensburg, tried to sue the doctor, Tobey, claiming the misdiagnosis aggravated the original injury. *See id.* at 86. Darensburg contended that

These statutory and common-law examples illustrate when a party may become an employer. Employer status, however, may vary depending on the law applied.[193] Likewise, the same variations arise when determining whether an individual is an employee performing on behalf of an employer.[194] Thus, in answering the question as to when an employment relationship exists, determining who is an employee is important as well.

B. *Determining Who Is an Employee*

Under Rule 503, a corporate client's representative may also be an employee for the corporation to claim a privilege over certain employee communications.[195] Generally, an employee is defined as a party who serves another in exchange for compensation and is under the other party's control.[196] Like the term "employer," courts attach various meanings to the term "employee," depending on whether the case at issue involves a statutory or common-law claim.[197]

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workers compensation did not apply in this case, asserting that a physician could not be a co-employee of a worker. *See id.*

193. *See* Guerrero v. Refugio County, 946 S.W.2d 558, 566 (Tex. App.—Corpus Christi 1997, no writ) (applying a statute to discern status as an employer); *Darensburg*, 887 S.W.2d at 89 (applying a common-law analysis to determine whether a corporation was a physician's employer).

194. *See* Cobb v. Sun Papers, Inc., 673 F.2d 337, 339 (11th Cir. 1982) (determining whether the plaintiff was a statutory employee); Newspapers, Inc. v. Love, 380 S.W.2d 582, 586 (Tex. 1964) (using common-law principles to ascertain if the person involved was an employee).

195. *See* TEX. R. EVID. 503(a)(2)(B) (expanding the Texas attorney-client privilege to include any other person who communicates with the company's attorney while acting in the scope of their employment).

196. *See* BLACK'S LAW DICTIONARY 525 (6th ed. 1990) (defining an employee as "[a] person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed"); *see also* 29 U.S.C. § 152 (3) (1994) (defining an employee as anyone doing work, except agricultural workers, domestic servants, persons who work for their parents or spouse, and independent contractors); 42 U.S.C. § 2000e(f) (1994) (defining an employee as one who works for an employer); TEX. LAB. CODE ANN. § 21.002(2) (Vernon 1996) (defining an employee as "an individual employed by an employer").

197. *See, e.g.*, Boire v. Greyhound Corp., 376 U.S. 473, 475 (1964) (stating that the NLRB concluded that the individuals filing a labor grievance were employees based on two factors, training and control); Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979) (using the economic realities test to define an employee under 42 U.S.C. § 2000e(f)); Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344, 349 (S.D.N.Y. 1984) (applying the economic realities test to define an employee under 42 U.S.C. § 2000e(f)), *aff'd*, 770 F.2d 157 (2d Cir. 1985); Smith v. Dutra Trucking Co., 410 F. Supp. 513, 516 (N.D. Cal. 1976) (using the common-law distinction between an employee and a borrowed servant to determine whether the plaintiff was an employee within 42 U.S.C. § 2000e(f)), *aff'd*, 580 F.2d 1054 (9th Cir. 1978); Newspapers, Inc. v. Love, 380 S.W.2d 582,

As expected, Texas courts hearing cases based on statutory actions follow the intent of the statute when determining who is an employee.[198] However, absent specific guidance from the statute, courts must resort to the common-law definitions of an employee to make such a determination.[199] Employment cases based on common-law claims typically follow

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586 (Tex. 1964) (distinguishing an employee from an independent contractor based on the employer's right of control over the work details); Ackley v. State, 592 S.W.2d 606, 608 (Tex. Crim. App. 1980) (applying the common-law definition of employee in a criminal offense under the Texas Alcoholic Beverage Code); Stoker v. Furr's, Inc., 813 S.W.2d 719, 721-22 (Tex. App.—El Paso 1991, writ denied) (defining an employee in Texas as one who has a contract for hire and has begun serving the employer); Ross v. Texas One Partnership, 796 S.W.2d 206, 210-211 (Tex. App.—Dallas 1990) (applying the economic realities "right of control" test for an independent contractor and concluding that a security company hired by an apartment complex is an independent contractor based on the amount of supervision, right to control, manner of payment, and furnishing of equipment by the employer), *writ denied per curiam*, 806 S.W.2d 222 (Tex. 1991); *see also* H. Lane Dennard, Jr. & Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labor Law Problems*, 28 GA. L. REV. 683, 714 (1994) (applying the definition of employee in IRS cases to a common-law relationship with the employer based on the right to control, the power of the employer to discharge the employee, and the employer's provision of necessary supplies).

198. *See Cobb*, 673 F.2d at 339 (advising that when a court is interpreting a statute, such as 42 U.S.C. §2000e(f), the court should look to the act's language, the act's history, relevant case law, and the individual case at bar); *see also Spirides*, 613 F.2d at 829-80 (using the economic realities test to interpret a statute in the absence of congressional guidance); *Amarnare*, 611 F. Supp. at 349 (looking to a civil rights statute to determine who may be an employee and concluding that, based on the economic realities of the specific situation, the plaintiff was an employee); *Smith*, 410 F. Supp. at 516 (attempting to resolve the use of a common-law definition of employee with the legislative intent of 42 U.S.C. § 2000e(f), and noting that no specific meaning was attached to the statute).

199. *See Cobb*, 673 F.2d at 339 (advising that when a court is interpreting a statute, such as the definition of employee under 42 U.S.C. §2000e(f), the court should look to the act's language, history, other cases and the individual case at bar). In *Cobb*, the Eleventh Circuit also decided to apply the economic realities test for terms to which Congress did not assign a technical definition. *See id.* at 339-40 (deciding that Congress intended to give the common, ordinary definition to "employee," and that, absent Supreme Court guidance, the economic reality test should be employed to analyze the relationship); *see also Spirides*, 613 F.2d at 830 (using the economic realities test when interpreting a statute without congressional guidance); *Amarnare*, 611 F. Supp. at 349 (relying on 42 U.S.C. § 2000e(f) to determine who may be an employee and concluding that, based on the economic realities of the specific situation, the plaintiff was an employee); *Smith*, 410 F. Supp. at 516 (attempting to resolve a common-law definition of employee with the legislative intent of 42 U.S.C. § 2000e(f) when no specific meaning was attached to the statute); *Ackley*, 592 S.W.2d at 608 (refusing to attach a specific meaning to the term employee based on the type of work the employee performed); *Stoker*, 813 S.W.2d at 721-22 (using the Texas Worker's Compensation Act to define an employee as a provider of services under a contract for hire, concluding that a person is an employee only after they begin service to the master). *Stoker*, decided by the El Paso court of appeals, suggests that if an individual is not subject to the employer's right to control, nor any other part of the economic realities

traditional master-servant doctrines as well as the economic realities test.[200]

1. Employee v. Independent Contractor

One of the difficulties faced by courts when attempting to define an employee lies in distinguishing employees from independent contractors. An independent contractor is one who works for another but is subject to control as to the end results alone, not as to the details of the actual work.[201] Examples of independent contractors include emergency room doctors, newsboys, and taxi cab drivers.[202] As with an employer and an employee, courts examine the totality of the circumstances to determine if, based on the nature of the relationship, the person is an independent contractor.[203] Under an employee-independent contractor analysis, the right to control is the most distinguishing factor between an employee and an independent contractor, although no one factor is controlling.[204]

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test, an individual can not be an employee under the common-law definition of employee as applied to the Worker's Compensation Act. *See id.* (holding that the plaintiff had no wrongful discharge claim because she had not yet begun to work for the defendant).

200. *See Love*, 380 S.W.2d at 586 (utilizing the right of control factor stemming from the master-servant doctrine, in congruence with other case decisions, when determining whether or not an employment relationship exists); H. Lane Dennard, Jr. & Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labor Law Problems*, 28 GA. L. REV. 683, 714 (1994) (indicating that the definition of "employee" is derived from the common-law relationship with the employer based on the right to control and the power of the employer to discharge the employee).

201. *See* Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 665 (1996) (distinguishing between details of the work and the end result and indicating that an independent contractor is subject to control only for the latter); *see also Love*, 380 S.W.2d at 590 (concluding that a party, who lacks the right to control and is governed by a contract expressing the party's status as a non-employee, is an independent contractor); *Ross*, 796 S.W.2d at 211-12 (concluding that because a security company hired by an apartment complex worked without supervision and furnished its own equipment, it was an independent contractor and not an employee).

202. *See, e.g.*, Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947-48 (Tex. 1998) (stating that doctors in emergency rooms are independent contractors under agency principles); *Love*, 380 S.W.2d at 592 (indicating that because newspaper carriers are not requisitely controlled, they are independent contractors); Farrell v. Greater Houston Transp. Co., 908 S.W.2d 1, 4 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (stating that because the cab company did not exercise any real control over its drivers, the drivers were independent contractors, not employees).

203. *See Cobb*, 673 F.2d at 340 (listing factors that determine if an individual is an employee). These factors primarily relate to compensation, benefits, and the nature of the work. *See id.* If a party is not an employee, the party is probably an independent contractor, based on the same factors. *See id.*

204. *See* Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344, 348-49 (S.D.N.Y. 1984) (explaining that the right to control is paramount to the existence

However, for purposes of the subject matter test, the attorney-client privilege may, in fact, extend to independent contractors.[205] For example, in *In re Bieter Co.*,[206] the Eighth Circuit confronted the issue of whether a partnership could protect communications between its attorney and its independent contractor.[207] The court decided that an entity, regardless of whether it is a partnership or a corporation, could extend the privilege to include communication by an independent contractor as long as the independent contractor is the functional equivalent of an employee.[208]

2. The Doctrines of Borrowed-Servant and Loaned-Servant: Satisfying Rule 503

Another problem that emerges with regard to establishing an employment relationship that satisfies Rule 503's scope of employment language involves situations of dual employment. A dual employment issue arises either under the borrowed-servant doctrine[209] or the loaned-servant doctrine.[210] For communications to be privileged under Rule 503, a person employed under a dual employment scheme must prove that an employment relationship exists with the second employer by satisfying all elements of the evidentiary rule, including scope of employment.[211] Both

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of an employment relationship, although briefly mentioning other factors as well), *aff'd*, 770 F.2d 157 (2d Cir. 1985); *Love*, 380 S.W.2d at 585-86 (stressing that above all other employment factors, the true test is the power to control).

205. *See In re* Bieter Co., 16 F.3d 929, 937 (8th Cir. 1994) (extending the privilege to an independent contractor and refusing to distinguish between who is on the payroll and who is not for purposes of the attorney-client privilege).

206. 16 F.3d 929 (8th Cir. 1994).

207. *See Bieter*, 16 F.3d at 936 (framing the issue in terms of whether an independent contractor was a client's representative).

208. *See id.* at 938-39 (explaining the decision to include independent contractors as client representative and indicating that without the functional equivalent standard the subject matter test would be short-circuited).

209. *See* Aguilar v. Wenglar Constr. Co., Inc., 871 S.W.2d 829, 831 (Tex. App.—Corpus Christi 1994, no writ) (defining a borrowed servant as one supplied to a temporary master); Mercury Life & Health Co. v. De Leon, 314 S.W.2d 402, 405 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.) (defining a borrowed servant as a special, temporary employee of the second employer).

210. *See* Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344, 349 (S.D.N.Y. 1984) (describing how an agency employee may become a loaned employee of the agency's client by virtue of the "'special' employer's exclusive right" to temporarily supervise), *aff'd*, 770 F.2d 157 (2d Cir. 1985); James E. Holloway, *A Primer on Employment Policy for Contingent Work: Less Employment Regulation Through Fewer Employer-Employee Relations*, 20 T. MARSHALL L. REV. 27, 38 (1994) (defining a contingent worker, a form of loaned servant, as employed by both the employment agency and the second organization).

