Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited

Stephen A. Saltzburg
CORPORATE ATTORNEY-CLIENT PRIVILEGE IN SHAREHOLDER LITIGATION AND SIMILAR CASES: GARNER REVISITED

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I. INTRODUCTION

It is frequently asserted that privileges must be narrowly construed, since they operate in derogation of the “search for truth” undertaken by courts.¹ Such assertions are made by the highest court in the land,² which is cited by lower courts with apparent zeal.³ This is not to say that the Supreme Court and lower courts never create new privileges⁴ nor adopt an expansive view of established privileges, for they sometimes do.⁵ New privileges struggle to gain

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acceptance, however, and established privileges are not immune from judicial winnowing. I have noted elsewhere that it is understandable that judges, especially appellate judges, would strain to limit the scope of privileges. Judges hear privilege claims in the course of litigation in which it appears possible that a party might be denied evidence, perhaps crucial evidence, if a privilege is sustained. No judge is likely to be enthusiastic about the prospect that a party who might win (or worse, who should win) if the court could consider all available evidence, might lose as a result of being unable to secure evidence falling within the protective cover of a privilege. Appellate courts generally hear claims only from those litigants who have already lost and who complain about evidence that might have been obtained. It is therefore not difficult to understand appellate sympathy for such litigants.

Judges are not alone in their reluctance to embrace privileges enthusiastically. Legal commentators since Wigmore have viewed privileges with suspicion, and there are few writers who advocate an expansive attitude toward privileges. Wigmore made the argument that has carried the day among legal scholars: Privileges involve a loss of evidence for triers of fact; that loss imposes costs upon the judicial system; and those costs ought not to be borne unless it can be demonstrated that the benefits exceed them. Wigmore and other writers found the costs to be readily apparent and placed the burden on the advocates of privileges to demonstrate that the benefits sufficiently outweigh the costs so as to justify the privileges.

It might well be too late in the game to suggest that Wigmore was wrong and that the commentators and courts who quote, cite, and rely upon him have been misled. Since so many cases and arti-
icles begin their analyses with the Wigmore four-part balancing test, a suggestion that it is not well reasoned and that the references to it have been too readily made has the potential to offend so many people that it might not be worth it. Whether it is worth it or not will soon be clear, since I begin with the assertion that Wigmore was wrong—demonstrably wrong.

I do not suggest, however, that Wigmore was entirely incorrect. There are reasons to question whether litigants should be denied some evidence when privilege claims are raised. Nevertheless, Wigmore made the mistake of focusing almost exclusively on balancing at the time of litigation, after privileged communications have already occurred (an ex post approach), and paid insufficient attention to the time before privileged communications have transpired (an ex ante approach). Despite this fact, few have questioned Wigmore's focus and, as a consequence, it has dominated the law of evidence.

I start my discussion with an explanation of the deficiencies in Wigmore's analysis. I then move to a discussion of attorney-client privilege and explain why it is justifiable. In the course of this explanation, I offer a rationale for the privilege and then briefly review why this rationale is essential for determining the proper scope of

14. Wigmore's balancing test is as follows:

General principle of privileged communications. Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception . . . four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Only if these four conditions are present should a privilege be recognized.

Id. Indeed, the most important case cited herein, Garner v. Woflinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971), begins its discussion of the merits of a corporate attorney-client privilege claim in a shareholder suit with Wigmore's balancing test. Id. at 1100.

15. I develop this point at greater length in Saltzburg, supra note 8, at 600 n.9, 605-12.

16. See id.

17. See infra notes 24-32 and accompanying text.

18. See infra notes 32-33 and accompanying text.
attorney-client privilege for corporations and other entities. Only when this is done can I then delineate the appropriate parameters of the corporate attorney-client privilege in shareholder and similar suits. During my analysis of this issue, I challenge the wisdom of the seminal case, \textit{Garner v. Wolfinbarger}, and argue that \textit{Garner} took the wrong path, which most courts have mistakenly followed ever since.

\textbf{II. The Costs Of The Attorney-Client Privilege}

Some clients seek legal advice or legal services from a lawyer because they are concerned about possible liability, criminal or civil, for events that have happened or might happen. Other clients seek legal assistance in bringing claims or in instituting proceedings to vindicate legal rights and to obtain compensatory or remedial relief. There are also clients who retain lawyers to provide services that have nothing, or almost nothing, to do with initiating, defending, or avoiding litigation.

