Vulnerability of Professional-Client Privilege in Shareholder Litigation*

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THE PROFESSIONAL PRIVILEGE AND SHAREHOLDER OPPRESSION

Lawyers and accountants often give corporate directors, officers or majority shareholders professional advice and assistance in charting corporate courses of action that minority shareholders find objectionable. Especially when a plan to eliminate a minority shareholder from a company (a "squeeze-out") is being evolved, those in control of the company are likely to ask the company's attorney and accountant for guidance, and the attorney or accountant may prepare letters or memoranda, or participate in conferences, in which he describes methods and procedures to accomplish the desired objective and points out advantages and disadvantages of alternative methods. The conferences of majority shareholders, directors, officers, lawyers, accountants and other business advisers, as they search for the most advantageous and least risky way of eliminating the minority shareholder, may take on all the coloration of a full-fledged "plot" or "conspiracy." Businessmen, lawyers and accountants participating in transactions of this kind usually consider their communications confidential, and the thought probably never occurs to most of them that their scheming might some day be laid bare before a court or jury.

In particular, lawyers generally assume that information communicated by a corporate official to an attorney and the attorney's response are protected from disclosure by the attorney-client privilege.[1] When corporate officials and the lawyer involved in a squeeze-play or other corporate transaction prejudicial to a minority shareholder learn that their communications and documents, which reveal their plotting against a minority shareholder, might not be privileged but instead might be subject to discovery, the shock may set the stage for a settlement favorable to the minority shareholder.

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1. *See, e.g.*, 4 J. Moore & J. Lucas, Moore's Federal Practice ch. 26 (2d ed. 1974); 8 C. Wright & A. Miller, Federal Practice and Procedure ch. 6 (1970, Supp. 1976); C. Wright, Handbook of the Law of Federal Courts, §§ 81-90 (2d ed. 1970, Supp. 1972). The attorney representing a minority shareholder should not overlook the possibility of obtaining depositions or other discovery before an action is brought in order to preserve evidence. *See, e.g.*, Fed. R. Civ. P. 27.

For the use of interrogatories in an action by minority shareholders attacking the sale of corporate assets to the majority shareholder, *see* Garbarino v. Albercan Oil Corp., 35 Del. Ch. 27, 109 A.2d 824 (1954).

And if the dispute does have to be litigated, the communications and documents might well provide information vital to the minority shareholder's case or at least produce a sympathy-invoking climate conducive to a determination favorable to him.

Interrogatories and other discovery tools can of course be used by a minority shareholder's attorney to obtain information useful in a derivative suit or other litigation the shareholder is bringing to protect the corporation or his own interests. During the last thirty years, the courts, especially the federal district courts under the federal rules, have consistently permitted broader and broader discovery. This article does not discuss discovery techniques. Adequate text material on that subject is readily available elsewhere.[2] Rather, it deals with challenges to the attorney-client or accountant-client privilege when such a privilege is asserted to avoid disclosure of communications between corporate officers and agents and a lawyer or accountant.

BASIS AND SCOPE OF ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is summarized in the often-quoted statement of Professor Wigmore as follows:

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

Confidential communications from the client to the attorney are protected from both pretrial discovery and the lawyer's testimonial disclosure. The client cannot be compelled to disclose what he told the attorney, and the attorney may not reveal his client's communications. The privilege "belongs" to the client, not the lawyer, but the lawyer often asserts it on the client's behalf.[4] The purpose of the privilege is to encourage uninhibited communications between the client and the attorney by dispelling apprehension that they will be compelled to disclose the communications.[5] An attorney, it is thought,

2. "The confidential nature of our work is something most lawyers probably take for granted." Burnham, *Confidentiality and the Corporate Lawyer,* 56 Ill. B.J. 542 (1968).

3. 8 J. Wigmore, Evidence § 2292, at 554 (McNaughton rev. 1961) [hereinafter cited as 8 J. Wigmore].

4. "The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary." Proposed Rule of Evidence for United States Courts and Magistrates 503(c), transmitted to Congress by the Supreme Court on November 20, 1972 (*see* 56 F.R.D. 183, 236 (1972)), but not adopted by Congress (*see* 65 F.R.D. 131, 146 (1974)).

5. 8 J. Wigmore § 2291, at 545. "The modern rationale of the privilege, since the latter part of the eighteenth century, has been the policy promoting free consultation of clients with their legal advisors." Gardner, *A Re-evaluation of the Attorney-Client Privilege,* 8 Vill. L. Rev. 279, 305 (1963).

best serves his client, and indirectly society, if he acquires all relevant information about the client's case.[6] As has been pointed out, "[t]he privilege rests on the untested and essentially untestable assumption that the benefits derived from encouraging communications outweigh the costs of keeping the information from other parties."[7]

The Wigmore summary of the attorney-client privilege indicates that only communications by the client are protected from disclosure. It does not say that communications from the lawyer to the client are protected. But, as Wigmore points out, the courts protect a lawyer's responses to his client when they are related to the confidence or their disclosure would tend to reveal the contents of confidential communications from the client to the lawyer.[8] Furthermore, information gathered by a lawyer in preparing for litigation is protected by another rule, the so-called "work-product" rule. But the protection afforded by that rule is defeated by a sufficient showing of necessity.[9]

A corporation's right generally to assert the attorney-client privilege in litigation brought against it by parties outside the corporate family is firmly established.[10] "[T]he attorney-client privilege in its broad sense is available

6. See Model Code of Evidence rule 210, comment a (1942): "The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases."

7. Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test,* 84 Harv. L. Rev. 424, 425 (1970). *See also* Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts,* 6 Ga. L. Rev. 339 (1972).

8. 8 J. Wigmore § 2292, at 554; *Id.* § 2320. *See also* Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956); *In re* Prudence-Bonds Corp., 76 F. Supp. 643 (E.D.N.Y. 1948), *aff'd* 174 F.2d 288 (2d Cir. 1949). "The lawyer's response to the client's communication is privileged because it must of necessity reveal the substance of the original communication." Heininger, *The Attorney-Client Privilege as it Relates to Corporations,* 53 Ill. B.J. 376, 377 (1965).

9. Generally, under the work-product rule, materials prepared by (or for) a lawyer in anticipation of litigation or for trial (the "work product") are protected from discovery, absent a showing of special necessity or justification for its production. In addition, the lawyer's mental impressions, opinions, conclusions or legal theories are, as a practical matter, completely immune from discovery. *See generally,* 8 C. A. Wright & A. Miller, *supra* note 1, §§ 2021-22. *See* Fed. R. Civ. P. 26 for the "work-product rule" adopted for use in the federal courts. Rule 26 provides in part that the right to discovery will override the privilege of confidentiality "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the material by other means." State discovery rules are generally similar, but not identical, and must be consulted when appropriate.

10. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir.) *cert. denied,* 375 U.S. 929 (1963). Model Code of Evidence rule 209(a) (1942); Uniform Rule of Evidence 26(3) (1953 version); "A corporation, like any other 'client,' is entitled to the attorney-client privilege." Bell v. Maryland, 378 U.S. 226, 263 (1964). *See also* Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971), *noted in* 12 B.C. Ind. & Com. L. Rev. 1200 (1971), 45 Tul. L. Rev. 1063 (1971), 25 U. Miami L. Rev. 188 (1970), 12 Wm. & Mary L. Rev. 925 (1971); Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956); Belanger v. Alton Box Board Co., 180 F.2d 87, 93-94 (7th Cir. 1950);

to corporations."[11] Nevertheless, "there remains in many places a residual feeling that the attorney-client privilege is not really appropriate and entitled to full scope in the corporate arena."[12] Uncertainties as to what limitations will be imposed on the privilege in a corporate setting[13] and recognized exceptions to the privilege open up opportunities for an aggrieved minority shareholder to obtain information contained in communications between corporate representatives and the corporation's attorney. The following paragraphs suggest how those opportunities can be explored and utilized. Incidentally, if a minority shareholder attempts to obtain information and the corporation refuses discovery, invoking the attorney-client privilege, and the court sustains the privilege, the corporation may not waive the privilege later at the trial should it become advantageous to the corporation or its controlling shareholders and officers to disclose the information.[14]

In practical operation the reach of the attorney-client privilege in a corporate setting is narrower than might be supposed. Corporate officers and agents who provide an attorney with information—the attorney's sources—can always be questioned by a shareholder-plaintiff's attorney as to matters within their own knowledge.[15] Further, preexisting corporate documents and financial records not prepared for communicating with the corporation's attorney are not immunized from discovery simply because they have been

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Robertson v. Commonwealth, 181 Va. 520, 25 Se.2d 352 (1943); Simon, *The Attorney-Client Privilege as Applied to Corporations,* 65 Yale L.J. 953 (1956); *Comment, The Attorney-Client Privilege in Shareholders' Suits,* 69 Colum. L. Rev. 309 (1969).

11. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963).

12. Burnham, *The Attorney-Client Privilege in the Corporate Arena,* 24 Bus. Law. 901, 913 (1969).

13. The court in the *Radiant Burners* case expressly declined to decide what limitations were to be imposed on the privilege. *Id.*

14. While the client does not waive the privilege by testifying generally in the cause or testifying as to facts which were the subject of consultation with his attorney, if the client or his attorney at his instance takes the stand and testifies to privileged communications in part this is a waiver as to the remainder of the privileged consultation or consultations about the same subject.

International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185-86 (M.D. Fla. 1973), *citing inter alia,* Hunt v. Blackburn, 128 U.S. 464 (1888). *See* Fed. R. Civ. P. 37(b)(2)(B). *See also* United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950), *cert. denied,* 342 U.S. 920 (1952) ("It is . . . one thing to allow the privileged person to suppress the evidence, and, *toto coelo,* another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses.").

15. *See* City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962) (The client "may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.").

In most instances, therefore, the existence of the privilege merely means that the attorney may not be called to impeach his own client or, in those instances wherein the client may have chosen to take the risk of refusing to speak, that the attorney may not be used as a vehicle for circumventing the client's constitutional rights.

Maurer, *Privileged Communications and the Corporate Counsel,* 28 Ala. Law. 352, 354 (1967).

transmitted to the attorney and left in his custody.[16] "All relevant facts of which the corporation has knowledge, including the facts related by it to its attorneys in privileged communications, are subject to discovery by interrogatories directed to the corporation or depositions of corporate employees."[17] Documents from the corporation's general files which an attorney uses in preparing his advice for the corporation do not achieve a privileged status.

The rule establishing the attorney-client privilege should be strictly construed, because, as Professor Wigmore has pointed out, "[i]ts benefits are all indirect and speculative; its obstruction is plain and concrete."[18] As a minority shareholder faces serious obstacles in his preparation for trial, and the risk is great that shareholder litigation will be wrongly decided for lack of information, courts should not be reluctant in shareholder litigation, when an appropriate situation arises, to find that the privilege does not apply or that the case falls within an exception to the privilege.

WAYS OF ATTACKING PRIVILEGE IN SHAREHOLDER LITIGATION

A minority shareholder bringing a derivative suit or other action against the corporation or its directors or officers conceivably may be able to persuade the court that a corporation should never be able to invoke the attorney-client privilege against a shareholder in an action brought by the shareholder. After all, the corporation's funds (funds which belong derivatively to all the shareholders) pay the attorney and the advice he gives is supposedly for the benefit of the corporation and its shareholders as a group. Especially when the minority shareholder is bringing a derivative suit, which is an action for and on behalf of the corporation and in which any recovery generally goes to the corporation, it seems inappropriate to permit the corporation's attorney-client privilege to be asserted in order to defeat the suit. A number of courts have flatly held that the privilege is unavailable to a

16. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 324 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963) ("Certainly, the privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure."); Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962), *cert. denied,* 371 U.S. 951 (1963) (the attorney may refuse to produce such documents only if the client could have refused to produce them); 8 J. Wigmore § 2307. *Cf.* American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 88 n.12 (D. Del. 1962) ("This Court does not feel a corporation should be able to insulate vital facts by using the privilege in a perverting manner.").

17. Heininger, *supra* note 8, at 377.

18. 8 J. Wigmore § 2292, at 554. *See also* Hickman v. Taylor, 329 U.S. 495 (1947).

> The privilege must be placed in perspective. The beginning point is the fundamental principle that the public has the right to every man's evidence, and exemptions from the general duty to give testimony that one is capable of giving are distinctly exceptional. . . . An exception is justified if—and only if—policy requires it be recognized when measured against the fundamental responsibility of every person to give testimony.

Garner v. Wolfinbarger, 430 F.2d 1093, 1100 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971).

corporation in a suit brought by shareholders.[19] Although the number of reported decisions dealing with a corporation's assertion of the attorney-client privilege in shareholder litigation is small, the trend is clearly away from this categorical position. Apparently, no federal court of appeals has yet supported it. Rather than a complete absence of privilege, the generally accepted view is that the shareholder-plaintiff may show cause why assertion of the privilege is inappropriate on the particular facts of the case.[20]

In a case arising in the Northern District of Alabama,[21] minority shareholders in an insurance company brought a class action against the corporation, its directors, officers and controlling persons, seeking to recover the purchase price of stock they had bought in the corporation. They alleged violations of federal and state securities laws and common law fraud. They also asserted a derivative action on behalf of the corporation against the individual defendants on the ground that the corporation itself had been injured by fraud in the purchase and sale of its securities. On deposition plaintiffs asked Schweitzer, who had been the corporation's attorney at the time of the transactions sued on but had later become its president, certain questions concerning advice he had given the corporation on the issuance and sale of stock, information the company had furnished him, and the content of discussions at meetings he and company officials had attended. The corporation and Schweitzer objected to the questions on the ground that the attorney-client privilege barred his revealing communications to him by the corporation while he was its attorney or the advice which he gave

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19. Garner v. Wolfinbarger, 280 F. Supp. 1018 (N.D. Ala. 1968), *vacated and remanded,* 430 F.2d 1093 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971), *noted in* 29 Ohio St. L. J. 1046 (1968); Dahlke v. Morrison, No. 69-497 (N.D. Ala., Oct. 3, 1969); Fischer v. Wolfinbarger, Nos. 5911, 5919 (M.D. Tenn., Aug. 29, 1969); Fischer v. Wolfinbarger, 45 F.R.D. 510 (W.D. Ky. 1968); Epstein v. Weiss, No. 67-233 (E.D. La., May 13, 1972); Pattie Lea, Inc. v. District Court, 161 Colo. 493, 423 P.2d 27 (1967) (involving certified public accountants rather than lawyers). "A corporate entity acts only for stockholders, and they are entitled to see written communications and to inquire concerning oral communications between their corporation and its attorneys." Fischer v. Wolfinbarger, 45 F.R.D. at 511. Under English law a company is considered to be a trustee for its members (shareholders), and the courts permit discovery of communications between company officials and the company's solicitors. Gouraud v. Edison Gower Bell Tel. Co. 59 L.T.R.(n.s.) 813 (Ch. 1888); W. Dennis & Sons, Ltd. v. West Norfolk Farmers' Manure and Chem. Co-op Co. [1943] 1 Ch 220, *digested* in 87 Sol. J. 211 (1943). For a criticism of these cases, see Comment, *The Attorney-Client Privilege in Shareholders' Suits, supra* note 10. *See generally* Annot., 34 A.L.R.3d 1106 (1970).