211. *See* TEX. R. EVID. 503(a)(2)(B) (defining a representative of the client).

the borrowed-servant and loaned-servant doctrines assist such employees in this endeavor.[212] Once the relationship exists, communications made by these employees may be privileged.[213]

The borrowed-servant doctrine is a common-law theory that allows a master, the original employer, to lend his servant to another master for a short period of time.[214] The servant must perform so as to advance the cause of the second employer, who is the special employer.[215] The second employer must also have control over the servant;[216] this control is typically ascertained by utilizing the economic realities test. Furthermore, the servant must not act merely in this capacity as part of his duties to the original employer.[217] If these conditions are satisfied, a servant is considered borrowed and an employee of the second employer for the duration of the borrowing period.[218]

The loaned-servant doctrine, also known as the joint-employer doctrine, is similar to the borrowed-servant notion but more complex. Loaned-servant situations arise when an employee serves the second employer as part of a responsibility to the original employer.[219] The most frequent examples include temporary employees, contract employees,

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212. *See Amarnare*, 611 F. Supp. at 649 (discussing how a loaned servant can become an employee of both the lessor and lessee employers simultaneously); *De Leon*, 314 S.W.2d at 405 (indicating that a borrowed servant may become an employee of the borrowing employer if the employee has knowledge of the borrowing).

213. *See* TEX. R. EVID. 503 cmt. (expanding the attorney-client privilege to non-control group employees without a distinction between direct and indirect employees).

214. *See Aguilar*, 871 S.W.2d at 831 (emphasizing that a borrowed servant is loaned on a temporary basis and attains his status based on which employer controls him and the particular time of the borrowing); *De Leon*, 314 S.W.2d at 405 (noting that an employer may loan an employee on a temporary basis to another employer).

215. *See Aguilar*, 871 S.W.2d at 831 (stating that the second employer must exercise control over the employee under the borrowed-servant doctrine).

216. *See id.* (stressing the significance of the secondary employer's right to control).

217. *See De Leon*, 314 S.W.2d at 405 (denying the existence of a borrowed-servant status where obeying the temporary master is done only for the original master). When this situation occurs, the servant may be a loaned servant, as the essence of the loaned-servant doctrine recognizes that advancing the second employer's business is advancing the first master's business. *Cf.* James E. Holloway, *A Primer on Employment Policy for Contingent Work: Less Employment Regulation Through Fewer Employer-Employee Relations*, 20 T. MARSHALL L. REV. 27, 42 (1994) (discussing the loaned-servant doctrine as applied in *Amarnare*).

218. *See Aguilar*, 871 S.W.2d at 831 (explaining all necessary conditions for the borrowed-servant doctrine, including sole control vesting in the special employer).

219. *See* Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 689 (1996) (describing the typical loaned-servant scenario: an employee is leased to an employer to work in the lessee's concern, but is paid by the leasing employer).

and project-specific employees.[220] In these instances, the employee works for the second employer under an agreement with the first employer.[221]

Like the borrowed-servant doctrine, case law has defined when a servant attains loaned status.[222] In *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[223] a federal district court recognized that control over methods of work, assignments, hours, and other common aspects of an employment relationship influence whether the servant is loaned.[224] Similarly, in *Rodriguez v. Martin Landscape Management, Inc.*,[225] a Texas court of appeals reasoned that a contract between the temporary agency and Martin Landscape gave Martin Landscape the right to control the agency's employees.[226] Ultimately, both *Amarnare* and *Rodriguez* reveal that the right to control is paramount in determining whether an individual is a loaned servant, and thus an employee.[227] Consequently, these

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220. *See id.* at 688-89 (describing types of loaned-servant relationships as including temporary help and employee leasing); *see also* Robert B. Moberly, *Temporary, Part-Time, and Other Atypical Employment Relationships in the United States*, 38 LAB. L.J. 689, 689 (1987) (describing the loaned-servant concept as it relates to part-time and seasonal workers).

221. *See* Rodriguez v. Martin Landscape Management Inc., 882 S.W.2d 602, 604 (Tex. App.—Houston [1st Dist.] 1994, no writ) (explaining the contract between the lessor and lessee companies).

222. *See* Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, 611 F. Supp. 344, 349 (S.D.N.Y. 1984) (establishing criteria for determining when a servant is loaned, including the right to control, work conditions and tasks, and methods of payment, as arranged with the permanent employer), *aff'd*, 770 F.2d 157 (2d Cir. 1985).

223. 611 F. Supp. 344 (S.D.N.Y. 1984), *aff'd*, 770 F.2d 157 (2d Cir. 1985).

224. *See Amarnare*, 611 F. Supp. at 349 (expanding upon the definition of the loaned-servant doctrine).

225. 882 S.W.2d 602 (Tex. App.—Houston [1st Dist.] 1994, no writ).

226. *See* Rodriguez v. Martin Landscape Management Inc., 882 S.W.2d 602, 604 (Tex. App.—Houston [1st Dist.] 1994, no writ). An employment services company sustained injuries while working on assignment for Martin Landscape Management ("MLM"). He sued MLM for negligence. *See id.* The court decided that MLM was Rodriguez's employer and limited recover to worker's compensation scheme. *See id.* at 605-06 (discussing how MLM satisfied the definition of employer, limiting Rodriguez's recovery to statutory compensation schemes). Although the court phrased its description as borrowed, this case illustrates the loaned-servant concept of temporary employment through an agency. *Compare id.* at 604 (describing Rodriguez as a borrowed servant), *with* Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 689 (1996) (explaining the structure of a loaned-servant relationship).

227. *See Amarnare*, 611 F. Supp. at 348 (indicating that the right to supervise and control an employee's work suggests that an employment relationship exists between the servant and the special employer); *Rodriguez*, 882 S.W.2d at 604 (explaining that the theory that MLM was Rodriguez's employer flowed from the fact that MLM had a right to control Rodriguez during the course of his temporary employment).

determinations closely follow the formulations of the economic realities test and have ramifications in the application of the attorney-client privilege.[228]

Although establishing an employment relationship is a critical part of the analysis, the subject matter inquiry does not end with that issue. The circumstances under which a corporation may invoke Rule 503 must also be ascertained. Specifically, consideration must be given to when the matter communicated is within the employee's specific duties and when the employee acts to personify the corporation.[229] These particular issues are the subject of Part IV, next.

IV. What Circumstances Place a Corporate Employee Within the Scope of Employment?

Examining when the employee acts in a manner that personifies the corporation is one way of determining whether a non-control group employee acting within the scope of his employment falls under the attorney-client privilege.[230] This determination involves identifying situations where the acts of corporate agents become attributable to the corporation.[231] Such an examination, in turn, requires exploring the corporate

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228. *Compare Amarnare*, 611 F. Supp. at 349 (using the employer's right to control assignments, hours, and working conditions as determinative of whether a servant is loaned), *with* Cobb v. Sun Papers, Inc., 673 F.2d 337, 339 (11th Cir. 1982) (listing eleven factors to consider under the economic realities test to determine when an employment relationship exists). Like *Amarnare*, the court in *Cobb* focused mainly on the right to control the employee and the payment of benefits. *See Cobb*, 673 F.2d at 339.

229. *See* John William Gergacz, Attorney-Corporate Client Privilege ¶ 3.02[3][d][ii] (2d ed. 1990) (explaining possible circumstances that place an employee into their scope so as to satisfy a subject matter standard).

230. *See id.* (proposing that a privilege attaches when an employee acts as a part of the corporate machine); *see also* 2 David W. Louisell & Christopher B. Mueller, Federal Evidence § 211, at 793 (1985) (stating that corporations can only speak through corporate agents); Harold Gill Reuschlein & William A. Gregory, Handbook on the Law of Agency and Partnership § 2, at 5 (1979) (stating that a corporation acts only through its agents); 24 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5483, at 283-85 (1986) (discussing how a corporation needs agents to act in all ways to act "as a natural person" for purposes of the attorney-client privilege). Gergacz presents a third question: whether the subject matter the employee communicated to the attorney was a part of the employee's responsibilities or was incidental to the employee working at the time the event took place. *See* John William Gergacz, Attorney-Corporate Client Privilege ¶ 3.02[3][d][ii] (2d ed. 1990). This question will partly be discussed under specific duties, but any further discussion of it is subsumed into the inquiry of when an employee personifies a corporation. *See id.*

231. *See* United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 619 (D.C. 1979) (emphasizing the importance of identifying when agents act as the corporation to trigger the attorney-client privilege); Helms v. Home Owners' Loan Corp., 129 Tex. 121, 133, 103 S.W.2d 128, 130 (1937) (finding that the court had to determine if the agent personified the

principal and agency laws,[232] as well as the doctrine of respondeat superior.[233] Not every employment situation, however, gives rise to a personi-

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corporation); Wells v. Hiskett, 288 S.W.2d 257, 263 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.) (determining whether a corporate agent's acts were those of the corporation itself); *see also* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990) (recommending the application of the privilege only when the agent acts as an extension of the corporation).

232. *See American Tel. & Tel.*, 86 F.R.D. at 619 (framing the scope of employment discussion in terms of agency and employment); *see also In re* Ampicillin Antitrust Litig., 81 F.R.D. 377, 384 (D.C. 1978) (determining if the attorney-client privilege applies to patent agents); Samaritan Found. v. Goodfarb, 862 P.2d 870, 875-76 (Ariz. 1993) (in banc) (adopting a functional approach to determine whether or not the attorney-client privilege applies to corporate agents); Marriott Corp. v. American Academy of Psychotherapists, Inc., 277 S.E.2d 785, 790-91 (Ga. Ct. App. 1981) (applying a human agent analysis to determine if Georgia will recognize the attorney-client privilege for corporations); *cf.* Holloway v. Skinner, 898 S.W.2d 793, 795 (Tex. 1995) (stating that corporations cannot function without human agents); *Helms*, 129 Tex. at 129, 103 S.W.2d at 133 (using agency principles to resolve the corporation/agent issue); Ebby Halliday Real Estate, Inc. v. Murnan, 916 S.W.2d 585, 590 (Tex. App.—Fort Worth 1996, writ denied) (determining whether or not to impute liability to a corporation based on whether or not it acted through its agent); Vosko v. Chase Manhattan Bank, 909 S.W.2d 95, 100 n.7 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (discussing how agency works with a corporate principal); Hirsch v. Texas Lawyers' Ins. Exch., 808 S.W.2d 561, 563 (Tex. App.—El Paso 1991, writ denied) (equating notice to an agent with notice to the corporation); *Williams*, 772 S.W.2d at 262-64 (discussing how an agent's actions are those of the corporation based on the agent's authority); Group Hosp. Servs., Inc. v. Daniel, 704 S.W.2d 870, 877-78 (Tex. App.—Corpus Christi 1985, no writ) (analyzing whether a corporation can be held liable for acts of its agents); W. T. Grant Co. v. Wilson Indus., Inc., 346 S.W.2d 629, 630 (Tex. Civ. App.—Texarkana 1961, writ ref'd n.r.e.) (stating that the acts of an agent are those of the corporation itself); *Wells*, 288 S.W.2d at 262 (allowing a corporation to act only through its agents).

233. *See, e.g.*, Pilgrim v. Fortune Drilling Co., Inc., 653 F.2d 982, 986-87 (5th Cir. 1981) (using Texas law to define respondeat superior based on scope of employment); Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569 (Tex. 1972) (allowing liability for the master when the servant is in their scope of employment); Southwest Dairy Prod. Co. v. De Frates, 132 Tex. 556, 558, 125 S.W.2d 282, 284 (1939) (denying liability to the master where the employee returned to work from dinner and became involved in an accident); Direkly v. ARA Devcon, Inc., 866 S.W.2d 652, 654 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.) (describing the respondeat superior test based in part on whether an employee acted within the scope of his employment); Chevron, U.S.A., Inc. v. Lee, 847 S.W.2d 354, 356 (Tex. App.—El Paso 1993, no writ) (applying the respondeat superior principle to an employee who was on a special mission because a special mission is within an employee's scope of employment); Dieter v. Baker Serv. Tools, Inc., 739 S.W.2d 405, 407 (Tex. App.—Corpus Christi 1987, writ denied) (finding liability caused by servant to the master where the servant was acting in the scope of his employment or furthering the master's purposes); Kimbell Properties, Inc. v. McCoo, 545 S.W.2d 554, 556 (Tex. Civ. App.—Amarillo 1976, no writ) (requiring that an employee be within the scope of his employment before imputing liability to the master); Terry. S. Boone, *Violence in the Workplace and the New Right to Carry Gun Law—What Employers Need to Know*, 37 S. TEX. L. REV. 873, 878-79 (1996) (explaining respondeat superior in terms of an employee's scope of employment); Marc C. Carter, Note, *Getting to the Deep Pocket: An Analysis of*

fication of the corporation, as exemplified by the mere witness exclusion.[234]

A. *Principal and Agency Theories in the Corporate Context*

Corporate principal and agency theory represent the notion that a corporation is a fictional person that can only think and act through its management and agents.[235] Because the "thinking" of a corporation is conducted by the board of directors, who are members of the control group, and are hence, already protected by the attorney-client privilege,[236] the issue under Rule 503 concerns agents outside of this group.[237] The question is whether the lower echelon employees, the agents, possess the requisite authority so as to satisfy the requirement that they be acting

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Employer and Third Party Liability Under Yellow Cab Co. v. Phillips, 17 T. MARSHALL L. REV. 445, 445 (1992) (discussing an employer's liability in terms of whether the employee was acting in the scope of employment when the tort occurred).