For purposes of this discussion, the last class of clients is excluded. Those who seek legal assistance without contemplating involvement in, or actually becoming involved in, subsequent legal proceedings, litigation, or investigations generally receive no protection from the attorney-client privilege, for the privilege is triggered only when some tribunal seeks to discover the lawyer-client communications. If the client correctly believes that no tribunal will ever make the quest, there will be no reason for the client to rely upon or invoke the privilege. Of course, clients who are not involved in formal proceedings might well have as strong a desire as other clients to keep private any information they communicate to their lawyers and any details about what the lawyer has done or has been asked to do. The Model Code of Professional Responsibility and general principles of fiduciary duty provide this privacy by imposing obligations upon lawyers to protect their clients' secrets and trust. Lawyers are thus

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subject to discipline and liability for revealing any of their clients' confidential information. These client protections are related to, but independent of, the evidentiary attorney-client privilege. It is conceivable that a system might compel lawyers to supply to a tribunal information about their services, while merely barring lawyers from extrajudicially volunteering the same information. Nevertheless, our system happens to protect clients, both in and out of legal proceedings, with the evidentiary privilege as well as the general nondisclosure obligation imposed upon lawyers. My focus in this discussion will be solely on the privilege and, therefore, solely on clients who might have occasion to rely upon it.

Consider the position of a client who has some reason to believe that litigation, other proceedings, or an investigation might occur and that a tribunal might focus its attention upon the client. It is reasonable, even prudent, for the client to take steps to be in the best possible position before the tribunal. One step is to avoid saying or doing things that might produce an adverse reaction from the tribunal. If there were no privilege covering communications between client and lawyer, and if lawyers could freely be called to give testimony as to everything their clients said or did during the professional relationship, a client would be well advised to say and do nothing that, if later disclosed, might be taken in a negative light.

It is possible that clients might disclose to lawyers almost none of the information so freely disclosed in a privileged setting. Moreover, it is not only possible, but extremely likely, that clients would resist disclosing things that would appear to them as most apt to hurt them if discovered by others.23

Lawmakers, therefore, make a judgment when they establish an attorney-client privilege: they decide that they want to encourage clients to disclose information to their attorneys and that the privilege works to provide that encouragement. It is undeniably true that not only are we uncertain about what information clients would reveal to lawyers if there were no privilege, but we would be equally hard-pressed to prove that clients actually communicate more fully because there is a privilege. Moreover, we probably shall never know exactly what impact the privilege has upon willingness to communicate, because the privilege is of such vintage that no experiment in doing without it is to be expected. Hence, judgments about the effi-


cacy of the privilege in promoting communications must be intuitive, and lawyers' feelings about the privilege are largely affected by their own contacts with clients as well as by anecdotal reports from other lawyers.

Thus, as a result of having the privilege, lawyers can inform their clients that what they communicate in confidence for the purpose of obtaining legal services is generally privileged and will not be disclosed without the clients' consent. Therefore, lawyers are able to use the privilege to make their clients feel comfortable, and to suggest to their clients that they should speak freely without concern about suffering adverse effects as a result of having spoken. Clients can rely on this confidentiality when they speak to their counsel.

If the lawmakers who created the privilege are correct, clients will tell lawyers things that they might not otherwise say without a privilege. Thus, the privilege will actually generate communications that might never be made but for the existence of an attorney-client privilege. It is necessary to repeat that, absent a privilege, no one can prove these communications would have been suppressed. On the other hand, no one can prove the opposite either. The adoption of the privilege represents an educated guess about behavior. If it is a correct guess, then Wigmore is wrong in saying that the privilege is in derogation of the search for truth. He is wrong because he assumes that without the privilege the communications would have been exactly the same, which is the very assumption that lawmakers reject in adopting the privilege. Wigmore's mistake, as previously noted, was focusing exclusively on the impact of the privilege at the time of litigation. If we focus on how the privilege operates at the time that the lawyer and client meet, however, it is apparent—at least if there is any merit to the assumption regarding what causes lawmakers to create the privilege—that additional communications are generated as a result of having the privilege. Yet, whether these communications actually will result in more evidence being presented to a trier of fact is another question. The client's right to claim the privilege means that the additional communications might never be disclosed. Nevertheless, the client can waive the privilege and it is, therefore, possible that the additional information may ultimately be disclosed. In addition, at the very least, it is likely that in some cases a more complete and accurate version of the facts will be presented by a lawyer whose client is forthright than by a lawyer whose client hides
Whether disclosed or not at the time of litigation, no tribunal can demonstrate that had the client been denied a privilege, the additional communications would exist. The assumption of the privilege is that they would not. This means that no one can demonstrate that the attorney-client privilege causes a tribunal to lose evidence that would have been available to it were there no privilege. Upholding an attorney-client privilege claim signifies only that what is created through the privilege can be protected by it. In fact, even where clients do invoke the privilege they may still be compelled to answer questions, during discovery or other legal proceedings, about information of which they have knowledge; they may also be called upon to produce evidence they possess that might have bearing upon the dispute. The privilege only protects the actual communications between clients and their attorneys. Of course, individuals might be able to claim another privilege, such as the privilege against self-incrimination, which authorizes them to withhold from a tribunal information they possess. But if that other privilege can be claimed after the individual becomes a client, it could have been claimed before, and is not, therefore, enhanced by the recognition of an attorney-client privilege.