20. Since the corporation is the real plaintiff (the injured party), and since the privilege is designed to protect the client (the corporation in this case), shareholders in a derivative action [which is also designed to protect the corporation] . . . *should be permitted to show cause* why the corporation may not invoke the attorney-client privilege against, in effect, itself.

45 Tul. L. Rev. 1063, 1068 (1971). *Cf.* Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971).

21. Garner v. Wolfinbarger, 280 F. Supp. 1018 (N.D. Ala. 1968), *vacated and remanded,* 430 F.2d 1093 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971).

to the corporation. The district court held that a corporation could not assert the privilege against its own shareholders in an action charging the corporation, its directors and officers with wrongdoing.[22]

On appeal, the United States Court of Appeals for the Fifth Circuit held that a corporation is not barred from asserting the attorney-client privilege simply because those demanding information have the status of shareholders but that the availability of the privilege for a corporate client is subject to the right of shareholders to show cause why the privilege should not be invoked in particular instances; and that the district court had erred in not holding an evidentiary hearing on the claim of privilege, at which plaintiffs might have shown good cause why the corporation should not be permitted to assert the privilege.[23] The court stated that many "indicia" bear on whether good cause exists, among them the following:

> the number of shareholders [calling for the information] and the percentage of stock they represent; the bona fides of the shareholders; the nature of [their] claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; and the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.[24]

The court of appeals added that the district "court can freely use *in camera* inspection or oral examination and freely avail itself of protective orders . . . to preserve confidentiality."[25] The court of appeals thereupon vacated the district court's order on unavailability of the attorney-client privilege and remanded the cause for further proceedings.

On remand, the district court held an evidentiary hearing, at which evidence was adduced by pretrial depositions and exhibits, the court finding the following facts among others: the corporation had publicly offered its stock for sale without registration under the Securities Act of 1933 (and strong evidence indicated it had failed to comply with any exemption from the registration requirements of that Act); the corporation continued to sell its stock after the Securities and Exchange Commission staff had requested assurance that it would discontinue its public offering of unregistered securi-

22. 280 F. Supp. at 1019.
23. 430 F.2d at 1103-04 (5th Cir. 1970).
24. 430 F.2d at 1104.
25. *Id.*

ties; a former president of the corporation had testified that its affairs were not being conducted in its best interest; important witnesses had refused to testify, invoking the privilege against self-incrimination; no trade secrets were involved in the case; and no improper purpose on the part of the shareholders seeking information had been shown. On the basis of these findings, the court concluded that the corporation should not be allowed to assert the privilege against its own shareholders, that the shareholders were entitled to discover any communications which passed between management and the corporation's attorney.[26]

Unfortunately, neither the court of appeals nor the district court provide specific guidance as to how the suggested "indicia" are to be evaluated in relation to each other or weighed in a closer case against considerations tending to support preservation of the privilege. The lower court stated without explanation that any one of its seven findings of fact, considered alone, would "constitute a sufficient basis for granting plaintiffs' [discovery] motion."[27] Although the reasoning leading to this conclusion is not articulated, the opinion reveals a striking willingness to find good cause to overcome the privilege. Under this approach, apparently all the plaintiff in most shareholder litigation must show to defeat the claim of privilege is a colorable claim of breach of fiduciary or other duty and need for the requested information.

It is still too early to determine whether the approach developed in the Fifth Circuit will be adopted generally.[28]

WHO IS THE "CLIENT" OF A CORPORATION'S LAWYER?

The point is sometimes made in arguments to preserve the privilege that an attorney employed by a corporation in many situations is really advising the managers and in truth is their personal attorney,[29] that the managers'

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26. Garner v. Wolfinbarger, 56 F.R.D. 499, 502-04 (S.D. Ala. 1972). *See* Bailey v. Meister Brau, Inc., 55 F.R.D. 211 (N.D. Ill. 1972) ("[p]laintiff's claim contain[ed] substantial allegations of wrongful action by [corporate officer] and others, and the disclosures sought ha[d] been identified clearly and [were] not available elsewere" *Id.* at 214.).

27. Garner v. Wolfinbarger, 56 F.R.D. 499, 504 (S.D. Ala. 1972).

28. The *Garner* analysis was followed in Bailey v. Meister Brau, Inc., 55 F.R.D. 211 (N.D. Ill. 1972). *See* text accompanying notes 37-40 *infra.*

During a panel discussion of professional responsibility organized in August, 1975, by the ABA Section of Corporation, Banking and Business Law, the Chairman of the ABA Standing Committee on Ethics and Professional Responsibility recalled that the ABA had appeared as *amicus* in favor of the existence of the privilege in *Garner* and expressed the personal view that the decision was unfortunate and should be limited to its facts. Van Dusen, *Who Is Counsel's Corporate Client, in Panel Discussion, The Murky Divide: Professionalism and Professional Responsibility, Business Judgment and Legal Advice—What Is a Business Lawyer?,* 31 Bus Law 457, 474-478 (1975).

29. On the kinds of matter which ultimately do become the subject of derivative litigation—and thus as to which the issue of attorney-client privilege comes before the courts—communications with the corporate attorneys have probably

interests may be adverse to those of some of the shareholders,[30] and that therefore the managers should be able to claim a personal attorney-client privilege.[31] Although the loyalty of the corporation's attorney in a personal sense might run to corporate management, his professional obligation is to the corporation and derivatively to the shareholders as a group, and his duties include protection of legitimate shareholder interests. If an attorney employed by the corporation and paid with corporate funds helps directors or majority shareholders to take action adverse to minority shareholders, for example, if he helps them squeeze out minority shareholders, if he serves the interests of some of the shareholders to the exclusion of other shareholders, he should be held to have breached his professional obligations, at least in the absence of a showing of an overriding corporate justification.[32] The Committee on Professional Ethics and Grievances of the American Bar Association stated in Opinion 86:

> been concerned with the protection of the directors and officers, as well as the corporation itself, virtually from the start of discussions.

Burnham, *supra* note 12, at 904.

> In the typical situation, the corporate lawyer does represent the corporate officers, directors and other employees, as well as the corporation itself—in both his own mind and theirs—at least until a conflict of interest actually develops.

Id. at 905.

> Therefore, such communications will have been made at least in part on the officers' and directors' own behalf and so—even if we accept the idea that communications made solely on the corporation's behalf are not privileged as against plaintiff shareholders—there should be a valid privilege in most derivative cases.

Id. at 908.

30. *See* Comment, *The Attorney-Client Privilege in Shareholders' Suits, supra* note 10, at 317-19.

31. *See* Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964) (court found that company counsel represented both the corporations involved and the corporate employees personally). *Cf.* United States v. Koenig, 388 F. Supp. 670 (S.D.N.Y. 1974) (where corporation and its president had retained separate counsel at the time documents were prepared by corporation's counsel, the president could not prevent corporation from waiving the privilege; the burden of proof to establish the privilege is on the claimant).

32. *See* ABA Code of Professional Responsibility, Ethical Consideration 5-18 which provides in part that

> [a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer . . . or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

For the view that in a situation of possible conflict of interest between management and shareholders professional ethics should not require counsel to inform shareholders of his advice to management, *see* Van Dusen, *supra* note 28, at 475-76.