234. *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 508 (1947) (refusing to grant privilege to notes prepared based on interviews from witnesses who were also employees of the company involved in the suit); *Samaritan Found.*, 862 P.2d at 877 (stating that if an employee's actions in the event did not subject the corporation to liability, the employee is a witness and no privilege will attach to communications they make to the company's attorney); Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 256 (Ill. 1982) (limiting the subject matter test when the employee is a fortuitous witness only); Leer v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co., 308 N.W.2d 305, 309 & n.8 (Minn. 1981) (tempering the subject matter test by not allowing a privilege to be invoked when matters that the employee merely witnessed while on duty are concerned).

235. *See Helms*, 129 Tex. at 129, 103 S.W.2d at 133 (identifying one of the parties as a corporation that only acts through agents); *Murnan*, 916 S.W.2d at 590 (stating that agency theory only allows a corporation to act if it does so through agents); *Williams*, 772 S.W.2d at 262 (restating the proposition that corporations act, if at all, through officers and agents); *W.T. Grant Co.*, 346 S.W.2d at 630 (echoing the concept that a corporation can only act via its officers and agents); *Wells*, 288 S.W.2d at 262 (explaining that a corporation is separate from those who own and manage it, but that the entity needs these people to act if it is to act); 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5483, at 284 (1986) (discussing how a corporation, like a person, has to have the ability to see, hear, speak, and think, which only occurs through its managers and agents).

236. *See* Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 749 (1997) (noting that the attorney-client privilege is limited to the control group, which includes the board of directors, who guide the efforts of the corporation); *see also* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE & PROCEDURE § 5483, at 284 (1986) (referring to management as the corporate brain).

237. *Cf.* Polland & Cook v. Lehmann, 832 S.W.2d 729, 738 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (requiring authority vested in the agent before a principal-agency relationship exists); Moody v. EMC Servs., Inc., 828 S.W.2d 237, 241 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (indicating that absent authority, the person acting on behalf of another is not an agent).

within scope of their employment in order to fall within the protection of Rule 503.

1. The Agent As Personification of the Corporation

The cases identifying when an agent personifies a corporation suggest a broad interpretation of authority. Two particular Texas cases suggest that the authority is so broad that disproving that authority exists may be a better approach for determining whether an agent's actions personify the corporation.[238] For example, in *Green Tree Acceptance, Inc. v. Holmes*,[239] a buyer sued the seller of a motor home for deceptively selling the vehicle.[240] The seller-corporation, through its agent, had recorded the mileage significantly lower than the actual mileage on the vehicle.[241] Knowledge of the incorrect reading of the mileage was imputed to the corporation because the corporation failed to demonstrate that the agent, who incorrectly recorded the mileage, lacked the authority to make such representations on behalf of the corporate entity.[242] Thus, when the corporation failed to check or correct the reading, the agent's act and knowledge became those of the corporation.[243]

In contrast, *Holloway v. Skinner*[244] involved an agent who was found not to have personified the corporation because the agent acted contrary to the corporation's interests.[245] In this case, one shareholder sued a shareholder-officer for tortious interference with a franchise royalties contract.[246] In determining whether the shareholder-officer acted in a way that personified the corporation, the Texas Supreme Court concluded that the proper inquiry should discern whether or not the agent discharged his duties in a manner completely contrary to the principal corporation's best interests.[247]

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238. *See* Holloway v. Skinner, 898 S.W.2d 793, 797 (Tex. 1995) (extending authority up to a point where the agent acts completely contrary to the principal corporation's interests); Green Tree Acceptance, Inc. v. Holmes, 803 S.W.2d 458, 460 (Tex. App.—Fort Worth 1991, writ denied) (binding a corporation to the knowledge acquired by its agent during the course of corporate duties unless the corporation can show the agent lacked authority).

239. 803 S.W.2d 458 (Tex. App.—Fort Worth 1991, writ denied).

240. *See Green Tree Acceptance*, 803 S.W.2d at 459.

241. *See id.* at 459-60.

242. *See id.* at 460.

243. *See id.*

244. 898 S.W.2d 793 (Tex. 1995).

245. *See* Holloway v. Skinner, 898 S.W.2d 793, 797 (Tex. 1995) (rejecting a scope of authority analysis in favor of a counter-principal showing).

246. *See id.* at 794.

247. *See id.* at 797 (stating that the main issue should revolve around whether the agent behaved in a manner completely contrary to the corporation's best interests, revealing that the corporation's agent was clearly motivated by personal interest).

These cases exemplify the wide breadth of corporate agency principles and suggest that agents may personify their corporate principals in a broad manner.[248] However, personifying the corporation as an agent is not the only means by which an employee may be acting within the scope of employment so as to satisfy Rule 503. If the subject matter of a corporate employee's communication pertains to that employee's duties, then the corporation may be successful in claiming a privilege over that communication.[249]

2. Ability to Subject the Corporation to Liability

Another manner by which an employee may personify a corporation is if the employee can subject the corporation to liability.[250] For instance, in *Samaritan Foundation v. Goodfarb*,[251] an Arizona medical malpractice case, the plaintiff sought access to the summaries of interviews with employees in the operating room when the malpractice occurred.[252] The defendant, however, sought to protect the summaries under the attorney-client privilege.[253] The Supreme Court of Arizona decided that a claim of privilege could be successful if the agents were acting in a manner that could subject the corporation to liability; without this status, the employ-

248. *See* Upjohn Co. v. United States, 449 U.S. 383, 381 (1981) (implying that a corporate employee's action arising under employee authority may create legal problems for the corporation); *see also Holloway*, 898 S.W. 2d at 797 (questioning whether the agent only acted in self interest thereby violating the agent's requirement of selflessness); *Green Tree Acceptance*, 803 S.W.2d at 460 (imputing an agent's knowledge to the corporation where the company cannot show the agent's lack of authority).

249. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990) (suggesting one way of determining whether a matter is within the scope of employment based on an employee's specific responsibilities to the corporation). Gergacz, recommends that a privilege attach to a communication whose subject matter is related to the employee's specific duties to the company. *See id.*

250. *See* Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (rejecting the control group test based partly on the realization that non-control group employees can generate legal problems for the corporation, some of which can make the corporation liable); United States v. America Tel. & Tel. Co., 86 F.R.D. 603, 620 (D.D.C. 1979) (suggesting invocation of scope of employment when the employee's actions carry the possibility of corporate liability); Samaritan Found. v. Goodfarb, 862 P.2d 870, 877 (Ariz. 1993) (in banc) (legitimizing the attorney-client privilege for corporations when the actions of the employee, which are imputed to the corporation, give rise to corporate liability); Group Hosp. Serv., Inc. v. Daniel, 704 S.W.2d 870, 878 (Tex. App.—Corpus Christi 1985, no writ) (describing an agent acting as the corporation in terms of the supervisory ability to create liability for exemplary damages, possibly including lower level supervisors who were excluded before the *Upjohn* decision).

251. 862 P.2d 810 (Ariz. 1993).

252. *See Goodfarb*, 862 P.2d at 873.

253. *See id.* The summaries were protected under the work-product doctrine, a separate concept sometimes analyzed synonymously with the attorney-client privilege. *See id.*

ees could be considered witnesses to the events.[254] Ultimately, the court held that no statements made to the corporation's attorney qualified as privileged because, as witnesses, the employees did not act so as to potentially subject the corporation to liability.[255]

Similarly, in *Group Hospital Service, Inc. v. Daniel*,[256] a woman with chronic allergies sued her insurance company for revoking her policy after the agent who conducted the interview represented to her that the company would cover her despite a troubled medical past.[257] The Corpus Christi court of appeals stated that an agent bound and personified the corporation if the agent was a supervisor, manager, or had the ability to engage in a non-delegable duty and that such a status could make the corporation liable for exemplary damages.[258] However, because the agents involved in that case were not managerial, they did not satisfy the personification standard under the former rule's employment of the control group test.[259] Under the new, broader subject matter test, such an action could have been considered a personification and within the scope of employment because issuing an insurance policy creates a contract, which creates liability for the corporation to perform under its term.[260]

3. Specific Duties and Authority

The inquiry regarding specific duties provides insight to satisfying Rule 503's scope of employment requirement. Generally, specific duties focus on those tasks that the employer (principal) hired the employee (agent)

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254. *See id.* at 877 (recognizing the need to allow the privilege when the employee has exposed the corporation to liability).

255. *See id.* at 880. The Arizona court suggests that had the agents acted so as to subject the hospital to liability, their statements may have been privileged because such statements would have concerned matters that arose within their scope of employment. *See id.*

256. 704 S.W.2d 870 (Tex. App.—Corpus Christi 1985, no writ).

257. *See* Group Hosp. Servs., Inc. v. Daniel, 704 S.W.2d 870, 873-74 (Tex. App.—Corpus Christi 1985, no writ).

258. *See id.* at 877-78.

259. *See id.* The management requirement stems from Texas' adoption of the control group test in November 1982. *See* National Tank Co. v. Brotherton, 851 S.W.2d 193, 198 (Tex. 1993) (holding that the drafters of the Texas Civil Evidence Code chose the control group test, which involves managers only). Because the subject matter test is now the law, the same criteria should apply to any corporate employee; in other words, if the employee's actions can subject the corporation to exemplary damages, the employee can probably personify the corporation. *See Group Hosp. Servs.*, 704 S.W.2d at 877-78.

260. *Compare Group Hosp. Servs.*, 704 S.W.2d at 878 (stating that agents who could create exemplary damage liability for corporations have some management authority), *with* TEX. R. EVID. 503 & cmt. (adopting the subject matter test for Texas evidence law).

to perform.[261] Accordingly, if an employee communicates with the employer's legal counsel within that employee's specific duties, one can infer that the employee acted within the scope of employment. Under that inference, a corporation could successfully invoke the attorney-client privilege and protect that communication from disclosure.[262] Hence, establishing that an employee communicated within his specific duties can be a key inquiry, which is best guided by the principles governing agent authority.[263]

Following the standards of an employment relationship, the principal has the right to control the agent.[264] The best reflection of a principal's right to control the agent lies in the authority that the principal confers upon the agent.[265] Authority under agency principles refers to the agent's ability to alter the principal's legal relationships.[266] An agent's

261. *See* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (per curiam) (applying the privilege where the communication's subject matter is related to the performance of employee duties), *aff'd by an equally divided court*, 400 U.S. § 48 (1971).

262. *See* Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (requiring, under the subject matter test, that the matter address an employee's corporate duties).

263. *Compare* JOHN WILLIAM GERGACZ, ATTORNEY CORPORATE-CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990) (relating the scope of employment inquiry to an employee's specific duties), *with* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 7, at 15-16 (1979) (explaining how agents will perform tasks for their principals).

264. *See* Schultz v. Rural/Metro Corp., 956 S.W.2d 757, 760 (Tex. App.—Houston [14th Dist.] 1997, no. pet. h.) (requiring proof of the right to control as a burden of proving an agency relationship); Walker v. Federal Kemper Life Assurance Co., 828 S.W.2d 442, 452 (Tex. App.—San Antonio 1992, writ denied) (portraying the right of the principal to control the agent as essential to the relationship); Stanford v. Dairy Queen Prod., 623 S.W.2d 797, 801 (Tex. App.—Austin 1981, writ ref'd n.r.e.) (stating that right to control is an essential part of the agency relationship); RESTATEMENT (SECOND) OF AGENCY § 14 (1958) (allowing a principal the right to control the agent's conduct).

265. *See* Polland & Cook v. Lehmann, 832 S.W.2d 729, 738 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (allowing principals to confer authority upon their agents); Moody v. EMC Servs. Inc., 828 S.W.2d 237, 241 (Tex. App.-Houston [14th Dist.] 1992, writ denied) (stating that principles have the power to confer authority on agents).