This discussion demonstrates that when the attorney-client privilege is properly understood, it reaches communications that are presumed to have been made precisely because the privilege exists. No tribunal is denied any evidence that it definitely would have been able to obtain simply because the privilege is recognized. It is not accurate, therefore, to say that the privilege operates in derogation of the search for truth. Such a statement focuses on the post-communications time period, while it is important, in understanding the privilege, to focus on the period before the communications are made.

24. See id.
25. The Supreme Court makes a similar point in Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . ").
26. Id.
27. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ").
28. That the attorney-client privilege neither adds to nor subtracts from the privilege against self-incrimination is evident in Fisher v. United States, 425 U.S. 391, 396-401 (1976) (compelled production of client's papers held by attorney does not implicate client's fifth amendment privilege from being compelled to produce them himself).
Thus, Wigmore tended to be too sweeping in his statements about privileges. He failed to distinguish the attorney-client privilege from those privileges that do deny tribunals evidence—evidence that plainly would be available without a privilege. The privilege against self-incrimination, for example, gives a person a right to refuse to answer any questions that might tend to incriminate him in any criminal proceeding. A criminal defendant has the right not to be called by the government to testify against himself, and the government may not comment upon his choice. The privilege against self-incrimination denies the government the testimony of a witness that would be available but for the privilege. Similarly, the spousal privilege, which authorizes either a criminal defendant or his spouse called to testify against him to claim a privilege, denies the government the witness-spouse's testimony and, thus, makes an otherwise available witness' testimony inaccessible to a tribunal. These privileges are different from the attorney-client privilege. In contrast, they plainly remove from a tribunal's consideration evidence it would have access to but for the privileges.

It is this difference—the fact that the attorney-client privilege covers only that which it creates—that accounts for the absolute nature of the privilege and its applicability in virtually all tribunals. Thus, the attorney-client privilege, unlike some other privileges, is not costly when it is properly confined to communications made as part of a legitimate attorney-client relationship. It may become costly, however, when it is extended beyond the rationale that supports it.

III. CREATING INCENTIVES FOR COMMUNICATIONS

As previously demonstrated, the attorney-client privilege exists to create incentives for clients to communicate with their lawyers. Since clients can confidently rely on the privacy of the relationship

29. Griffin v. California, 380 U.S. 609 (1965), bars comment on the exercise of the defendant's right not to testify.
30. I make no suggestion here that we should presume defendants to be guilty, and only suggest that it is obvious that a defendant, whether guilty or innocent, has a story to tell. That story is withheld from the government unless the defendant agrees to tell it.
32. Unlike the attorney-client privilege, these privileges are not extended to encourage communications. The criminal defendant, for example, is not afforded the fifth amendment privilege to encourage him to say or do things he would not without protection of the privilege. The same can be said about the spousal privilege. See infra § III.
33. See Saltzburg, supra note 19, at § V.
and risk nothing by being candid with counsel, they have reason to
disclose as fully as possible everything they know that pertains to the
services they seek. It is but one of several legal devices that have
been created to encourage communications. The informant’s privi-
lege, which permits the government to protect the identity of an in-
formant who has supplied information, is another. Without this
privilege, knowledgeable persons, fearful that identification might re-
sult in loss of employment or in physical harm, might keep their
information to themselves.

The procedural and evidentiary rules adopted by American
courts and legislatures provide incentives not only for clients and cer-
tain witnesses to provide information, but they also create incentives
for lawyers and investigators to seek out information from those who
have it. The most important rule in this regard pertains to work
product.

The work product rule affords lawyers and other persons work-
ing for the lawyer on a client’s case a qualified right to withhold
from discovery materials they obtain in the course of their investiga-
tions, where the investigations are the result of foreseeable litiga-
tion. The work product concept differs from the attorney-client
privilege in two main respects. The work product rule can offer more
sweeping protection than the attorney-client privilege because it cov-
ers not only statements from a client to his attorney, but also any
information obtained from outside witnesses as well. At the same
time, however, the work product doctrine offers less protection than
the attorney-client privilege because, unlike the privilege, it is lim-
ited to situations in which litigation was reasonably foreseeable when
the statements were obtained and, more importantly, it is not an
absolute protection; a party may discover his opponent’s work prod-

34. See, e.g., McCray v. Illinois, 386 U.S. 300 (1967); Wirtz v. Continental Finance &
Loan Co., 326 F.2d 561 (5th Cir. 1964).
38. See, e.g., Hickman v. Taylor, 329 U.S. 495, 511 (1947); Coastal States Gas Corp. v.
Department of Energy, 617 F.2d 854, 864-65 (D.C. Cir. 1980); Colton v. United States, 306
F.2d 633, 640 (2d Cir.), cert. denied, 371 U.S. 951 (1963); Natta v. Hogan, 392 F.2d 686,
of work product might receive almost absolute protection—e.g., mental impressions of counsel.
See Upjohn Co. v. United States, 449 U.S. 383, 400 (1981); See also Saltzburg, supra note
19, at 297 & n.105.
uct upon a showing of good cause.\textsuperscript{40} The difference between the privilege and the work product doctrine is vitally important. Although both are part of our adversary tradition and tend to provide incentives for communications and investigation, they rest upon different assumptions and provide incentives to different groups. The privilege is addressed to clients, while the work product rules are addressed to lawyers and other agents.