A good book is yet to be written on the conflict of interest problems of corporate counsel, especially counsel for close corporations. Perhaps the best material is Panel Discussion, *The Murky Divide: Professionalism and Professional Responsibility, Business Judgment and Legal Advice—What is a Business Lawyer?*, 31 Bus. Law. 457 (1975), and panel discussion *Business Planning and Professional Responsibility* (pts. 1 & 2), 8 Prac. Law 17 (Jan. 1962) and 8 Prac. Law 39 (Feb. 1962). *See also* Note, *Independent Representation for Corporate Defendants in Derivative Suits*, 74 Yale L. J. 524 (1965).

> In acting as the corporation's legal advisor he [the lawyer] must refrain from taking part in any controversies or factional differences which may exist among shareholders as to [the corporation's] control. When his opinion is sought by those entitled to it, or when it becomes his duty to voice it, he must be in a position to give it without bias or prejudice and to have it recognized as being so given.[33]

Incidentally, in an action against corporate officers or directors, plaintiff-shareholder's counsel should always move to prevent the corporation's attorneys from representing the officers or directors, the real parties defendant, or the corporation from bearing the cost of their defense on the merits.[34]

EFFECT OF CORPORATE MANAGEMENT'S FIDUCIARY DUTIES

An important consideration not present when an attorney's client is an individual—the high fiduciary duties those in control of the corporate client owe the corporation and minority shareholders[35]—should not be lost sight of in determining whether attorney-client privilege applies in shareholder litigation. Corporate managers and controlling shareholders after all do not manage for themselves. Their actions should be calculated to benefit the corporation and the shareholders as a whole, not to further the personal interests of the managers or the interests of some of the shareholders over the interests of other shareholders. As has been pointed out: "In view of management's general fiduciary capacity, perhaps it would be preferable as a matter of public policy to allow the decisions as well as the information upon which they were based to stand on their merits instead of permitting management to hide behind the attorney-client privilege."[36] To give a minority shareholder access to the corporation's attorney-client communications is to make more effective the accountability to him of the corporation's managers, who are supposed to be working for him and to be loyal to him but who so often take action adverse to his interests.

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33. *Cited in* Goldstein v. Lees, 46 Cal. App. 3d 614, 622, 120 Cal. Rptr. 253, 258 (1975).

34. In a recent federal derivative suit, the court after a careful analysis of the potential conflict of interest between the individual and corporate defendants concluded that the "ethical considerations convincingly establish that in a derivative suit the better course is for the corporation to be represented by independent counsel from the outset, even though counsel believes in good faith that no conflict of interest exists." Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 216 (N.D. Ill. 1975). *See generally* W. Cary, Cases and Materials on Corporations 911-14 (4th ed. unabr. 1969); Note, *Independent Representation for Corporate Defendants in Derivative Suits, supra* note 32.

35. *See* F. O'Neal, Oppression of Minority Shareholders § 7.13 (1975).

36. Note, *Evidence—Good Cause and the Attorney-Client Privilege in Shareholder's Suits,* 49 N.C. L. Rev. 802, 807 (1971). "Under [Professor Wigmore's test requiring a balancing of 'injury' against 'benefit derived'], a balance already delicate when the client is an individual is made even more so because of the danger of abuse in the corporate setting and the special fiduciary role of corporate management." *Id.* at 808.

The importance that is to be attached to the fiduciary duties owed by corporate officers to minority shareholders in determining whether the attorney-client privilege applies to communications between corporate officers and the corporation's attorney is illustrated by an interesting federal case.[37] Apparently no court had dealt with the precise fact situation before. Company A was in the process of acquiring control of Company B by purchasing controlling stock in B from the estate of Company B's founder, X. On May 16, by the vote of X's executor, Company A's senior vice president, Y, was installed as president and chairman of the board of Company B. On June 6 Company A purchased Company B's assets and the stock held by X's estate. Plaintiff, a former chief operating officer and director of Company B, brought suit under the federal securities laws, claiming that he had a contract to purchase Company B and that Company A and X's family and executor had conspired to breach his contract rights. At an oral deposition, Y refused to answer plaintiff's questions about conversations between Y and Company A's attorney between May 16 and June 6 concerning Company A's asquisition of Company B. Y Claimed that the conversations were shielded by the attorney-client privilege, as Y was still an officer of Company A and the conversations were communications between Y and that corporation's attorney about the corporation's legal affairs. Weighing the possible injury to management and shareholders who were not parties to the action against the benefits to be obtained by plaintiff, the court decided in favor of disclosure. The court stated that "[t]he important consideration was that management's duties gave the shareholders a sufficient interest in knowing its legal communications to outweigh the interests served by confidentiality. That interest is even stronger where an executive's communications have been with counsel for a party whose interests are potentially adverse to those of the executive's shareholders, as here."[38] Y was under a continuing duty to plaintiff between May 16 and June 6, the court said, and as long as that duty continued "so did the concomitant interest" of the Company B shareholders in knowing Y's "legal communications concerning the future of their company."[39] In weighing the pro's and con's of disclosure, the court took into consideration that plaintiff's claim contained substantial allegations of wrongful action by Y and others, that plaintiff had clearly identified the disclosures sought, and that the information sought was not available elsewhere.[40]

37. Bailey v. Meister Brau, Inc., 55 F.R.D. 211 (N.D. Ill. 1972).

38. *Id.* at 213-14.

39. *Id.* at 214.

40. Another attorney-client privilege issue was before the court in this case. Company B's lawyer had "testified . . . that he had been retained by [Company A] subsequent to the acquisition [of Company B], in connection with its purchase of a foreign company, but that he never received any money or promise of money from anyone other than [X's] estate for any work [he did in Company A's takeover of Company B]. . . . Plaintiff's position [was] that [the attorney's] fees from [Company A] may have been a reward for improper cooperation in the [takeover of Company B]." The attorney refused to answer questions about the amount of his

EXCEPTIONS TO THE PRIVILEGE: THE "JOINT ATTORNEY"

Even if a court cannot be persuaded to deny the attorney-client privilege in a suit brought by a shareholder, the attorney representing the shareholder may be able to gain access to attorney-client communications by taking advantage of established exceptions to the privilege, some of which become applicable with considerable frequency in shareholder litigation. The following paragraphs outline these exceptions and explain how a minority shareholder's lawyer can use them.

A long-established exception to the attorney-client privilege, the "joint attorney" exception,[41] provides some support for precluding the corporation from asserting the privilege in a suit brought by a shareholder. The "joint attorney" exception is stated by Wigmore as follows: "[W]hen the *same attorney acts for two parties* having a common interest, and each party communicates with him . . . the communications . . . are not privileged in a controversy between the two original parties, inasmuch as the common interest and employment forbade concealment by either from the other."[42] An attorney employed by a corporation is, of course, not strictly a "joint attorney" of the corporation and suing shareholders. But at least some of the situations in which the "joint attorney" exception has been applied provide analogies for denying the privilege in a controversy between the corporation and some of its shareholders. For example, in litigation between partners the privilege has been denied to communications by one of the partners to the firm's attorney.[43] Further, the reason giving rise to the "joint attorney" exception applies, at least in part, to shareholder litigation when the privilege is invoked to deny access to communications to and from the corporation's attorney. A corporation's shareholders have an interest in the corporation which justifies their having access to communications about its affairs. An attorney employed by a corporation should serve not just the corporate entity but the shareholders as a group. His efforts should be exerted for the benefit of all. This view has been challenged as inconsistent with the concept of corporate entity,[44] but the obvious answer lies in the well-established proposition that "the separate personality of a corporation . . . will be dis-

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fees from Company A or the existence of any memorandum setting forth his agreement with Company A. The court ordered the attorney to respond to plaintiff's questions, holding that "[i]n the absence of unusual circumstances, the amount of an attorney's fee and the conditions of his employment do not come within the attorney-client privilege." *Id.* at 214.