266. *See* RESTATEMENT (SECOND) OF AGENCY § 7 (1958) (stating that "authority" refers to the agent's power to alter the principal's legal relationships through acts performed in conjunction with the principal's manifested consent); HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 13, at 32 (1979) (distinguishing power and authority by narrowing authority to an agent's ability to alter the principal's relationships).

authority comes in two forms: apparent authority[267] and actual authority.[268]

Apparent authority is the type of authority that the principal represents to a third party either by behavior or estoppel.[269] Where the principal represents to third parties that someone is an agent, the principal may not later deny the agency relationship so as to escape potential liability.[270] For example, in *Paramount National Life Insurance Co. v. Williams*,[271] an insurance agent issued a policy without the insurance company's actual authority.[272] However, the company issued the policy and accepted the premiums.[273] Paramount's actions therefore implied that the agent had apparent authority to issue the policy.[274]

In terms of Rule 503 and the attorney-corporate client privilege, apparent authority is irrelevant to the discussion of the agent's specific duties

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267. *See* RESTATEMENT (SECOND) OF AGENCY § 8 (1958) (defining apparent authority based on the principal's representations to others); *see also* Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 949 (Tex. 1998) (describing a type of authority based on the principal's behavior to others, not the agent); Brownsville Med. Ctr. v. Gracia, 704 S.W.2d 68, 75 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (holding that an independently contracted doctor may be an agent under ostensible or apparent agency theory where the hospital did not adequately notify patients that such doctors were not hospital employees).

268. *See* RESTATEMENT (SECOND) OF AGENCY § 7 cmt. a (1958) (referring to "authority" as intentionally conferred, thus meaning actual authority); *see also Lehmann*, 832 S.W.2d at 738 (recognizing actual authority as intentionally conferred); *Moody*, 828 S.W.2d at 241 (explaining that actual authority either arises through intent or implication); HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 14, at 33 (1979) (describing actual authority as a manifestation of assent by the principal to the agent).

269. *See* RESTATEMENT (SECOND) OF AGENCY § 8 cmt. a (1958) (noting that apparent authority depends on the principal's behavior towards third parties, not the agent); *see also Sampson*, 969 S.W.2d at 949 (describing apparent authority as a type of authority based on the principal's representation to others besides the agent); *Gracia*, 704 S.W.2d at 74-75 (finding that the independently contracted doctor was an agent under the ostensible agency theory where the hospital failed to adequately notify patients that such doctors were not hospital employees).

270. *See* RESTATEMENT (SECOND) OF AGENCY § 103 (1998) (estopping the denial of agency where the principal manifests an agency relationship to third parties, who may rely on the agency). *But see Sampson*, 969 S.W.2d at 950 (reviewing facts similar to *Gracia*, but concluding that because of the signs and forms, patients were sufficiently aware that emergency room doctors were not agents of the hospital under apparent authority).

271. 772 S.W.2d 255 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

272. *See* Paramount Nat'l Life Ins. Co. v. Williams, 772 S.W.2d 255, 262 (Tex. App.—Houston [14th Dist.] 1989, writ denied) .

273. *See id.* at 266-67.

274. *See id.* at 262 (recognizing that the insurance agent "had apparent authority to bind" the insurance company). The court also concluded that the insurance company had notice of the alleged misrepresentations and of a transaction that merited further investigation. *See id.* at 266-67.

because the specific duties inquiry refers only to matters represented from the principal to the *agent* and does not involve third parties.[275] By contrast, apparent authority solely concerns the representation of the agent's authority by the principal towards *third parties*.[276] Thus, actual authority is better-suited to the specific duties issue because it focuses on the representations between the principal and the agent.[277] Actual authority may be manifested in two ways, express or implied.[278]

a. Express Actual Authority

Express actual authority arises in circumstances where the principal has clearly manifested that the agent will perform a certain act.[279] A principal can often create such express authority through a writing.[280] For in-

275. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990) (relating the scope of employment question to specific duties). Most likely an employee's specific duties will come from the employer, not from what an employer communicates to third parties. *See id.*

276. *See* RESTATEMENT (SECOND) OF AGENCY § 8 (1958) (describing apparent authority as a manifestation of consent from the principal to third persons).

277. *See* Mexico's Indus., Inc. v. Banco Mexico Somex, 858 S.W.2d 577, 583 (Tex. App.—El Paso 1993, writ denied) (describing actual authority as between the principal and the agent); Haywood, Jordan, McCowan, Inc. v. Bank of Houston, 835 S.W.2d 738, 742 (Tex. App.—Houston [14th Dist.] 1992, no writ) (noting that express authority, a type of actual authority, goes from the principal to the agent); Polland & Cook v. Lehmann, 832 S.W.2d 729, 738 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (denoting actual authority as conferred from principal to agent, not to a third party); Moody v. EMC Servs. Inc., 828 S.W.2d 237, 241 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (restating the law of actual authority as flowing from principal to agent); Behring Int'l, Inc. v. Greater Houston Bank, 662 S.W.2d 642, 649 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd by agr.) (echoing the theme of actual authority as limited to the principal and the agent); Saunders v. Commercial Indus. Serv. Co., 541 S.W.2d 658, 660 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.) (summarizing actual authority as delegated from principal to agent).

278. *See* RESTATEMENT (SECOND) OF AGENCY §§ 26, 35 (1958) (discussing how authority arises through written or spoken words, or where authority appears reasonably necessary to accomplish the agency).

279. *See Mexico's Indus.*, 858 S.W.2d at 583 (defining express authority as a clear instruction of the agent's acts); City of San Antonio v. Aguilar, 670 S.W.2d 681, 683 (Tex. App.—San Antonio 1984, writ dism'd) (classifying authority as express based on the clarity of the instructions); *Saunders*, 541 S.W.2d at 660 (qualifying express authority as direct and delegated); *see also* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 14(C), at 36 (1979) (emphasizing that, with express authority, the principal has made his willingness for the act desired to be performed clear).

280. *See* Farmer Enters., Inc. v. Gulf States Ins. Co., 940 S.W.2d 103, 111 (Tex. App.—Dallas 1996, no writ) (using two provisions of the Texas Insurance Code to explain the express, legal duties of recording and soliciting agents); *Aguilar*, 670 S.W.2d at 685 (interpreting a provision of the San Antonio city charter as allowing the city attorney to file an appeal in the case); HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON

stance, in *City of San Antonio v. Aguilar*,[281] a provision of the San Antonio City Code conferred responsibility for the city's legal matters upon the city attorney,[282] thereby permitting the San Antonio court of appeals to hold that the city attorney possessed the specific, express authority to seek an appeal on behalf of the city.[283] Similarly, in the corporate setting, contracts frequently confer the requisite express actual authority.[284] Such authority may also manifest itself in employer instructions that provide a solid basis from which to ascertain actions that the principal clearly desires the agent to perform.[285]

One of the best examples of express actual authority in regard to the attorney-client privilege is reflected in the federal case, *Baxter Travenol Laboratories, Inc. v. Lemay*.[286] In this case, Baxter hired one of its competitor's former employees as a litigation consultant.[287] The former employee acted as a consultant in a lawsuit between his old employer, Lemay, and the new employer, Baxter.[288] Baxter sought discovery of the former employee's activities, claiming that the matters he revealed should be unprivileged because they were attained before he started working for the new employer, and therefore, were not within the scope of the privilege.[289] The federal district court, however, ruled that the privilege would apply to the former employee's communications with Baxter's attorney if the former employee spoke in his capacity as a litigation consultant, which was the reason for which he was hired and constituted his express actual authority within the company.[290] Ultimately, the court held that

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THE LAW OF AGENCY AND PARTNERSHIP § 14(C), at 36 (1979) (explaining that a writing's express actual authority usually involves construction of the instrument's language).

281. 670 S.W.2d 681 (Tex. App.—San Antonio 1984, writ dism'd).

282. *See Aguilar*, 670 S.W.2d at 685 (conferring all power over legal matters to the city attorney based on the city charter).

283. *See id.* at 685 (finding that the attorney has authority to pursue the appeal unless the presumption can be rebutted); *see also* SAN ANTONIO, TEX., CHARTER art. V, § 54 (1951) (delegating all legal authority for the city government in San Antonio to the city attorney).

284. *See* Wheaton Van Lines, Inc. v. Mason, 925 S.W.2d 722, 731-32 (Tex. App.—Fort Worth 1996, writ denied) (discussing the scope of express actual authority as defined by the terms of a commercial agency contract).

285. *See* Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 645-46 (Tex. 1995) (empowering employers with the ability to instruct employees on their job tasks).

286. 89 F.R.D. 410 (S.D. Ohio 1981); *see* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990) (discussing *Baxter* as an example of specific duties being in the scope of employment based on the use of the information the employee made as it related to his current job).

287. *See* Baxter Travenol Lab. Inc. v. Lemay, 89 F.R.D. 410, 412 (S.D. Ohio 1981).

288. *See id.*

289. *See id.*

290. *See id.* at 414-15.

the matters were privileged because the relevant communications were made while the employee was acting within his duties as a litigation consultant.[291]

As this case illustrates, actual authority can be used to satisfy the scope of employment requirement. Basically, if an employee communicates with corporate counsel pursuant to the corporate employer's grant of actual authority, then that employee's communication falls within his specific duties and therefore within the scope of his employment. The corporate employer may then claim a privilege under Rule 503 over that communication.

b. Implied Actual Authority

Implied actual authority springs from, and is collateral to, express actual authority.[292] In fact, this type of authority requires express authority before it can arise.[293] Implied actual authority is, however, distinguishable from apparent authority, as a derivative of express actual authority, always focusing on the principal empowering the agent.[294]

In addition to express authority, the issue of implied authority also arose in *City of San Antonio v. Aguilar*.[295] The San Antonio court of appeals allowed the appeal filed by the city's attorney, without the city's

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291. *See id.* at 416 (overruling an order seeking to compel answer to an oral deposition because the matters did fall under the attorney-client privilege).

292. *See* RESTATEMENT (SECOND) OF AGENCY § 35 cmt. b (1958) (stating a principal's direction for an agent to perform a specific act allows the agent to perform acts incidental to accomplishing that purpose); *see also* Saunders v. Commercial Indus. Serv. Co., 541 S.W.2d 658, 660 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.) (defining implied authority as arising from express authority or necessity); HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 15, at 40 (1979) (defining implied authority as an extension of express authority or incidental to the agent's responsibilities).

293. *See* Behring Int'l Inc. v. Greater Houston Bank, 662 S.W.2d 642, 649 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd by agr.) (stating that "[i]n the absence of express authority . . . there can be no implied authority"); HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 15, at 43 (1979) (describing examples of business practices that are implied authority which would not exist without express authority to manage the business). These actions described by Reuschlein and Gregory include borrowing money, selling the business, making negotiable paper, mortgaging the property, and contracting abilities. *See id.*

294. *See Behring Int'l*, 662 S.W.2d at 649 (proclaiming that without express authority, implied authority does not exist). Because express authority only involves the principal and the agent, anything collateral to express authority, i.e., implied authority, limits itself to the agent and the principal. *See* RESTATEMENT (SECOND) OF AGENCY § 7 (1958) (defining authority as the power of the agent as revealed by the principal).

295. *See* City of San Antonio v. Aguilar, 670 S.W.2d 681, 682 (Tex. App.—San Antonio 1984, writ denied).

authorization to proceed, because the course of dealings between the attorney and the city allowed such an inference.[296] The Court stated that "implied [actual] authority exists where . . . appearances justify a finding that in some manner the agent was authorized to do what he did."[297] Similarly, in *Johnston v. American Cometra, Inc.*,[298] a gas sales agent's express responsibilities of selling gas allowed the court to find that his creation of customary collateral warranties on the gas was impliedly authorized.[299]

Essentially, a communication arising under an agent's implied authority could be considered as being within an employee's specific duties, therefore satisfying one component of the scope of employment analysis.[300] Moreover, the ability of implied actual authority to satisfy Rule 503's scope of employment requirement may represent an expansion of the attorney-client privilege.[301] In other words, by relying upon implied authority, in addition to express authority, the test would allow the corporation to assert the privilege over communications made by a greater number of employees.[302]

B. *The Doctrine of Respondeat Superior*

The doctrine of respondeat superior is the final possibility for interpreting corporate personification. Respondeat superior is a tort doctrine that holds a master liable for the tortious actions of his servant, if the servant commits the tort while acting within the scope of employment.[303] The

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296. *See id.* at 685.