IV. INCENTIVES AND CORPORATE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege has as its roots the consultation by a natural person with counsel.\textsuperscript{41} It is no shock in a society in which so much responsibility is borne by various forms of business entities and government agencies that they too have successfully sought to avail themselves of the protection associated with the privilege.\textsuperscript{42} Courts are divided, however, as to how and to whom the privilege should apply in the corporate and governmental context.\textsuperscript{43} I have suggested elsewhere that in order to determine the proper scope of the corporate attorney-client privilege one must begin with the privilege's rationale.\textsuperscript{44} As the previous discussion explained, the thrust of the privilege is to create incentives for communications. Clients who might hesitate to talk candidly with counsel ought not to hesitate when the privilege attaches. In the corporate context, this rationale suggests that the privilege ought to attach to statements by those corporate individuals who are extended a guarantee of confidentiality in order to encourage them to be forthright in communicating with corporate counsel.\textsuperscript{45} A corporate employee, who lacks authority to decide whether or to whom his communications to the corporation's attorney will be disclosed, is obviously not guaranteed confidentiality.


\textsuperscript{43} The different approaches courts have used are discussed in Saltzburg, \textit{supra} note 19, at 288-95.

\textsuperscript{44} Id. § V.

\textsuperscript{45} Id.
Therefore, such a person’s communications ought not to be privileged.\textsuperscript{46}

For example, a corporate employee’s communications ought not to be privileged if (1) the employee is ordered to meet with a lawyer hired by the corporation to conduct an investigation—for instance, into improper payments to foreign government officials;\textsuperscript{47} (2) the employee speaks with the lawyer without any understanding that the lawyer represents anyone but the corporation; and (3) the employee does not have the authority to control the subsequent use of his statements. After all, this employee cannot be said to be giving information that he might not have given absent a privilege, since the communications to counsel are not preceded by any guarantee that what the employee says will not be used to his disadvantage. A person obviously willing to make, or at least in a position where he might find it difficult to resist making,\textsuperscript{48} statements without a promise of confidentiality is exactly like any nonclient witness who is asked questions by a lawyer or another representative of a client. The questioner might have reason to be concerned about the ultimate revelation of the answers the employee gives, but this concern gives rise to work product protection, not the protection of the attorney-client privilege.\textsuperscript{49}

This analysis leads to an approach that is narrower than many advocates of corporate privilege would prefer.\textsuperscript{50} Although it is different from the approach used thus far by the Supreme Court,\textsuperscript{51} the suggested approach gives corporations and other entities the protection that they can fairly claim and no more. They cannot properly argue for a broader approach, since affording privileged status to communications made without any guarantee of confidentiality for the speaker would remove evidence from the reach of tribunals without promoting the communications in the least. This would result in an unjustified loss of evidence.

\textsuperscript{46} Id.


\textsuperscript{48} See Saltzburg, supra note 19, at 303.

\textsuperscript{49} Id. at 295-304.

\textsuperscript{50} For examples of approaches that suggest protecting more employee statements, see 2 J. Weinstein & M. Berger, Weinstein’s Evidence ¶ 503(b)(04) (1982).

V. THE CORPORATE PRIVILEGE IN SHAREHOLDER SUITS

The analysis offered thus far suggests a somewhat more narrow corporate attorney-client privilege than the Supreme Court has previously used and most writers have advocated. Application of this approach to shareholder suits against their corporations, however, suggests that the trend toward winnowing the privilege in these particular actions is undesirable. In shareholder suits, the analysis calls for a broader privilege than many courts have afforded. My belief is that the landmark decision in Garner v. Wolfinbarger was well intentioned, but wrong, and that subsequent cases that have followed it have lost sight of what the privilege is supposed to do.

Garner is of fundamental importance and is, therefore, considered first. After revealing its deficiencies, I propose that the Garner doctrine is unnecessary to protect shareholders. I conclude by suggesting that some post-Garner decisions that extend the Garner rule to fiduciary relationships not involving corporations and shareholders suffer from the same error as Garner.