41. *See* Grand Trunk W.R.R. v. H.W. Nelson Co., 116 F.2d 823, 835, *rehearing denied* 118 F.2d 252 (6th Cir. 1941); Benson v. Custer, 236 Iowa 345, 351-52, 17 N.W.2d 889, 892 (1945); Jenkins v. Jenkins, 151 Neb. 113, 36 N.W.2d 637 (1949).

42. 8 J. Wigmore § 2312, at 603-04.

43. Billias v. Panageotou, 193 Wash. 523, 76 P.2d 987 (1938) (in an action for dissolution of partnership communications which had been made to the partnership attorney were not privileged).

44. *See* Burnham, *supra* note 12, at 912.

regarded or 'pierced' whenever the corporate form is employed to evade an obligation, . . . perpetrate a fraud or crime, or gain an unjust advantage or commit an injustice."[45]

EXCEPTIONS: COMMUNICATIONS FOR PURPOSE OF COMMITTING CRIME OR FRAUD

A firmly established exception to the attorney-client privilege "is that communications made by a client to his attorney during or before the commission of a crime or fraud for the purpose of being guided or assisted in its commission are not privileged."[46] The courts appear to be gradually broadening this exception. A federal district court has indicated that the exception covers communications "for the purpose of committing a crime *or tort*;"[47] and the Court of Appeals for the Fifth Circuit has commented that it does "not consider unavailability of the privilege to be confined to the narrow ground of prospective criminal transactions. The differences between prospective crime and prospective action of questionable legality, or prospective fraud, are differences of degree, not of principle."[48] Indeed, in the Fifth Circuit the privilege seemingly "may be overcome, not only where fraud or crime is involved, but also where there are other substantial abuses of the attorney-client relationship."[49]

45. 1 F. O'Neal, Close Corporations: Law and Practice § 1.09a (2d ed. 1971).

46. Hyde Constr Co. v. Koehring Co., 455 F.2d 337, 342 (5th Cir. 1972). *See* Union Camp Corp. v. Lewis, 385 F.2d 143 (4th Cir. 1967); Pollock v. United States, 202 F.2d 281 (5th Cir. 1953); United States v. Bob, 106 F.2d 37 (2d Cir.), *cert. denied,* 308 U.S. 589 (1939); SEC v. Harrison, 80 F. Supp. 226 (D.D.C. 1948), *modified in part* 184 F.2d 691 (D.C. Cir. 1950), *vacated as moot and remanded for dismissal,* 340 U.S. 908 (1951). *See also* ABA Code of Professional Responsibility, Disciplinary Rule 7-102(B)(1).

47. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass 1950) (dictum) (emphasis supplied). *Accord* Uniform Rule of Evidence 26 (1953 version). For other decisions that have adopted the "crime or tort" formulation in dictum, see Pfizer Inc. v. Lord, 456 F.2d 545, 549 (8th Cir. 1972); International Tel. & Tel. Corp. v. United Tel. 60 F.R.D. 177 (M.D. Fla. 1973); Dura Corp. v. Milwaukee Hydraulic Prods., Inc., 37 F.R.D. 470, 471 (E.D. Wis. 1965); Paper Converting Mach. Co. v. FMC Corp., 215 F. Supp. 249, 251 (E.D. Wis. 1963). *But see* proposed Rule of Evidence for United States Courts and Magistrates 503(d)(1) (crime or fraud) (the proposed Rules of Evidence, 56 F.R.D. 183, were transmitted to Congress by the Supreme Court on November 20, 1972; although the rules were not adopted by Congress they will probably serve as a guide for the federal courts).

48. Garner v. Wolfinbarger, 430 F.2d 1093, (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971).

> We recognize the much stronger policy justifications behind the confidentiality of communications with one who is already a wrongdoer and seeks legal advice appropriate to his plight as opposed to one who seeks advice concerning proposed future conduct and, having later acted, seeks to maintain the secrecy.

Id. 1103, n. 20.

49. International Tel. & Tel. Corp. v. United Tel., 60 F.R.D. 177, 180 (M.D. Fla. 1973). In Burlington Indus. v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974) (not a shareholder litigation case) the court adhered to the traditional requirement of a showing of crime or fraud, stating that the privilege would not be "abrogated by allegations, however well supported, of misuse." *Id.* at 41.

This expanding exception to the attorney-client privilege is available to plaintiffs in a high percentage of shareholder suits. Certainly plaintiffs in shareholder litigation should have at least as much opportunity as plaintiffs in other kinds of litigation to overcome the attorney-client privilege by a *prima facie* showing that the client's communications to the lawyer were made in contemplation of crime, fraud or tort.[50] Plaintiffs are aided in this endeavor by the willingness of the courts "freely [to] use *in camera* inspection or oral examination"[51] in order to determine the appropriateness of the claim of privilege.[52] Often shareholder complaints involve alleged violations by controlling shareholders, corporate directors, officers of federal or state securities laws or other criminal conduct. In other instances, shareholder grievances involve acts by controlling shareholders or corporate executives which defraud the minority shareholders or the corporation. The plaintiff in a shareholder's suit perhaps increases the chances of a court's applying the crime-fraud exception if he alleges a *conspiracy* by controlling shareholders, corporate directors, and officers, and the corporation's lawyers and accountants to defraud him.[53]

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50. Courts in the United States have not followed the older English rule that the mere charge of illegality overcomes the privilege. Many American cases stress the necessity of plaintiffs' making out a *prima facie* case of criminal activity or fraud as a prerequisite to setting aside the privilege. *See, e.g.,* Clark v. United States, 289 U.S. 1, 14 (1933) (mere charge of wrongdoing without more will not avail; "[t]here must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in"); Union Camp Corp. v. Lewis, 385 F.2d 143, 144 (4th Cir. 1967) ("The attorney-client privilege is withdrawn upon a *prima facie* showing that the lawyer's advice was designed to serve his client in commission of a fraud or crime"); United States v. Bob, 106 F.2d 37, 40 (2d Cir.), *cert. denied,* 308 U.S. 589 (1939) (the court emphasized the necessity of plaintiffs' making out a prima facie case, stating that "the mere assertion of an intended crime or fraud is not enough"): The courts' interpretations of what constitutes a "prima facie case" have not been uniform. *See, e.g.,* Pfizer Inc. v. Lord, 456 F.2d 545, 549 (8th Cir. 1972) ("sufficient evidence to sustain a finding that the challenged communications were made in furtherance of a crime or tort"); Pollock v. United States, 202 F.2d 281, 286 (5th Cir. 1953) ("evidence . . . introduced giving color to the charge") SEC v. Harrison, 80 F. Supp. 226, 232 (D.D.C. 1948) (evidence sufficient "to reasonably justify a verdict of wrongdoing which could be sustained").

51. Garner v. Wolfinbarger 430 F.2d 1093, 1104 (5th Cir. 1970) (emphasis original). *See* text accompanying note 25 *supra.*

52. Although the Fifth Circuit Court of Appeals suggested in *Garner, id.,* that the trial court use *in camera* inspection of alleged privileged communications, apparently the lower court did not do so before or during the subsequent evidentiary hearing. Garner v. Wolfinbarger, 56 F.R.D. 499 (S.D. Ala. 1972). *See* text accompanying notes 25-26 *supra.* Other courts have used the procedure. *See, e.g.,* Xerox Corp. v. International Bus. Mach. Corp., 64 F.R.D. 367 (S.D.N.Y. 1974) (each party ordered to submit to a Special Master *in camera* one copy of each "privileged" or "work product" document sought by the other party); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974) (use of Special Master); International Tel & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177 (M.D. Fla. 1973) (the court ordered *in camera* inspection of answers to interrogatories and documents in question).