297. *Id.* at 683-84.

298. 837 S.W.2d 711 (Tex. App.—Austin 1992, writ denied).

299. *See* Johnston v. American Cometra, Inc., 837 S.W.2d 711, 715 (Tex. App.—Austin 1992, writ denied) (recognizing that under agency law, the ability to sell a product includes the right to make warranties regarding the product).

300. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990) (discussing scope of employment in terms of specific duties, although not distinguishing among the various types of actual authority).

301. *See id.* (exploring scope of employment through specific duties without considering if *all* of an employee's duties must be expressly assigned to the employee).

302. *See* TEX. R. EVID. 503(a)(2) (including as client representatives two groups: those who can seek or act on legal advice and those who communicate in their scope of employment in confidence for a legal matter); *cf. Johnston*, 837 S.W.2d at 715 (giving salespeople the implied authority to make warranties on the products they sell); *Aguilar*, 670 S.W.2d at 683-85 (explaining that not all actual authority is represented to the agent).

303. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499-500 (5th ed. 1984) (describing respondeat superior as a form of vicarious liability transferring liability servant to master); *see also* Terry S. Boone, *Violence in the Workplace and the New Right to Carry Gun Law—What Employers Need to Know*, 37 S. TEX. L. REV. 873, 878 (1996) (stating that employers can be liable when their employees commit negligent, tortious acts within the scope of employment); Marc C. Carter, Note, *Getting to*

respondeat superior principle works on a simple syllogism. If the servant is acting so as to benefit the master's business purpose, the servant is an extension of the master.[304] Because of this extension, the master is viewed as having committed the tort and is normally in the best position to absorb the losses inherent in the activities of the business.[305]

1. The Master's Authority over the Servant

Exploring the master's authority over the servant is a useful starting point for analyzing the doctrine of respondeat superior.[306] Several cases indicate that the servant's authority should be broad under that doctrine.[307] Moreover, the servant's authority appears to include both apparent and actual authority.[308] Some cases place liability on the master if

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the Deep Pocket: An Analysis of Employer and Third Party Liability Under Yellow Cab Co. v. Phillips, 17 T. MARSHALL L. REV. 445, 445 (1992) (referring to employers of tortfeasors as liable if the tort occurred while the servant was benefiting the master).

304. *See* Marc C. Carter, Note, *Getting to the Deep Pocket: An Analysis of Employer and Third Party Liability Under* Yellow Cab Co. v. Phillips, 17 T. MARSHALL L. REV. 445, 450 (1992) (discussing the idea that if the master would want a servant to act so as to benefit the master, the servant is an extension of the master).

305. *See id.* at 446-47 (listing policy reasons for using the doctrine of respondeat superior, such as the "deep pockets" theory). The respondeat superior doctrine closely follows the Supreme Court's recognition that lower-level employees may embroil the corporate master in legal disputes. *See* Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (recognizing that the actions of employees could potentially impute liability onto corporations).

306. *See, e.g.*, Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569-70 (Tex. 1972) (relying upon a servant's general authority as an employee advancing the master's purpose under respondeat superior); J. C. Penney Co. v. Oberpriller, 141 Tex. 128, 134-35, 170 S.W.2d 607, 608-09 (1943) (discussing the scope of an employee's authority as a furthering of the master's business); Direkly v. ARA Devcon, Inc., 866 S.W.2d 652, 654 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.) (analyzing the doctrine of respondeat superior in terms of a servant's authority in furthering the master's business); Ralph v. Mr. Paul's Shoes, Inc., 572 S.W.2d 812, 816 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (ruling that a master can be liable for a servant's actions if the act occurred under the servant's authority).

307. *See, e.g.*, *Leadon*, 484 S.W.2d at 569-70 (using a servant's general authority, not limited to express authority, in determining whether the employee acted within this general scope when advancing the master's purpose under respondeat superior); *J. C. Penney Co.*, 141 Tex. at 134-35, 170 S.W.2d at 609 (expanding authority to include express, implied, and any furthering of the master's business under scope of employment); *Direkly*, 866 S.W.2d at 654 (setting out an analysis for respondeat superior, including action under general authority and furthering the master's business); *Ralph*, 572 S.W.2d at 816 (holding a master liable for the servants' actions because the act occurred under the employees' general authority).

308. *See, e.g.*, *J. C. Penney Co.*, 141 Tex. at 131, 170 S.W.2d at 609 (discussing whether the employee's actions in the case fell under an implied or express authority); Wheaton Van Lines, Inc. v. Mason, 925 S.W.2d 722, 731 (Tex. App.—Fort Worth 1996, writ denied) (extending actual authority beyond express instructions to the full range of an agent's busi-

the servant was acting under general authority, regardless of whether the master conferred the power intentionally or unintentionally.[309]

For example, in *Ralph v. Mr. Paul's Shoes, Inc.*,[310] an employer was held liable for damages to a store's inventory when two off-duty waitresses caused a fire by improperly discarding cigarettes that they had smoked.[311] The court based its decision on the duty of the waitresses to their master to dispose of the cigarettes properly.[312] Because proper disposal was a part of their responsibilities, the court found that the waitresses' actions were within the scope of their employment.[313] The court, however, did not specify whether this responsibility came under the waitresses' actual or apparent authority.

Other courts affix liability to the master when the employee is in the process of furthering the master's business in any capacity.[314] For example, under general authority, an employer was held liable for the injury to a lumberjack in *Leadon v. Kimbrough Brothers Lumber Co.*[315] In *Leadon*, the employee keeping a lookout failed to warn the lumberjack of a tree limb that knocked the lumberjack into a power saw, thereby requiring that the lumberjack's leg be amputated.[316] The Texas Supreme Court determined that the lookout's duty to watch for falling tree limbs

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ness purposes, making the authority implied); City of San Antonio v. Aguilar, 670 S.W.2d 681, 683 (Tex. App.—San Antonio 1984, writ dism'd) (describing express authority in terms of clear, explicit instructions from the master).

309. *See Leadon*, 484 S.W.2d at 569-70 (stating that the employee need not be acting only under express authorization from the employer to be within the scope of employment); *Direkly*, 866 S.W.2d at 654 (defining authority under a respondeat superior analysis as general); *Ralph*, 572 S.W.2d at 816 (holding that "the act must be committed within the scope of the general authority of the servant").

310. 572 S.W.2d 812 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

311. *See Ralph*, 572 S.W.2d at 815-16.

312. *See id.* at 816.

313. *See id.* (stating that the "disposal of smoking materials was to some extent actuated by their duties of employment, and thus their acts were within the scope of their employment").

314. *See, e.g.*, *Leadon*, 484 S.W.2d at 569 (expanding respondeat superior to any act done in furtherance of the employer's business objective); J. C. Penney Co. v. Oberpriller, 141 Tex. 128, 133, 170 S.W.2d 607, 609-10 (1943) (requiring only that a servant act so as to promote the principal's business in order to bring a tort claim under respondeat superior); *Direkly*, 866 S.W.2d at 654 (recommending a three-part test for respondeat superior, including furtherance of the master's business as the second part); Dieter v. Baker Serv. Tools, Inc., 739 S.W.2d 405, 407 (Tex. App.—Corpus Christi 1987, writ denied) (applying respondeat superior when the employee's acts advance the employer's purposes); Kimbell Properties, Inc. v. McCoo, 545 S.W.2d 554, 556 (Tex. Civ. App.—Amarillo 1976, no writ) (discussing how the plaintiff would have to show that the servant was acting in furtherance of the master's business for the master to be liable for the plaintiff's injury).

315. 484 S.W.2d 567 (Tex. 1972).

316. *See Leadon*, 484 S.W.2d at 568-70.

allowed Leadon to concentrate on his sawing; thus, the lookout advanced the master's business, and the lumber company was liable for the injury.[317]

Basically, under the doctrine of respondeat superior, any type of authority conferred upon a servant will place the servant within the scope of employment.[318] Such a showing would, therefore, likely permit a court to award a privilege to the employer over any communications that fall under this scope.[319]

2. Exceptions to the Doctrine

Texas recognizes two exceptions to the doctrine of respondeat superior: a travel exception and a personal business exception. The travel exception to the doctrine establishes that an employee traveling to and from the master's place of business is not acting within the scope of employment.[320] Thus, in *Direkly v. ARA Devcon, Inc.*,[321] the Houston court of appeals held that a woman who was killed in a car accident on her way to pick up a briefcase in order to continue working at home was not acting in the scope of her employment.[322] The court concluded that once she

317. *See id.* at 570. *But see* Leer v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co., 308 N.W.2d 305, 309 (Minn. 1981) (stating that because mere witnesses to accidents do not act on behalf of the corporation, the act of witnessing an accident occurred outside the scope of employment). Under the ruling in *Leer*, liability would not be imputed to the master because the employee involved was not acting in the scope of employment, contrary to *Leadon*. *Compare Leadon*, 484 S.W.2d at 570 (finding that a witness may cause liability to be imputed to the master if the witness furthered the master's work), *with Leer*, 388 N.W.2d at 309 (stating that an employee who has knowledge solely through being a witness did not impute such knowledge to the corporation for purposes of the attorney-client privilege).

318. *See Kimbell Properties*, 545 S.W.2d at 556 (requiring a furthering of the master's business without discussion of specific authority involved); *Leadon*, 484 S.W.2d at 569-70 (framing respondeat superior in terms of general authority).

319. *See* TEX. R. EVID. 503(a)(2)(B) (permitting a privilege to a communication made by a client's representative in the scope of employment).

320. *See, e.g.*, Pilgrim v. Fortune Drilling Co., 653 F.2d 982, 987 (5th Cir. 1981) (reviewing Texas case law on respondeat superior and concluding that an employee on the way to work is not acting on behalf of the employer); Direkly v. ARA Devcon, Inc., 866 S.W.2d 652, 654 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.) (stating that when an employee is driving to work, the employee is not in the course of employment); London v. Texas Power & Light Co., 620 S.W.2d 718, 719-20 (Tex. Civ. App.—Dallas 1981, no writ) (deciding that, under Texas law, an employee is not in the scope of employment by merely driving to and from work without additional factors). The court in *London* did not list any specific factors, but did suggest that the master's right of control over the servant may place an employee into scope of employment while traveling to and from work. *See id.* at 720.

321. 866 S.W.2d 652 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.).

322. *See Direkly*, 866 S.W.2d at 655.

departed work, she was no longer under her employer's control, even though she left with the intent of continuing work.[323] In other words, because the master no longer had the right to control her or her actions, she was outside the scope of her employment, and the doctrine of respondeat superior was inapplicable as a theory of recovery.[324]

Following similar reasoning, departures from the scope of employment during working hours in pursuit of personal business have also been found to be outside the scope of employment in regard to the doctrine of respondeat superior.[325] For instance, because an employee left the workplace, an employer was not held liable for a subsequent accident in *J. C. Penney Co. v. Oberpriller*.[326] In this case, an employee was asked to drop off a package for the employer.[327] After dropping off the package, the employee went to a garage to pick up his car.[328] The employee remained on the clock the entire time.[329] While returning from the garage with his car, the employee became involved in an accident.[330] Subsequently, the injured party sought to recover against the employer under respondeat superior, but the employer was not held liable because the Texas Supreme Court decided that the employee was outside his scope of employment from the time he left the post office until the time that he returned to work.[331]

Both the travel and personal business exceptions exist because neither is consistent with advancing the master's business.[332] According to these

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323. *See id.* (stating that unless the employee is under a special mission of the employer, a commute from work to home to finish work at home is not in the scope of the employment).

324. *See id.* at 654.

325. *See, e.g.*, J. C. Penney Co. v. Oberpriller, 141 Tex. 128, 132-33, 170 S.W.2d 607, 609 (1943) (determining whether or not the employee's dual errand of dropping off a package for the employer and picking up his own car invoked respondeat superior for a subsequent accident when returning to work, and deciding any tort occurring after the delivery occurred outside the scope of employment); Southwest Dairy Prod. Co. v. De Frates, 132 Tex. 556, 559, 125 S.W.2d 282, 283 (1939) (reiterating that temporary departures from the advancing of the master's business severs the master-servant relationship, negating employer liability for torts arising during the period of the temporary severance).

326. *See J. C. Penney Co.*, 141 Tex. at 128, 170 S.W.2d at 610 (reversing employer liability based on the time of the accident, which was after the master's business was accomplished and while returning to work after handling a personal matter).