Garner truly was a seminal case. It marked the first time that a federal court of appeals gave careful consideration to the scope of attorney-client privilege in an action by corporate shareholders against their corporation. The United States District Court for the Northern District of Alabama rendered the first opinion in the case, which took up less than two columns of one page in the Federal Supplement. In fact, the list of lawyers in the case equalled the length of the opinion. The court noted that the plaintiffs had requested the President of the First American Life Insurance Co., who had been counsel for the corporation when the events giving rise to the litigation occurred, to answer oral interrogatories propounded on a deposition. The President, who resigned between the time he had refused to answer the questions and the court's opinion, had invoked the attorney-client privilege. After noting that counsel could cite

52. See Saltzburg, supra note 19, at 306.
53. See infra note 122 and accompanying text.
55. It is clear that the court recognized the novel question presented, since it noted that the district court had found only two English cases on point, and the court of appeals itself cited no additional authorities dealing with the question presented. Id. at 1101-02.
only two English cases shedding light on the scope of corporate privilege in a shareholder suit, the court concluded, without any extended discussion, that it was "of the opinion that the privilege here claimed is not available as against plaintiff stockholders."\textsuperscript{57}

It is almost axiomatic in law that when the list of counsel equals the length of the opinion of a lower court there will be an appeal. And there was in \textit{Garner}. The United States Court of Appeals for the Fifth Circuit explained the facts in greater detail than did the district court.\textsuperscript{58} It observed that stockholders of the insurance company had brought a class action alleging violations of the Securities Act of 1933,\textsuperscript{60} the Securities Exchange Act of 1934,\textsuperscript{60} Securities and Exchange Commission rule 10b-5,\textsuperscript{61} the Investment Company Act of 1940,\textsuperscript{62} and Alabama law.\textsuperscript{63} They asked for relief for the corporation and its officers.\textsuperscript{64} Specifically, they asked to recover the purchase price that the class members had paid for their stock in the company.\textsuperscript{65} In addition, they claimed that the company had itself been injured and asserted a derivative action on behalf of the corporation against various individual defendants.\textsuperscript{66}

R. Richard Schweitzer was President of the company at the time of the deposition and previously was counsel for the company when it issued the stock the plaintiffs bought.\textsuperscript{67} The court explained that at the deposition, the plaintiffs' counsel had asked Schweitzer about the advice he had given the corporation, the content of discussions between himself and company officials, and the information he had furnished to the officers, all of which were actions taken during his role as the corporation's counsel.\textsuperscript{68} Both Schweitzer and new counsel for the corporation rendered objections to this questioning and raised the attorney-client privilege claim.\textsuperscript{69}

\textsuperscript{57} 280 F. Supp. at 1019.
\textsuperscript{58} See 430 F.2d at 1095-96.
\textsuperscript{60} Id. §§ 78a-78kk.
\textsuperscript{61} 17 C.F.R. § 240.10b-5 (1983). They also alleged common law fraud. \textit{Garner}, 430 F.2d at 1095.
\textsuperscript{63} Securities Act of Alabama, ALA. CODE §§ 8-6-1 to 8-6-95 (1975 & Supp. 1983); see 430 F.2d at 1095 & n.6.
\textsuperscript{64} 430 F.2d at 1095.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} He had resigned as President before the district court rendered its decision. 280 F. Supp. at 1019 n.1.
\textsuperscript{68} 430 F.2d at 1096.
\textsuperscript{69} Id. Portions of the court's opinion on appealability, id. at 1096-97, and the choice of
On the merits, the court began with—what else?—a statement of the Wigmore test of privileges as well as a quotation from Wigmore as to the costs associated with the attorney-client privilege. This beginning led, almost ineluctably, to a narrow view of the privilege.

The court reasoned as follows: The real issue presented was, in Wigmore's terms, how to balance the corporation's interest in maintaining the privilege against the shareholders' need for evidence. Management obviously prefers to confer with counsel in private and to avoid the risk of compelled disclosure of communications. Management, however, does not manage for itself; it manages for the owners of the corporation, the stockholders. Management has a legitimate interest in exercising reasonable judgment, yet it has no valid interest in placing an "ironclad veil of secrecy" between itself and the owners of the corporation. Therefore, the argument made by the American Bar Association that "the cause of justice requires that counsel be free to state his opinion as fully and forthrightly as possible without fear of later disclosure to persons who might attack the transaction." fails to distinguish between the interests of the client and the attorney. Furthermore, two exceptions to the privilege—for communications made in furtherance of a crime or fraud and communications to a joint attorney—are useful analogies to a shareholder exception. The corporation should not lose the privilege merely because its shareholders sue on its behalf, but

where the corporation is in suit against its stockholders on charges

law, as between state and federal, id. at 1097-1100, receive no attention here. It is only important for me that the court reached the merits of the privilege claim and found that there was a sufficient federal interest in the securities claim that it would arrive at its own approach to corporate privilege in the context of this kind of case. Id. at 1100. In a famous footnote, the Court observed that the district court had not ruled on motions to dismiss the derivative claim and opined that "our decision does not turn on whether that claim is in the case or out." Id. at 1097 n.11. More will be said about this later. See infra notes 121-124 and accompanying text.