53. *See* F. O'Neal, Oppression of Minority Shareholders § 7.10 (1975). *See also* Proposed ABA Statement of Policy Regarding Lawyers' Responsibilities and Liabilities

WHICH CORPORATE AGENTS SPEAK AS THE "CLIENT"?

As a corporation can act only through agents, a question arises as to which corporate agents, when they communicate with the corporation's attorney, speak on a privileged basis. Are communications from any corporate agent covered by the privilege or only communications from certain agents? The courts and the commentators have given various answers.[54] At one time some courts held that a communication could come from any corporate officer or agent and still be privileged.[55] More recently the courts have developed two tests for determining which corporate agents may speak as the "client." A number of lower federal courts and some state courts have formulated a so-called "control group test,"[56] under which a corporation can claim a privilege only if the corporate officer or employee communicating information to the attorney has the power to decide, or is an "authorized member" of the group with power to decide, "any action which the corporation may take upon the advice of the attorney."[57] Under this test, if a corporate employee at the time he communicates information to the corporation's attorney is not in a position to participate in the decision in aid of which the attorney's advice is being sought, his communications are not protected by the attorney-client privilege. On the other hand, the Court of Appeals for the Seventh Circuit has laid down a more expansive test which sustains the privilege when the employee's communication is made "at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment."[58]

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when Advising with Respect to Laws Administered by the SEC, 31 Bus. Law. 471 (1975).

54. *See* Pye, *Fundamentals of the Attorney-Client Privilege,* 15 Prac. Law., 15, 18-19 (Nov. 1969); Annot., 9 A.L.R. Fed. 685 (1971).

55. Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 795 (D. Del. 1954); United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950).

56. Congoleum Indus. v. GAF Corp., 49 F.R.D. 82 (E.D. Pa. 1969); Hogan v. Zletz, 43 F.R.D. 308 (N.D. Okla. 1967), *aff'd sub nom* Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963) (corporation's officers, directors and department heads considered part of "control group"); Day v. Illinois Power Co., 50 Ill. App.2d 52, 199 N.E. 2d 802 (1964). *See* Note, *supra* note 7 (supporting the test). For criticism of the test, see Burnham, *supra* note 2 at 545-548 (1968); Heininger, *supra* note 8 at 384-86 (1965).

57. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied,* 372 U.S. 943 (1963). For cases giving a broader definition than the "control group" test of who is a representative of a corporate client, see United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950); Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792 (D. Del. 1954); D.I. Chadbourne, Inc. v. Superior Court, 60 Cal.2d 723, 36 Cal. Rptr. 468, 388 P.2d 700 (1964).

58. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) *aff'd by an equally divided court,* 400 U.S. 348, *reh. denied,* 401 U.S. 950 (1971). The court commented that a corporation's employee,

This decision was affirmed by an evenly divided Supreme Court.[59] As this evenly divided affirmance is without effects as a precedent, both standards continue to be applied.[60]

TERMINATION OF PRIVILEGE BY DISCLOSURE OR WAIVER

When the attorney-client privilege is invoked, the plaintiff may be able to defeat the claim of privilege by showing that the communications were not intended to be confidential or have not actually been treated with confidentiality or that the privilege has been waived. The attorney-client privilege applies only to confidential communications. Communications otherwise covered by the attorney-client privilege are not privileged if the client and attorney disclose or intend to disclose to third persons the information contained in the communications.[61] Thus communications made by a client to his attorney with the understanding that the attorney is to impart to a third party the information contained in the communications are not privileged.[62] Further, a communication between attorney and client privileged at the time made may lose its privilege because of subsequent waiver or loss of confidentiality. For example, where a corporation permitted government repre-

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> though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is a performance by the employee of the duties of his employment.

Id. The court, however, apparently would deny the privilege if the communication is on a matter as to which the communicating employees "are virtually indistinguishable from bystander witnesses," *id.* at 491, or if the information which the employees conveyed to the attorney was information which the employees obtained "fortuitously." *Id. See also* Comment, *The Privileged Few: The Attorney-Client Privilege as Applied to Corporations,* 20 U.C.L.A. L. Rev. 288 (1972) (suggesting a solution combining what the author asserts are the favorable features of the control group test and the Harper & Row test).

59. 400 U.S. 348, *reh. denied,* 401 U.S. 950 (1971).

60. *Compare, e.g.,* Hasso v. Retail Credit Co., 58 F.R.D. 425 (E.D. Pa 1973) (adopting the Seventh Circuit test) *with* Eutectic Corp. v. Metro, Inc., 61 F.R.D. 35 (E.D.N.Y. 1973) *and* Burlington Indus. v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974) (requiring the control group test).

61. Radio Corp. of Am. v. Rauland Corp., 18 F.R.D. 440 (N.D. Ill. 1955); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 E.D. Mich. 1954).

> A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

Proposed Rule of Evidence for United States Courts and Magistrates 503(a)(4) (transmitted to Congress by the Supreme Court on November 20, 1972, but not adopted by Congress; see note 47 *supra*). Cf. American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 90 (D. Del. 1962) (receipt of information from other sources than the client).

62. Radio Corp. of Am. v. Rauland Corp., 18 F.R.D. 440 (N.D. Ill. 1955); Rediker v. Warfield, 11 F.R.D. 125 (S.D.N.Y. 1951). *Cf. In re* Ruos, 159 F. 252, 256-57 (E.D. Pa. 1908) (information received from third parties).

sentatives to examine its files, including communications to and from its "house counsel," any privilege which might have attached to those communications was lifted by the corporation's voluntarily making them available.[63] Similarly, a plaintiff-witness waives the privilege as to documents by using them to refresh his recollection.[64] Indeed, the mere filing of privileged documents in the corporation's general files may destroy the privilege.[65] On the other hand, disclosure of privileged information during settlement negotiations waives only such information as is disclosed during negotiations;[66] it does not open up other lawyer-client communications to discovery.

The requirement that communications must be kept confidential in order to retain their confidential status is difficult to comply with in a large corporation. The nature and structure of the modern public-issue corporation normally lead to distribution of some attorney communications to a considerable number of people within the corporate organization. "To be effective, communications to and from the 'lawyers' seem to require broad distribution within the company."[67] The precise extent to which documents containing legal advice from a corporation's attorney or communications to him from corporate employees may be circulated within the corporate organization without loss of the attorney-client privilege is far from settled.[68] Two federal district courts have recently held that:

63. United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464 (E.D. Mich. 1954).

64. Bailey v. Meister Brau, Inc., 57 F.R.D. 11 (N.D. Ill. 1972).

65. *See id.* at 465 (dictum). *Cf.* Cote v. Knickerbocker Ice Co., 160 Misc. 658, 290 N.Y.S. 483 (N.Y. Mun. Ct. 1936).

66. Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 45 (D. Md. 1974), International Business Mach. Corp. v. Sperry Rand Corp., 44 F.R.D. 10 (D. Del. 1968). In American Optical Corp. v. Medtronic, Inc., 56 F.R.D. 426, 431 (D. Mass. 1972) the court states:

> Negotiated settlements are to be encouraged, and bargaining and argument precede such settlements. Clients and lawyers should not have to fear that positions on legal issues taken during negotiations waive the attorney-client privilege so that the private opinions and reports drafted by an attorney for his client become discoverable.