327. *See id.* at 130, 170 S.W.2d at 608.

328. *See id.*

329. *See id.* at 130-31, 170 S.W.2d at 608.

330. *See id.* at 129, 170 S.W.2d at 608.

331. *See id.* at 132, 170 S.W.2d at 609.

332. *See* Direkly v. ARA Devcon Inc., 866 S.W.2d 652, 654 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.) (making a policy determination that, if, on the facts of this case, the employer is liable, then every employee who took work home would be in the

concepts, the employee is no longer an extension of the master, thus constraining the application of the doctrine of respondeat superior.[333] However, the travel and personal business exceptions do not apply if the employee is on a special mission for the master even if the employee is not acting in the scope of employment.[334] For example, in *Chevron, U.S.A., Inc. v. Lee*,[335] an employer whose employee was attending a mandatory seminar was sued for an accident in which the employee was involved on the way to the seminar.[336] On appeal, the employer disputed the jury's finding that the employee was within his scope of employment while traveling to the seminar.[337] However, the El Paso court of appeals agreed with the jury, holding that because the employee was traveling so as to *ultimately* advance the employer's business objectives, the employee had acted within his scope of employment.[338] As a result, respondeat superior applied, thereby allowing the employer to be held liable for the injuries that the plaintiffs suffered.[339]

As a result of *Lee*, Texas law now regards an employee who is on a special mission for his employer as giving rise to the liability of the employer for torts arising from such pursuit.[340] Essentially, the servant on a special mission is seen as advancing the master's business.[341] If this is

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scope of employment and the master liable). Other cases hold that when an employee on the job engages in personal matters, the master's purpose is not being advanced. *See J. C. Penney Co.*, 141 Tex. at 132-33, 170 S.W.2d at 609 (deciding that any tort occurring after the delivery for the employer was made was outside the scope of employment); Dairy Prod. Co. v. De Frates, 132 Tex. 556, 559, 125 S.W.2d 282, 283 (1939) (restating that temporary departures from the advancement of the master's business severs the master-servant relationship to a degree that negates an employer's liability for torts arising during the temporary severance).

333. *See, e.g., Direkly*, 866 S.W.2d at 655 (stating that the employer exercised no control over Wodtke, therefore the employer was not liable because Wodtke was not advancing her employer's business purpose); London v. Texas Power & Light Co., 620 S.W.2d 718, 719-20 (Tex. Civ. App.—Dallas 1981, no writ) (declaring that an employee is not furthering the employer's business simply by driving to work, even if receiving a mileage allowance).

334. *See Direkly*, 866 S.W.2d at 654 (recognizing that when an employee undertakes a special mission under the employer's direction, the employee is acting within the scope of employment); Chevron, U.S.A., Inc. v. Lee, 847 S.W.2d 354, 356 (Tex. App.—El Paso 1993, no writ) (creating an exception to the doctrine of respondeat superior when the employee undertakes a special mission on behalf of the employer, therefore allowing the employer to be liable).

335. 847 S.W.2d 354 (Tex. App.—El Paso 1993, no writ).

336. *See Chevron*, 847 S.W.2d at 355.

337. *See id.*

338. *See id.* at 356.

339. *See id.*

340. *See id.* (discussing when an employee will be considered on a special mission so as to hold the employer liable under respondeat superior).

341. *See id.* (indicating a special mission is a form of advancing the master's business).

true, the servant would be acting as an extension of the master,[342] and in a corporate context, in a manner that personified the corporation.[343] Such a servant-employee would qualify as a client's representative, and thus, the corporation would be able to claim a privilege so long as the employee's actions constituted a communication to corporate counsel.[344]

The issue of corporate personification, as demonstrated under agency principles and the doctrine of respondeat superior, illustrates another way of satisfying the scope of employment requirement.[345] However, the scope of employment language departs from federal variations of the subject matter tests by loosening the requirement beyond mere employee responsibilities.[346] Unlike the federal tests,[347] the Texas rule appears broad enough to include corporate personification through corporate agency, both by personification and specific duties, as well as liability potential and respondeat superior.[348]

C. *The Mere Witness Exclusion*

As a means of curtailing what could potentially be a very broad privilege, the rules of evidence and the case law that interprets them do not permit the elevation of an employee's communication to privileged status when the employee was only a witness, and not a participant, to the event

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342. *See id.* at 355 (allowing liability for a master when the servant furthers the master).

343. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1980) (examining when the employee acts as a part of the corporate machine so as to fall under the scope of employment).

344. *See* TEX. R. EVID. 503(a)(2)(B) (requiring scope of employment as part of the expanded definition of client representative).

345. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990) (explaining that the determination of whether an employee's communication was made within the scope of employment is conducted by analyzing whether the employee acted as a part of the corporate machine).

346. *Compare id.* (explaining that scope of employment extends beyond specific duties), *with* Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (narrowing to corporate duties), *and* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (permitting a privilege only in regards to communications addressing employment duties), *aff'd by an equally divided court*, 400 U.S. 348 (1971).

347. *Compare* TEX. R. EVID. 503(a)(2)(B) (excluding supervisor involvement from, and not narrowing the duties within Texas' subject matter test), *with Diversified Indus.*, 572 F.2d at 609 (requiring supervisor involvement and focusing only on duties), *and Harper & Row Publishers*, 423 F.2d at 491-92 (requiring supervisor involvement and employee duties as the only components of the original subject matter test).

348. *See* TEX. R. EVID. 503(a)(2)(B) (using scope of employment for the Texas subject matter test); *Holmes*, 803 S.W.2d at 460 (discussing how broadly corporate agents bind their corporations); *Leadon*, 484 S.W.2d at 569-70 (defining scope of employment for respondeat superior in terms of broad authority).

causing the lawsuit.[349] The underlying policy implicated in this rule suggests that a corporate employee who witnesses an event giving rise to court action is not "special" enough to allow their communications to be protected by an evidentiary privilege.[350]

In *Hickman v. Taylor*,[351] the United States Supreme Court was faced with the issue of whether to allow the plaintiffs access to documents that the defendant's attorney had prepared based on interviews with employees who witnessed a tugboat accident.[352] The Court had to balance the purpose behind the discovery rules with the interests supporting the attorney-client privilege.[353] Ultimately, the Court determined that the discovery rules could not encroach upon the domains of the privilege.[354] Accordingly, the Court did not award the attorney-client privilege to the documents, opining that "the protective cloak of . . . privilege does not extend to information which an attorney secures from a [mere fortuitous

349. *See* Hickman v. Taylor, 329 U.S. 495, 508 (1947) (denying privilege to memoranda summarizing statements of employees who were witnesses to the accident generating the suit); United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 619 (D.D.C. 1979) (discussing the mere witness exclusion based on the *Hickman* decision); *Samaritan Found.*, 862 P.2d at 877 (awarding privilege only when the employee is involved and not to an employee fortunate enough to witness the event); Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 256 (Ill. 1982) (discussing the weakness of the original subject matter test as a failure to distinguish between acting employees and bystander witness employees); Leer v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co., 308 N.W.2d 305, 309 (Minn. 1981) (holding that statements regarding events an employee only witnessed are not worthy enough to allow privilege); 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 211, at 808 (1985) (discussing how blanket coverage of any statement would make the attorney-client privilege overly broad); 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5483, at 291 (1986) (suggesting that *Harper & Row Publishers, Inc. v. Decker* excluded witnesses in creating the subject matter test); John William Gergacz, *Attorney-Corporate Client Privilege: Cases Applying* Upjohn, *Waiver, Crime-Fraud Exception, and Related Issues*, 38 BUS. LAW. 1653, 1655-56 (1983) (explaining that *Leer* did not award a privilege because the employee spoke only as a witness to the accident).

350. *See Hickman*, 329 U.S. at 508 (disallowing a privilege because the memoranda sought summarized statements of a partnership's employees who witnessed a tug boat accident); *American Tel. & Tel. Co.*, 86 F.R.D. at 619 (commenting on how a mere employee witness was not able to make privileged statements in *Hickman*); *Consolidation Coal Co.*, 432 N.E.2d at 256 (discussing the modified subject matter test as an improvement over the original subject matter test because it excluded bystander-employee witnesses from the privilege).

351. 329 U.S. 495 (1947).

352. *See Hickman*, 329 U.S. at 497.

353. *See id.* at 507-08 (reconciling discovery's search for the truth with the proper bounds of the privilege).

354. *See id.* at 508 (restricting discovery that may concern privileged matters).

bystander-] witness while acting for his client in anticipation of litigation."[355]

Subsequently, using the mere witness exclusion, the Minnesota Supreme Court ruled in *Leer v. Chicago, Milwaukee, St. Paul & Pacific Railway Company*[356] that a railyard switch operator who witnessed an accident did not personify the corporation because he was only a witness, not a participant, in the accident.[357] Similarly, hospital employees who were present during a medical malpractice occurrence were held to be mere witnesses, excluded from the scope of the attorney-client privilege, in *Samaritan Foundation v. Goodfarb*.[358] In *Goodfarb*, the Supreme Court of Arizona held that although the employees were on duty, they did not participate in the failed operation.[359]

In short, mere connection to the event may be too remote to allow the attorney-client privilege to apply.[360] For the privilege to apply, the employee must be an actor in the incident who can subject the corporation to liability.[361] This standard therefore excludes communications by those who are mere witnesses notwithstanding their status as employees, agents, or officers.[362] Thus, employees who communicate on events as mere witnesses, such employees cannot personify the corporation, nor can their communications on those events give rise to the attorney-client privilege.[363]

V. Proposal: Defining "Scope of Employment" for Purposes of the Texas Attorney-Corporate Client Privilege

The role that the "scope of employment" analysis plays under the new Rule 503 is an issue because of the adoption of the subject matter test in

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355. *Id.* at 508.

356. 308 N.W.2d 305 (Minn. 1981)

357. *See* Leer v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co., 308 N.W.2d 305, 308-09 (Minn. 1981) (adopting the mere witness exclusion because it best harmonized *Hickman* with the control group and subject matter tests).

358. *See* Samaritan Found. v. Goodfarb, 862 P.2d 870, 880 (Ariz. 1993) (in banc) (denying a privilege to the hospital because the employees performed no action aside from witnessing the physician's alleged negligence).

359. *See Goodfarb*, 862 P.2d at 878.

360. *See id.* at 878 (refusing to extend the subject matter test to mere witnesses in Arizona).

361. *See id.* (summarizing the distinction between employees acting in their scope of employment and employees who are only witnesses).

362. *See id.* at 880 (following the mere witness exclusion).

363. *Cf. id.* at 878 (stating that the connection between the liability-causing event and the employee was too attenuated to give rise to a privilege).

Texas.[364] Texas Rule of Evidence 503(a)(2)(B) defines a client's representative as "any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication *while acting in the scope of employment* for the client."[365] Thus, for a communication between a client's representative and the corporation's attorney to attain privileged status, the communication must satisfy not only the scope of employment component, but also the confidentiality and effectuation of purpose components.[366]

In formulating the application of the subject matter test, Texas courts must strike a balance between restraining privileges while, at the same time, allowing corporations the freedom to obtain adequate representation.[367] The effectuation of purpose and confidentiality requirements serve the aim of keeping the new privilege within necessary boundaries by not allowing a corporation to involve counsel in every communication.[368] However, for the scope of employment component to serve the goal of adequate representation, the term "scope of employment" must be construed broadly and defined in such a way that incorporates both evidence law and substantive law.[369] Accordingly, this Comment proposes the following formulation as the paradigm for scope of employment language and analysis for Texas courts applying Rule 503's subject matter test to determine when the attorney-corporate client privilege may be asserted successfully.

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364. *See* TEX. R. EVID. 503 & cmt. (adopting the subject matter test in Texas evidence law).

365. TEX. R. EVID. 503(a)(2)(B) (emphasis added).

366. *See id.* (establishing the circumstances under which the privilege will attach under the subject matter test).

367. *Compare* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 322-23 (7th Cir. 1963) (attempting to equate individual and corporate clients), *with* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 73 (1961) (cautioning to keep privileges within the narrowest limits). *Radiant Burners* was the first case to explicitly extend the attorney-client privilege to corporations. *See* R. David White, Radiant Burners *Still Radiating: Attorney-Client Privilege for the Corporation*, 23 S. TEX. L.J. 293, 293 (1982) (describing *Radiant Burners* as a challenge to the "unspoken assumption" that a corporation could invoke the attorney-client privilege).