70. Id. at 1100.
71. Id. at 1100-01.
72. Id. at 1101.
73. Id. at 1102. The American Bar Association appeared as amicus curiae and supported the privilege claim. Id. at 1097. The Court, however, rejected the ABA argument. Id. at 1102.
74. E.g., In re Sealed Case, 676 F.2d 793, 812-13 (D.C. Cir. 1982).
76. E.g., SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 512-13 (D. Conn.), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976).
77. See 430 F.2d at 1102-03.
of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.\(^\text{78}\)

The court did not define "cause." Instead, it set forth indicia that "may contribute to a decision of presence or absence of good cause."\(^\text{79}\) The indicia are:

1. "the number of shareholders and the percentage of stock they represent";\(^\text{80}\)
2. "the bona fides of the shareholders";\(^\text{81}\)
3. "the nature of the shareholders' claim and whether it is obviously colorable";\(^\text{82}\)
4. "the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources";\(^\text{83}\)
5. "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";\(^\text{84}\)
6. "whether the communication related to past or to prospective actions";\(^\text{85}\)
7. "whether the communication is of advice concerning the litigation itself";\(^\text{86}\)
8. "the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing";\(^\text{87}\)
9. "the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons".\(^\text{88}\)

After setting forth these indicia and suggesting that trial courts could use in camera inspection and protective orders in doing the

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\(^{78}\) Id. at 1103-04 (footnote omitted).
\(^{79}\) Id. at 1104.
\(^{80}\) Id.
\(^{81}\) Id.
\(^{82}\) Id.
\(^{83}\) Id.
\(^{84}\) Id.
\(^{85}\) Id.
\(^{86}\) Id.
\(^{87}\) Id.
\(^{88}\) Id.
balancing required,\textsuperscript{89} the court of appeals vacated and remanded the case to the district court.\textsuperscript{90}

The rationale for the attorney-client privilege—that it provides an incentive for communications that might not take place without it—is nowhere recognized in the court's opinion. Nor did the court appear to recognize that any rule of privilege that does not provide absolute protection for communications from persons who might be affected by possible disclosure cannot help but reduce the incentive for communications. Moreover, the court's indicia are so vague as to make it almost impossible for management to know when the statements they make to counsel might be revealed.\textsuperscript{91} Even worse, it is not self-evident why these criteria were chosen at all.

Although the court did not number its indicia, I hope that my use of the numbers will aid in an analysis of the court's indicia. Using the same numbers as above, I consider them seriatim.

1.—Why should it matter whether there is one shareholder or many? And why should it matter how many shares of stock are owned? If only one shareholder is smart enough to uncover wrongdoing, is his claim to relief not entitled to the same consideration as that of any litigant? Moreover, if a court is worried about abuse of minority shareholders by a majority, arguably it ought to be concerned more about small minorities rather than groups that can muster enough votes to have clout within the corporation.

2.—As for the bona fides of the shareholders, it is difficult to understand how it is to be determined. As long as a colorable claim (indicium 3) is made, it would appear that shareholders have a right to proceed with litigation. Undoubtedly, courts can protect trade secrets and confidential business information (indicium 9) so that a suit cannot be used for improper competitive reasons. Aside from this protection, however, it is unclear what a court should do to assess the motives of plaintiffs. Plaintiffs might intensely dislike management, but does that mean they should receive less protection from courts than plaintiffs who actually like the defendants they haul into court?

3.—The colorability of the shareholders' claim ought to receive consideration on a motion to dismiss, especially a motion to dismiss a

\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} The Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1981), specifically emphasized the need for clarity in devising an appropriate attorney-client privilege. Id. at 393.
derivative action under the Federal Rules of Civil Procedure. If a plaintiff has a colorable claim, can a court really assess degrees of colorability? If the claim is colorable, but not strong, it is arguable that any evidence that might strengthen it is more important than if the case were already certain to win.

4.—Deciding whether it is necessary or desirable for shareholders to have the information can be nothing more than begging the very question that was presented to the district court. All successful attorney-client privilege claims deny litigants access to confidential communications. The existence of the privilege represents a judgment that it is sometimes desirable to provide incentives for communications and to permit the communicator to keep his statements private. The need for evidence identified by the court in Garner is no different from any litigant’s need for evidence, and the court fails to explain why this need should receive special consideration in shareholder actions. As for availability of the same information from alternative sources, it is doubtful that the same information—i.e., candid communications to counsel—will ever be available. That is why the plaintiffs wanted discovery and why corporate officers do not want their private communications revealed.

5.—If the attorney-client relationship were used by the client to perpetrate a crime or a fraud, a well-established exception would be triggered. Should a lesser showing be required of shareholder plaintiffs than of other plaintiffs? The court appears to suggest that a lesser showing is required, although it never says why it makes the suggestion.