67. Withrow, *How to Preserve the Privilege,* 15 Prac. Law. 30, 34 (Nov. 1969).

68. *See* Natta v. Hogan, 392 F.2d 686, 693 (10th Cir. 1968); United States v. Aluminum Co. of Am., 193 F. Supp. 251 (N.D.N.Y. 1960); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1964) (dictum); Kobak, *supra* note 6 at 371-372; Comment, *The Lawyer Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment,* 56 Nw. U. L. Rev. 235, 248 (1961) (suggesting that disclosure should be permitted within the corporation on a "need to know" basis without destroying the privilege). *Cf.* 8 In 1 Pet Prods., Inc. v. Swift & Co., 218 F. Supp. 253 (S.D.N.Y. 1963); *see also* United States v. Merrell, 303 F. Supp. 490 (N.D.N.Y. 1969) (as the privilege does not apply to materials intended to be included in a tax return, a court will order the production of income and expense summaries prepared by the client and the attorney's work papers made in preparing the return); *cf. In re* Colton, 201 F. Supp. 13 (S.D.N.Y. 1961), *aff'd* 306 F.2d 633 (2d Cir. 1962), *cert. denied,* 371 U.S. 951 (1963) (books and papers turned over to an attorney by a taxpayer-client are not privileged, but hand written materials prepared by the client to use in consulting with the attorney are privileged). *But see* United States v. Schlegel, 313 F. Supp. 177, 179 (D. Neb. 1970). "[A] more realistic rule

> . . . where the dominant purpose of the communication is to facilitate the rendition of legal services to the client, and the communication itself or the substance thereof is transmitted to the lawyer shortly thereafter, the fact that the communication, at its inception, is within the corporate structure rather than directly with the attorney does not automatically defeat the privilege.[69]

As the attorney-client privilege belongs to the client, the client is the appropriate party to waive it. The attorney has no right to disclose confidential communications without the client's consent. However, a corporation's attorney, especially a member of the corporation's law department, usually has implied authority from the client to disclose confidential information, thus destroying the privilege, or to perform other acts that will waive the privilege. For example, insertion by the corporation's lawyer of a reference to a privileged communication in pleadings he files in court has been held to constitute a waiver of the privilege.[70]

INAPPLICABILITY OF PRIVILEGE TO BUSINESS ADVICE

Business advice given by a lawyer is not protected by the attorney-client privilege.[71] "The privilege applies to protect only those communications prompted by the need for advice on legal matters; no privilege is available if the firm seeks only nonlegal advice."[72] Thus a question may arise as to whether a communication from a corporation is legal and privileged or nonlegal and not privileged.[73] When a lawyer's advice relates to a mixture of business and facts, as it frequently does, the tendency of the courts is to preserve the privilege. Judge Wyzanski has commented:

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would be that the client intends that only as much of the information will be conveyed to the government as the attorney concludes should be, and ultimately is, sent to the government. In short, whatever is finally sent to the government is what matches the client's intent").

69. Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 39 (E.D.N.Y. 1973). Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 39 (D. Md. 1974).

> Those documents which are prepared at the direction of members of the control group to aid counsel in rendering legal assistance to the corporation, at the express or implied request of counsel, and which are primarily legal in nature, will not fall outside the scope of the attorney-client privilege merely because at their inception the communications were intracorporate.

Id.

70. *See* Smith v. Bentley, 9 F.R.D. 489 (S.D.N.Y. 1949). For possible waiver of the privilege by the attorney's discussion with other attorneys, *see* Note, *Waiver of Attorney-Client Privilege on Inter-Attorney Exchange of Information*, 63 Yale L. J. 1030 (1954).

71. Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 794 (D. Del 1954).

72. Note, *supra* note 7 at 428. *See also* Pye, *supra* note 54 at 20; 8 Wigmore §§ 2300-12.

73. *See, e.g.*, Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792 (D. Del. 1954); United States v. Vehicular Parking, Ltd., 52 F. Supp. 751 (D. Del. 1943).

> The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the public interest that the lawyer should regard himself as more than predicter of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.[74]

Nevertheless, where advice given by a lawyer is predominantly business in nature, a court may very well decide that the privilege does not protect it.[75] Whenever "the nonlegal reasons for communicating the information to the lawyer are strong enough that the communication would occur regardless of privilege, the privilege cannot be justified as an inducement to communication."[76]

COMMUNICATIONS TO INSIDE COUNSEL

Although members of corporation law departments ("house counsel" or "inside counsel") are usually considered "attorneys" for purposes of the attorney-client privilege,[77] communications from corporate officers or other employees seeking advice from a member of the corporation's own legal department are perhaps more likely to be classified by the courts as "business" communications, not subject to the privilege, than are communications between corporate employees and independent, outside counsel.[78] In the

74. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950). "A lawyer, in private practice or as house counsel, must have regard for the business consequences of his advice or he is not doing his job properly." Brereton, *Abrogation of the Corporate Privilege in Stockholder Suits,* 15 Prac. Law, at 24, 28 (Nov. 1969).

75. *See, e.g.,* Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794 (D. Del. 1954).

76. Note, *supra* note 7 at 428.

77. Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 36 (D. Md. 1974); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 360 (E.D. Mass. 1950). *But cf.* American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 89 (D. Del. 1962); Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792 (D. Del. 1954). In *Burlington Industries* the court held that for the purposes of the attorney-client privilege, a person can be both attorney and client for different communications.

> [I]t is possible for "in-house" counsel to be the sole counsel with respect to certain advisory communications, and co-counsel with outside attorneys for other communications. It is also possible for 'in-house' counsel, as a member of the corporate control group, to personify the corporate client in seeking legal advice from "outside" counsel.

65 F.R.D. at 37.

78. In theory, courts agree the communications (sic) to or from house counsel are as privileged as communications from other counsel. In practice, however, many courts recoil from attaching the privilege as freely to house counsel because of the high probability that house counsel will be dispensing business, rather than legal advice.

first place, some courts, perhaps improperly, are inclined to look upon an attorney employed in a corporate law department as being more a businessman than a lawyer, and they are reluctant to treat his activity as legal work. As the inside counsel is "located at the corporation's office and paid directly by the corporation, [he] starts out looking more like a businessman and, as a result, finds it harder to convince a court that in particular instances he was acting as a lawyer."[79] Furthermore, corporate executives more often call upon inside lawyers than outside lawyers for business advice. Members of corporate law departments, in the course of giving legal advice, frequently participate in company conferences at which business decisions are made. Inside lawyers "can rarely confine themselves to purely legal matters. Questions of policy, as well as executive guidance for matters that are partly legal, often fall within their domain."[80]

COMMUNICATIONS TO LAWYER-MANAGERS

A corporation's lawyer often become a part of its management team. The general counsel of a company may become a member of the board of directors and serve on committees of the board. He may even become an officer, typically a vice president. Indeed, in some companies, usually smaller companies, a lawyer acts as both general counsel and president. If a corporation's lawyer plays on the management team, courts are somewhat more ready to deny the protection of the attorney-client privilege to communications between him and other corporate employees. As a leading member of the New York City Bar has observed:

Kobak, *supra* note 7 at 353.

> If inside counsel is negotiating a contract on behalf of his corporation, the instructions which the board of directors may give him as to the terms to be incorporated in the negotiations probably are not privileged. However, if during the negotiations the board of directors requests the advice of counsel as to the legality or tax consequences of certain provisions to be included, this communication and the opinion of the attorney is privileged because he is wearing his "lawyer's suit."