368. *See* Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (addressing the fear that a corporation will attempt to use its attorneys to privilege every communication by requiring confidentiality and legal purpose before permitting communications to be privileged).

369. *Cf.* Michael L. Waldman, *Beyond* Upjohn: *The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 484 (1987) (referring to the subject matter test as a broader test for the attorney-client privilege, an evidentiary principle).

A. *Establishing an Employment Relationship*

The presence of an employment relationship is the first issue raised in the scope of employment analysis.[370] In essence, the corporation must qualify as an employer, and the individual must qualify as an employee in order for a corporate client to successfully assert the privilege over a representative's communication.[371] Absent an employment relationship, the privilege is inapplicable beyond the client's control group.[372]

In terms of the scope of employment analysis, Texas courts have several employment standard alternatives.[373] First, Texas courts could limit the language of Rule 503 by defining the parties based on the nature of the particular suit.[374] For example, statutory claims could use statutory definitions of employer and employee and apply them to Rule 503. With common-law claims, courts could use the common-law definitions of employer and employee to determine whether an employment relationship exists. However, building an evidentiary privilege based upon the cause of action would likely create one standard for statutory claims and another for common-law claims, thereby fostering unfairness to a party and risking confusion during trial where both types of claims are present.

A more persuasive interpretation of Rule 503 involves the use of both common-law and statutory definitions for employer and employee. The default rule would use common-law employer-employee definitions, unless a statute provided a definition of either term. Moreover, such an approach would allow the privilege to expand in a manner that incorporates most modern business practices. Furthermore, satisfying either a statutory or common-law definition of an employer or employee would enable a party asserting the attorney-client privilege to resolve the first

370. *See* TEX. R. EVID. 503(a)(2)(B) (requiring a client's representative to be an employee as part of the "scope of employment" prong of this definition).

371. *See id.* (excluding impliedly any party seeking to become a client's representative absent status as an employee).

372. *See id.* (a)(2) (supplying two standards for client representatives, the second of which requires employment).

373. *See, e.g.*, TEX. LAB. CODE ANN. § 21.002(8) (Vernon 1996) (defining who is an employer under the employment discrimination statute); Darensberg v. Tobey, 887 S.W.2d 84, 88-89 (Tex. App.—Dallas 1994, writ denied) (using a common-law analysis to determine whether a party's injuries occurred within the scope of employment); Ross v. Texas One Partnership, 796 S.W.2d 206, 210 (Tex. App.—Dallas 1990) (using a common-law analysis to distinguish an employee and an independent contractor), *writ denied per curiam*, 806 S.W.2d 222 (Tex. 1991).

374. *Compare* TEX. LAB. CODE ANN. § 21.002(8) (Vernon 1996) (defining an employer for the purpose of statutory employment discrimination suits), *with Ross*, 796 S.W.2d at 210-11 (using the economic realities test in Texas to determine if the parties were in an employment relationship).

issue raised under the scope of employment component of Rule 503.[375] Likewise, if the communications of independent contractors are at issue, Texas courts should review the relationship under the economic realities test. In addition, courts should follow federal law on this issue and hold that if the independent contractor is the functional equivalent of an employee, the privilege can apply to any communications with corporate counsel.

However, application of the subject matter test to borrowed servants may likely require an additional step of proving the servant has been borrowed from the first employer.[376] To determine whether a loaned or borrowed servant would qualify as an employee under Rule 503, Texas courts have several options.[377] First, they could follow the Texas Supreme Court's holding in *Newspapers, Inc. v. Love*[378] and focus solely on whether the employer has a sufficient amount of control over the employee so as to confer an employment relationship.[379] The weakness in the right to control analysis lies in its ignorance of other important factors, such as wages, benefits, and workload.[380] Moreover, exclusive focus on the right to control contravenes case law, which considers many other factors, even those factors that are used under the rubric of the right to control.[381] Perhaps a better option available is to use the economic realities test.[382] Courts using this standard could keep the right to control

375. *See* TEX. R. EVID. 503(a)(2)(B) (establishing a scope of employment requirement for a corporation to gain a privilege over a representative's communication).

376. *See* Aguilar v. Wenglar Constr. Co., Inc. 871 S.W.2d 829, 831 (Tex. App.—Corpus Christi 1994, no writ) (describing the steps that must occur for a servant to become borrowed).

377. *See, e.g.*, Newspaper, Inc. v. Love, 380 S.W.2d 582, 590 (1960) (placing emphasis on the right to control); *Darensburg*, 887 S.W.2d at 89 (focusing on the totality of the relationship, not just the right to control); *Aguilar*, 871 S.W.2d at 831 (discussing the borrowed-servant doctrine).

378. 380 S.W.2d 582 (Tex. 1964).

379. *See Newspapers*, 380 S.W.2d at 590 (referring to the right of control as a separate concept from the exercise of control).

380. *See Darensberg*, 887 S.W.2d at 89 (listing factors such as income, source, benefits, schedule, and patient load to determine whether a doctor was a corporate employee).

381. *See* Cobb v. Sun Papers, Inc., 673 F.2d 337, 340 (11th Cir. 1982) (listing eleven factors under the economic realities test, some of which Texas incorporates into the right to control); *Darensberg*, 887 S.W.2d at 89 (including schedule, equipment, and manner of result under the right to control). *Cobb* lists these factors independently. *See Cobb*, 673 F.2d at 340 (including hours, equipment, and integration of work into the employer's business under the economic realities test).

382. *See Cobb*, 673 F.2d at 340 (explaining how the economic realities test focuses on compensation and control over work); Smith v. Dutra Trucking Co., 410 F. Supp. 513, 516-17 (N.D. Cal. 1976) (using the economic realities test and focusing on right to control and the amount of operating profits as the factors that distinguish between an employee and an independent contractor), *aff'd*, 580 F.2d 1054 (9th Cir. 1978).

paramount while examining other considerations, such as benefits, method of termination, wages, and the source of payment.[383]

In situations where the employee is not a direct employee of the corporation, courts should use a broadened borrowed-servant analysis to determine whether a loaned employee qualifies for protection under the attorney-client privilege. Under this option, the right to control remains paramount, but would not be determinative, if Texas courts are willing to look at other factors, such as integration of the employee into the lessee-employer's business.[384] Under this method, an employment relationship could exist by virtue of the employee who acts through a primary employer.[385] Of the three options, the borrowed-servant doctrine is also the most similar in form to the loaned-servant doctrine because both doctrines have an employee and two employers.[386] The only significant difference is the length of the time of control.[387] To remedy this inconsistency, Texas courts could simply extend the borrowed-servant doctrine's time period and consider factors such as hours, assignment, and benefits. This new analysis would mold the borrowed-servant doctrine into a loaned-servant analysis for the purpose of establishing an employment relationship that satisfies Rule 503's scope of employment requirement.

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383. *Cf. Cobb*, 673 F.2d at 339 (focusing equally on several considerations, but keeping the right to control as the traditional test for distinguishing between employees and independent contractors).

384. *Cf.* Aguilar v. Wenglar Constr. Co., 871 S.W.2d 829, 831 (Tex. App.—Corpus Christi 1994, no writ) (listing other considerations for a borrowed-servant determination, but keeping right to control paramount).

385. *See id.* (referring to a borrowed worker as an employee, not an independent contractor); Mercury Life & Health Co. v. De Leon, 314 S.W.2d 402, 405 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.) (referring to the loaned employee as a special employee, not an independent contractor).

386. *See Aguilar*, 871 S.W.2d at 831 (describing the borrowed-servant relationship as one between two employers and one employee); Robert B. Moberly, *Temporary, Part-Time, and Other Atypical Employment Relationships in the United States*, 38 LAB. L.J. 689, 689 (1987) (describing the loaned-servant doctrine as a triangular relationship of two employers and a worker).

387. *Compare Aguilar*, 871 S.W.2d at 831 (implying that the borrowed-servant status is only temporary), *with* H. Lane Dennard, Jr. & Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labor Law Problems*, 28 GA. L. REV. 683, 685 (1994) (indicating that loaned servants retain the loaned-servant status until the end of their assignment, which can last from weeks to years).

B. *Personifying the Corporation and Examining the Scope of Employment*

1. Corporate Agency As Guidance

For the purpose of Rule 503, when employees act, they personify a corporation, and thereby allow the corporation to assert a privilege to any communications made with counsel regarding those acts.[388] Following that principle, one way to demonstrate both personification and privilege is to show that the agent's actions bound the corporation.[389] For purposes of Rule 503 and scope of employment, explanations on corporate agency suggest a broad definition of authority, and hence, corporate personification as well.[390]

Another manner by which an employee may act to personify the corporation, thereby allowing the corporation to assert the privilege, is when the employee's actions potentially subject the corporation to liability.[391] This possibility closely mirrors the idea that non-control group employees may generate legal problems for the corporation.[392] Consequently, the privilege should extend to include communications relating to such situations under the Texas subject matter test.

2. Broadly Interpreting Specific Duties: Express Actual Authority v. Implied Actual Authority

As an alternative, Texas courts could utilize the fact that an employee's communication fell within that employee's specific duties to satisfy Rule 503. Generally, any communication within the subject matter that relates

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388. *Cf.* Polland & Cook v. Lehmann, 832 S.W.2d 729, 738 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (describing actual authority as flowing from principal to agent).

389. *Cf.* Helms v. Home Owners' Loan Corp., 129 Tex. 121, 128, 103 S.W.2d 128, 132 (1937) (binding the corporation to the agent's agreements with third parties); Paramount Nat'l Life Ins. Co. v. Williams, 772 S.W.2d 255, 264-65 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (obligating the company to honor a contract that an unauthorized agent signed on its behalf based on equating his actions with those of the company).

390. *See* Green Tree Acceptance, Inc. v. Holmes, 803 S.W.2d 458, 460 (Tex. App.—Fort Worth 1991, writ denied) (imputing an agent's knowledge to a corporation absent the corporation's ability to disprove the agent's authority).

391. *Cf.* Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (rejecting the control group test partly because non-control group employees can generate legal problems for the corporation, some of which make the corporation liable); Samaritan Found. v. Goodfarb, 862 P.2d 870, 876 (Ariz. 1993) (in banc) (awarding a privilege for corporations when the employee's actions give rise to corporate liability and are imputed to the corporation); Group Hosp. Servs., Inc. v. Daniel, 704 S.W.2d 870, 878 (Tex. App.—Corpus Christi 1986, no writ) (describing an agent as a person who personifies the corporation in terms of the supervisory ability to create liability for exemplary damages).

392. *See Upjohn Co.*, 449 U.S. at 391-92 (describing the reasons for adopting a broader attorney-client privilege in federal courts).

to a corporate employee's express actual authority should generate protection under the new privileges rule because such matters are not only within the scope of employment, but they are also the essence and purpose of employment.[393] In other words, if a task is expressly represented to the employee as the employee's responsibility, then any communication between that employee and the corporation's counsel should be privileged because such matters fall under specific duties and are within the scope of employment.[394]

However, the larger issue facing Texas courts is deciding whether to include implied actual authority under the subject matter test.[395] Under this new rule, Texas could exclude matters that arise under implied actual authority, thereby limiting actual authority to specific duties, not collateral responsibilities.[396] A case example illustrates why implied actual authority should fall under the privilege. In *Johnston v. Cometra, Inc.*,[397] the Austin court of appeals declared that the authority to sell included the

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393. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 3.02[3][d][ii] (2d ed. 1990) (suggesting that "scope of employment" includes not only subject matter that comes to the employee's attention in his capacity as a corporate employee, but also subject matter that came to the employee's attention prior to his capacity as a corporate employee, so long as the information in the latter context is at least job-related).

394. *Cf.* Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (using a "specific duties" approach to scope of employment); Harper & Row Publishers, Inc., v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (allowing attorney-client privilege if the subject matter relates to the employee's corporate tasks), *aff'd by an equally divided court*, 400 U.S. 348 (1971); JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990) (recommending that the privilege attach under the scope of employment notion where a communicated matter is within an employee's specific duties to the corporate employer).