6.—The rationale of the privilege suggests that communications about past actions or future actions might be inhibited if those actions could give rise to litigation and the communications could be disclosed. Why should there be a special distinction between past and prospective actions in shareholder suits, when there is no such distinction in any other suits? The court provides no answer.

7.—Apparently, the court was unwilling to allow the plaintiffs to discover communications concerning the very litigation that they

commenced. This might be an equalizing approach, since plaintiffs would certainly claim the privilege as to their communications with their own lawyer. Under the court's approach, however, it is unclear why the plaintiffs should not be able to discover what the defendants are saying if the corporate attorneys represent the owners as well as management; the plaintiffs have a colorable claim; the defendants' conduct appears to have been problematic; and they continue to seek advice from the corporation's lawyer. After all, as the court reasoned earlier, management would then be using the corporation's lawyer against its owners.

8.—The court tells us that fishing expeditions are to be avoided; yet, it is not clear why. If the other indicia favor the plaintiffs and if corporate counsel is their counsel too, why should they be limited when their need to fish might be a product of the defendants' secrecy?

9.—It is unclear why protection of trade and commercial secrets should be weighed in this balance rather than be treated separately as they would be if no attorney-client privilege were involved.

These indicia governed the litigation as it returned to another district court on remand. The court examined the indicia and to no one's surprise found that good cause for discovery had been shown. In addition, most of the post-Garner cases that have resulted in opinions have reached the same conclusion.

Before further examining Garner on remand, there are some aspects of attorney-client privilege law that ought to be stated. The following is a list of several well-established doctrines that may operate to limit the breadth of the attorney-client privilege. After this list is set forth, I conclude that not only is there no need for an additional Garner exception, but that recognizing such an exception would be detrimental to legitimate corporate interests.

94. It is not entirely clear whether the court means in indicium seven communications about the subject matter of the litigation or merely the strategies of the litigation. If the court was referring to the communications concerning the very conduct involved in the litigation, it would appear that the shareholders' need for discovery of such communications would be stronger. The very fact that this indicium is subject to interpretation, however, undermines the Supreme Court's call for clarity in devising an appropriate attorney-client privilege. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

95. 430 F.2d at 1101-04. See supra notes 57-62 and accompanying text.


98. Id. at 504.

99. See infra notes 137-164 and accompanying text.
First, it is important that the corporation holds the privilege and is free to waive it even though waiver might work to the disadvantage of current or past officers or employees. This means that in circumstances in which it appears that corporate officers have hurt the corporation, even though the officers might have relied upon the privilege in communicating with counsel, the corporation may waive the privilege. If some officers or directors are suspected of wrongdoing, they might be disqualified from participation in the decision-making concerning any investigation into their conduct. Thus, the privilege might be waived without their participation. Furthermore, if officers have “taken the money and run,” there is every reason for the corporation to deny them any benefit that they might derive from the privilege. Of course, it is possible that a majority of shareholders and their chosen surrogates could take unfair advantage of a minority by controlling the privilege and avoiding waiver. In many cases, nevertheless, the ability to waive the privilege offers the corporation and its shareholders protection against wrongdoing.

Second, in order to claim the privilege, the corporation must be able to make a showing that the representatives who spoke to counsel did so in confidence for purposes of securing legal, as opposed to business, advice. The attorney-client privilege only protects communications that are made as the client seeks legal services, for these are the communications that the rationale for the privilege assumes might not be made absent a privilege. To the extent that the lawyer participated in meetings in which marketing or other business strategies were discussed, the privilege is unlikely to attach to those meetings.

Third, the privilege will not necessarily extend to all documents that the lawyer prepares for the corporation. The justification for protecting the lawyer’s materials under the privilege is that their revelation might be tantamount to revealing client communications,


101. The fact that corporations may choose not to waive the privilege is some evidence that they want corporate officers to rely upon the privilege and to know that their confidential communications will not be readily revealed.

102. See, e.g., SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 517 (D. Conn.), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976).

103. See Saltzburg, supra note 19, at 283-285.

since the lawyer and client communications may be intertwined.\textsuperscript{105} Where legal documents prepared for the corporation are not so intertwined, however, discovery of the lawyer's work could be obtained. Of course, some research done by the lawyer will be protected by the work product rule, but only if litigation was pending or anticipated when the information was compiled.\textsuperscript{106}

Fourth, the privilege generally will not bar questions about fees paid to counsel.\textsuperscript{107} Nor will it prevent inquiry into whether legal advice was sought in connection with certain transactions when a claim is made that failure to secure such advice amounted to an actionable wrong.\textsuperscript{108}

Fifth, former and current corporate officials can be asked, through depositions or interrogatories, about the facts that they knew or did not know at the time they took or failed to take certain actions. The extent to which they were knowledgeable or ignorant is not something protected by the privilege; all that is protected is specifically what they said to counsel in the process of seeking legal services.\textsuperscript{109}

Sixth, if the corporation claims advice of counsel as a defense, the privilege is lost. In many cases, the corporation must use this defense and thus abandon the privilege.\textsuperscript{110} The law is not as clear as to whether an individual officer may reveal otherwise privileged communications when she wishes to use advice of counsel as a defense in a suit against her individually for actions taken in her official corporate capacity. I would think, however, that the corporation would be estopped from preventing the official from defending herself.\textsuperscript{111} Since


\textsuperscript{106} See supra note 38 and accompanying text.