Heininger, *supra* note 8 at 381.

79. Burnham, *supra* note 2 at 543. *See also* American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 89 n. 20 (D. Del. 1962) (memorandum prepared by patent department employee was held not legal advice, although it might have been "if outside lawyers were performing the same task"); United States v. Swift & Co., 24 F.R.D. 280 (N.D. Ill. 1959) (holding that material prepared by house counsel in the ordinary course of business is not included in his work product: for purposes of the "work product" rule, even though litigation was pending at the time the material was prepared).

80. Simon, *The Attorney Client Privilege As Applied to Corporations,* 65 Yale L.J. 953, 969 (1956). For the possible effect on the attorney-client privilege of the way in which a corporate law department is organized, for example, whether the law department is "divisionalized," with lawyers in the department "reporting to" the managers of "autonomous" divisions in the enterprise, see Schaefer, *The Attorney-Client Privilege in the Modern Business Corporation,* 20 Bus. Law. 989 (1965).

> . . . it is very difficult for an attorney to be a "lawyer-manager" without losing, sooner or later, and perhaps imperceptibly, his professional status. It takes very little imagination to conclude, and available authorities confirm, that such loss of the professional relationship has been and will be, increasingly relied upon by the courts to curtail the attorney-client privilege in favor of more "liberal" discovery notions.[81]

A claim of attorney-client privilege when corporate counsel are also members of management additionally raises related problems of conflict of interest and fiduciary duty. Clearly, corporate officers and directors owe a high fiduciary duty to the corporation and its shareholders.[82] Whenever a corporation, in a sense, acts as its own counsel through lawyer-members of its management team, the assertion of the lawyer-client privilege to block inquiry into management's performance of its duties is singularly inappropriate. A recent, well-reasoned federal case[83] examines the dual lawyer-control group role and concludes:

> When dealing with the corporation's business, the policy of the law imposing exacting fiduciary duties and responsibilities upon the corporation's officers and directors must override the assertion of confidentiality and privilege in reliance on the fact that the individuals also happen to be lawyers.[84]

In the context of such a dual role, the requisite professional confidential relationship is highly unlikely. "When the attorney and the client get in bed together as business partners, their relationship is a business relationship, not a professional one, and their confidences are business confidences unprotected by a professional privilege."[85]

COMMUNICATIONS TO ACCOUNTANTS

Communications between corporate officials and accountants are even more readily subject to discovery than are communications between corporate officials and attorneys. Under federal law and at common law no privilege exists between an accountant and his client which would preclude production of an accountant's work papers or his being compelled to testify.[86] An accountant-client privilege has been created in some states by

81. *Id.* at 995. *See also* United States v. Vehicular Parking, Ltd., 52 F. Supp. 751 (D. Del. 1943) (communication of business advice by attorney, who was also general manager of client, held not privileged).

82. *See* text accompanying notes 35 and 36 *supra.*

83. Federal Savings and Loan Ins. Corp. v. Fielding, 343 F. Supp. 537 (D. Nev. 1972).

84. *Id.* at 545.

85. *Id.* at 546.

86. Sale v. United States, 228 F.2d 682 (8th Cir.), *cert. denied,* 350 U.S. 1006 (1956); Falsone v. United States, 205 F.2d 734 (5th Cir.), *cert. denied,* 346 U.S. 864 (1953); *In re* Colton, 201 F. Supp. 13, 16 (S.D.N.Y. 1961), *aff'd* 306 F.2d 633 (2d Cir. 1962), *cert. denied,* 371 U.S. 951 (1963); United States v. Boccuto, 175

statute,[87] but in a leading case interpreting a Colorado statute which protected from disclosure confidential communications between accountant and client, the court held that the statute does not apply in a suit brought by shareholders of the corporation.[88] The court commented as follows: "Certified public accountants hired by a corporation are hired for the benefit of all of its stockholders and such employment forbids concealment from the stockholders of information given the accountant by the corporation."[89] Furthermore, even if an accountant-client privilege exists under state law and applies to actions brought in state courts by shareholders of the corporate client, a minority shareholder can defeat the privilege if he can sue in a federal court and assert claims predicated upon alleged violations of federal law (e.g., the federal securities laws), because then the existence or non-existence of a privilege will be determined by federal law, which, as has been pointed out, does not recognize an accountant-client privilege.[90]

In some circumstances, communications to or from a corporation's accountant may come within the attorney-client privilege.[91] If communications have been transmitted "*in confidence* for the purpose of obtaining *legal* advice *from the lawyer*,"[92] the attorney-client privilege shields the communications from disclosure. The communications are not privileged if the advice sought relates not to legal but to accounting services, or if the accountant,

F. Supp. 886 (D.N.J.), *appeal dismissed for lack of juris.*, 274 F.2d 860 (3d Cir. 1959). *See generally* Note, *Privileged Communications—Accountants and Accounting*, 66 Mich. L. Rev. 1264 (1968).

87. Driver, *The Inside General Counsel's Response to Auditors' Inquiries*, 30 Bus. Law. (March 1975) 217, 219 n. 4 states that seventeen states provide by statute for an accountant privilege: Ariz., Colo., Fla., Ga., Ill., Ind., Iowa, Ky., La., Md., Mich., Mo., Mont., Nev., N.M., Penn., and Tenn. *See, e.g.*, Ariz. Rev. Stat. § 32-749 (Supp. 1975); Colo. Rev. Stat. § 13-90-107(f) (1973).

88. Pattie Lea, Inc. v. District Court, 161 Colo. 493, 423 P.2d 27 (1967). *See also* W. Dennis & Sons, Ltd. v. West Norfolk Farmers' Manure & Chem. Co-Op Co., [1943] 1 Ch 220.

89. 161 Colo. at 498-99, 423 P.2d at 30.

90. Baylor v. Mading-Dugan Drug Co., 57 F.R.D. 509 (N.D. Ill. 1972). In Basch v. Talley Indus., Civil No. 70-4144 (S.D.N.Y., filed Nov. 1, 1971) a private action under the federal securities laws in which the defendant corporation invoked an accountant-client privilege created by an Arizona statute, Judge Ryan stated:

> [T]he claims asserted in this action are predicated upon alleged violations of a federal statute which has nationwide application and is not subject to local law, which is not uniform. I hold that the admission of evidence and the extent of any privilege is to be determined by federal law, which does not recognize a privileged confidential relationship between an accountant and one who employs him.

Cf. United States v. Finley, 434 F.2d 596 (5th Cir. 1970); Colton v. United States, 306 F.2d 633 (2d Cir. 1962).

For a discussion of the applicable law of privilege in the federal courts, see Kobak, supra note 7 at 341-52.

91. *See e.g.*, United States v. Brown, 478 F.2d 1038 (7th Cir. 1973); United States v. Judson, 322 F.2d 460 (9th Cir. 1963); United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); United States v. Schmidt, 343 F. Supp. 444 (M.D. Pa. 1972); United States v. Cote, 326 F. Supp. 444 (D. Minn. 1971).

92. United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (emphasis original).

not the lawyer, provides the desired information.[93] The courts have recognized that some arbitrary lines may be drawn; but, "that is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the . . . [attorney-client privilege] under conditions where the lawyer needs outside help."[94]

93. United States v. Brown, 478 F.2d 1038 (7th Cir. 1973); United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). In *Brown,* the accountant's handwritten notes prepared at a meeting attended by client, accountant and attorney were held not privileged where accountant had been retained by client not lawyer, accountant's presence had been requested by client, and there was insufficient showing that notes represented attorney-client communication.

94. United States v. Kovel, 296 F.2d at 922.