395. The problem will not be as great in federal courts, where privileges exist at the discretion of the judges. *See* FED. R. EVID. 501 (giving federal courts discretion to recognize privileges except in state civil actions). Federal courts would be free to include or exclude matters relating to implied actual authority within the attorney-client corporate privilege. *See id.* (transferring discretion over privileges to courts for individual case determinations); Upjohn Co. v. United States, 449 U.S. 383, 386 (1981) (rejecting the control group test but not adopting the subject matter test). Any determination for either side would follow the federal evidentiary privileges rule, which leaves privilege determinations to individual courts. *See* FED. R. EVID. 501 (allowing courts privilege determination powers). Allowing or disallowing implied actual authority as within specific duties follows both the federal privileges rule and the holding in *Upjohn* that federal courts have discretion to grant privileges based on experience and reason. *See id.* (leaving the awarding of privileges to federal judges); *Upjohn Co.*, 449 U.S. at 386 (refusing to lay down a general rule for evidentiary privileges).

396. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 3.02[3][d][ii] (2d ed. 1990) (offering guidelines to determining whether communications by an employee fall within the scope of his duty).

397. 837 S.W.2d 711 (Tex. App.—Austin 1992, writ denied).

implied ability to make warranties on the product—in this case, gas. If a dispute arose over that warranty, however, the corporation could not assert the privilege over communications between its agent and its attorney if the privilege extended only to the agent's express actual authority.[398] This choice seems unwise because such a narrow interpretation of attorney-corporate client privilege was rejected by the new rule, which intended to broaden the attorney-client privilege by adopting the subject matter test.[399] Accordingly, Texas courts should broaden the attorney-client privilege substantively as well. In other words, Texas courts should include matters relating to an employee's implied actual authority as part of the employee's specific duties to the corporation; by doing so, courts would be increasing the possibility that these matters will be privileged.

3. Respondeat Superior and the Subject Matter Test

Under the respondeat superior doctrine, any transfer of authority by the employer places a servant within the scope of employment.[400] In terms of the subject matter test and Rule 503, if an employee acts under such given authority, that employee will be considered to have personified the corporation.[401] Therefore, along evidentiary lines, respondeat superior suggests that a privilege should attach because the employee ac-

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398. *See* Johnston v. America Cometra, Inc., 837 S.W.2d 711, 715 (Tex. App.—Austin 1992, writ denied) (deriving implied authority from the express task of selling).

399. *See* TEX. R. EVID. 503(a)(2)(B) & cmt. (broadening impliedly the attorney-client privilege by replacing the control group test with the subject matter test); *cf. Upjohn*, 449 U.S. at 391-92 (rejecting the control group test as too narrow to allow effective representation of corporations).

400. *See, e.g.*, Ralph v. Mr. Paul's Shoes, Inc., 572 S.W.2d 812, 816 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (applying employer liability where a tort occurred when the employee was acting under general authority); Kimbell Properties, Inc. v. McCoo, 545 S.W.2d 554, 556 (Tex. Civ. App.—Amarillo 1976, no writ) (allowing employer liability when the tort occurs while the servant is advancing the master's business objectives).

401. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 3.02[3][d][ii] (2d ed. 1990) (recommending application of the subject matter test when the employee is a cog in the corporation machine); *cf.* Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 527 n.1 (Tex. 1990) (including a transcript from the trial testimony where the questioning attorney and the witness referred to his knowledge and actions and the corporation's knowledge and actions as the same); Paramount Nat'l Life Ins. Co. v. Williams, 772 S.W.2d 255, 267 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (holding an insurance company liable when the agent who issued the policy did so without authority, but the company accepted the premiums, ratifying the action); *Ralph*, 572 S.W.2d at 816 (indicating that respondeat superior applies when the employee acts under general authority, making no distinction between actual or apparent authority).

ted as an extension of the employing entity.[402] Essentially, because the employee's actions involve the entity, the corporation's status as a client extends to the employee,[403] and as a part of the client, the attorney-client privilege can then extend to the employee as a client's representative under Rule 503.

However, an application of respondeat superior to Texas' new subject matter test reveals several weaknesses that may dissuade courts from using it as a standard in defining scope of employment. Most notably, the doctrine has been limited to tort claims only.[404] Additionally, a plaintiff must first sue under the doctrine before it can be applied.[405] Perhaps more problematic in terms of the subject matter test as *Ralph v. Mr. Paul's Shoes, Inc.*[406] shows, is that courts can use the doctrine to separate the employee's act from the employer's liability.[407] In a corporate context, this severance would impute only liability, to the employer not the act itself; essentially, the employee would not personify the corporation because the corporation did not act.[408] Courts, however, should follow

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402. *Cf.* Marc C. Carter, Note, *Getting to the Deep Pockets: An Analysis of Employer and Third Party Liability Under* Yellow Cab Co. v. Phillips, 17 T. MARSHALL L. REV. 445, 450 (1992) (explaining how a servant becomes an extension of a master).

403. *See* Green Tree Acceptance, Inc. v. Holmes, 803 S.W.2d 458, 460 (Tex. App.—Fort Worth 1991, writ denied) (imputing an agent's knowledge to the corporation). In *Green Tree*, the employee's affirmation of the incorrect odometer reading was enough to bind the corporation because the employee was acting within the scope of his employment. *See id.*

404. *See* Terry S. Boone, *Violence in the Workplace and the New Right to Carry Gun Law—What Employers Need to Know*, 37 S. TEX. L. REV. 873, 878 (1996) (referring to employer liability for an employee's negligent acts, which falls under general tort principles); Marc C. Carter, Note, *Getting to the Deep Pocket: An Analysis of Employer and Third Party Liability Under* Yellow Cab Co. v. Phillips, 17 T. MARSHALL L. REV. 445, 445 (1992) (stating that the theory of respondeat superior holds an employer liable for actions of a tortfeasor, invoking tort law).

405. *See* Marc C. Carter, Note, *Getting to the Deep Pocket: An Analysis of Employer and Third Party Liability Under* Yellow Cab Co. v. Phillips, 17 T. MARSHALL L. REV. 445, 446-47 (1992) (discussing the theories of respondeat superior as providing a basis for plaintiff's recovery by shifting the losses to the employer, who generally has more money and insurance than the tort-feasing employee and is more capable than the employee to distribute the losses to consumers).

406. 572 S.W.2d 812, 816 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

407. *Cf.* Ralph v. Mr. Paul's Shoes, Inc., 572 S.W.2d 812, 816 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (imputing liability to the master for damages caused by two off-duty employees who were smoking, even though the act of smoking was not that of the master).

408. *See Ralph*, 572 S.W.2d at 816 (holding a business owner liable for the acts of her employees); *see also* Samaritan Found. v. Goodfarb, 862 P.2d 870, 877 (Ariz. 1993) (in banc) (stating that an employee may subject the corporation to liability when he acts as the corporate entity).

the traditional formulation of the doctrine of respondeat superior, where the employee's acts can become those of the employer.[409]

Despite these weaknesses, respondeat superior appears to overlap with the subject matter test. The doctrine recognizes the views from *Upjohn* and *Samaritan Foundation*, wherein it was held that non-control group employees can personify the corporation through their ability to create liability for the corporate entity.[410] Additionally, given the nature of corporations as fictional persons, courts will generally be unable to separate the employee's act from the employer's liability because a corporation needs real people to act on its behalf for the corporation to function.[411] Thus, respondeat superior can provide some substantive guidance in determining when an employee acts so as to personify the corporation.

4. The Mere Witness Exclusion

Despite the broad proposal of the subject matter test, Texas courts should carve out a limitation on Rule 503 and disallow the privilege for communications relating to matters that an employee observed as a mere witness.[412] Under evidentiary theory, a communication between a mere witness and a party's attorney is not worthy of protection.[413] Yet, difficulties arise when courts attempt to identify when an employee is a witness versus acting as an extension of the corporation.[414] Nonetheless, Texas

409. *See, e.g.*, Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569 (Tex. 1972) (stating the circumstances that impute a servant's negligent acts to the master); London v. Texas Power & Light, 620 S.W.2d 718, 719-20 (Tex. Civ. App.—Dallas 1981, no writ) (explaining how the right to control makes a master liable for acts of servants).

410. *See* Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (recognizing that non-control group employees may act so as to create potential liability for the corporation); *cf. Samaritan Found*, 862 P.2d at 877 (distinguishing employees who create liability from those who are mere witnesses).

411. *See* Wells v. Hiskett, 288 S.W.2d 257, 262 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.) (restating that a corporation requires agents to act in order for the corporation to act); *see also* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 2, at 5-6 (1979) (stating that a corporation requires agents to act on its behalf).

412. *See* Hickman v. Taylor, 329 U.S. 495, 508 (1947) (declining to extend the attorney-client privilege when the employee will speak as an ordinary witness).

413. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (1961) (setting out an analysis of whether privilege should attach to communications that occur within certain relations). One of the requirements of this relationship is that confidentiality be essential. *See id.* Because the relationship between an attorney and a witness does not require confidentiality, the relationship is not worthy of protection. *See Hickman*, 329 U.S. at 508 (denying attorney-client privilege protection to information an attorney learns from a witness where litigation is anticipated).

414. *See, e.g.*, Leer v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co., 308 N.W.2d 305, 310 (Minn. 1981) (Otis, J., dissenting) (disagreeing with the majority over the role the

courts should deny protection to communications concerning matters that an employee observed as a witness only to avoid elevating fortuitous observation to that of privileged status.[415] Embracing the mere witness exclusion rule would also serve to promote the confinement of the privilege.[416] Furthermore, Texas law would also be consistent with other jurisdictions.[417] Thus, Texas courts should incorporate the mere witness exclusion rule into the subject matter test under Rule 503.

VI. Conclusion

Among the noticeable changes in the new Texas Rules of Evidence is Rule 503, which alters the standard that Texas courts must use when determining whether a attorney-corporate client privilege will be extended to prevent disclosure of the communication. By adopting the subject matter test in place of the control group test, the new rule follows modern federal case law regarding the mode of analysis for applying the privilege. However, the new Texas rule notably contains a relatively undefined term, "scope of employment." Although this term is a departure from traditional definitions of the subject matter test, the drafters provided no guidance as to what the term means. As a result, this Comment suggests a method for applying this language to various fact situations.

Successful use of the test should begin with identifying employers and employees and determining whether an employment relationship exists. Once an employment relationship exists, an employee may then satisfy the subject matter test in two ways, thereby allowing the corporation to invoke the privilege against disclosure of the employee's communication with counsel. An employee could personify the corporation or an employee could communicate on matters relating to his specific duties. Notably, a broad scope of employment does not make the privilege itself

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switch operator played). The dissenting opinion in *Leer*, for example, opined that the majority decided the case incorrectly because the switch operator, whose communications were at issue, may have acted to personify the corporation. *See Leer*, 308 N.W.2d at 310 (Otis, J., dissenting) (suggesting that the employee's position as switch operator places him in the very position of keeping track of events in the railyard, making him personify the corporation and thereby potentially invoking privilege over his communications with the corporation's attorney).

415. *Cf. Hickman*, 329 U.S. at 508 (refusing to extend the privilege to communications concerning events that an employee only witnessed).

416. *See* 8 John Henry Wigmore, Evidence in Trials at Common Law § 2192, at 73 (1961) (urging narrow privileges).

417. *See Hickman*, 329 U.S. at 508 (denying privilege, under federal law, to communications with employees who merely witnessed events); Samaritan Found. v. Goodfarb, 862 P.2d 870, 878 (Ariz. 1993) (en banc) (recognizing the mere witness exclusion rule in Arizona); *Leer*, 308 N.W.2d at 309 & n.8 (adopting the mere witness exclusion rule in Minnesota).

overly broad because application of the privilege depends upon the entire context of the communication that the corporation seeks to prevent from being disclosed. Thus, this Comment recognizes that the attorney-corporate client privilege should be regarded as encompassing only communications made to the corporation's counsel by employees in the scope of their employment. Thus, only those communications that the rule is designed to protect from forced disclosure will be regarded as privileged.

Unfortunately, no quick solution appears to be forthcoming. Ten years passed before the Texas Supreme Court explicitly adopted the control group test as the appropriate attorney-corporate client privilege mode of analysis. The larger problem of "scope of employment" may likely loom as long as, if not longer than, the control group test did before its outright adoption. Furthermore, this problem will likely arise on a case-by-case basis, until the Texas Supreme Court provides a general rule that other courts in Texas can follow. However, as the United States Supreme Court cautioned in *Upjohn*, courts decide real cases, not theoretical principles of law. As a result, a solution may be forthcoming, but only after a dispute arises that summons the court to the aid of the parties.