\textsuperscript{107} E.g., Priest v. Hennessy, 51 N.Y.2d 62, 69, 409 N.E.2d 983, 986, 431 N.Y.S.2d 511, 515 (1980). But see United States v. Lawson, 600 F.2d 215, 218 (9th Cir. 1979); United States v. Jones, 517 F.2d 666, 674 (5th Cir. 1975). See generally Saltzburg, Communications Falling Within the Attorney-Client Privilege, 66 Iowa L. Rev. 811, 826-27 (1981) (details of attorney-client relationship rarely “amount to information conveyed by the client in order to obtain the legal services that are sought by the client”).


\textsuperscript{111} Cf. In re Friend, 411 F. Supp. 776, 777 (S.D.N.Y. 1975) (lawyer entitled to disclose privileged documents to grand jury in order to defend himself).
the corporation established the officer-lawyer relationship and encouraged the officer to seek legal advice, it would be difficult to defend a decision that denied the officer, when sued civilly or prosecuted criminally, the opportunity to explain her actions. If legal standards of liability permit officers to be sued individually for their corporate behavior, there is every reason to permit them to raise defenses afforded them by law and little reason to permit the corporation to deny them evidence in their defense.

Seventh, once a party makes a prima facie showing that the client—in the corporate context, this would mean those persons whose communications fall within the privilege—attempted to use the lawyer in furtherance of a crime or a fraud, or what the client reasonably should have known was a crime or fraud, the privilege vanishes. For example, the prima facie showing can be made in shareholder actions by evidence that a prospectus contained misleading information. Any objective facts that appear to call into question representations or actions by corporate officers might be enough to require a trial court to examine otherwise privileged communications in camera.

Eighth, although corporate officials might invoke their privilege against self-incrimination and thereby attempt to deny shareholders evidence about the state of their knowledge or other information to which they may be privy, invoking the privilege in a civil action in which they are named as defendants could be quite costly: Their privilege claim can be used as evidence against them. Moreover, it is possible that the officials could lose their attorney-client privilege altogether, since a court might rely on an adverse inference as prima facie evidence that the communications between the officials and counsel were in furtherance of a crime or fraud.

Each of these aspects of attorney-client privilege applies to all cases, regardless of whether they are shareholder suits. Thus, when the limitations on the privilege are fully understood, the argument for a special rule for shareholder suits appears to be weak. At this point, however, the question might be asked whether there is any reason to worry about the additional disclosure that might result from the Garner approach, given the many ways in which shareholders might already obtain communications between corporate officials

112. See supra notes 74-75 and accompanying text.
113. Garner recognized this. 430 F.2d at 1104. See supra text accompanying note 89.
There is a reason—a good one. It is true that corporate officers act not for their own benefit, at least not in theory, but for the benefit of the shareholders who own the company. It is also true that corporate counsel owes a duty to the corporation and all its shareholders, not to specific officials. Thus, there is a superficial attraction to Garner's idea that all of the various people who make up a corporation, including its owners, should share in any communications made on the corporation's behalf with its counsel. There is a problem, however, with this idea, which the Garner court failed to appreciate: Corporate officers know that in a complex world of federal and state regulation of corporate activities they are always subject to suit as a result of any decision that they make. Any corporate document might be challenged as incomplete or misleading. Any decision could be challenged as wasteful or self-serving. Although doctrines like the business judgment rule afford some measure of protection and enable officials to preclude some litigation, it is easy to understand why corporate officials would be concerned about possible suits naming them as defendants.

Some of these suits may be derivative actions, in which there are also various doctrines that afford breathing room for officials. Nevertheless, simply being named as a defendant might require officers to hire separate counsel and to go through motions and some personal suffering before finally vindicating themselves. Corporate officers who are concerned about being named as defendants have as much reason as any other individuals to fear the use of their communications to counsel against them. Although I do not suggest that the officers are consulting with counsel in their individual capacities, I do


118. Some commentators suggest they must have separate counsel. E.g., Neal & Thompson, Vulnerability of Professional-Client Privilege in Shareholder Litigation, 31 Bus. Law 1775, 1784 (1976). Even if separate counsel is reimbursed by the corporation, the burden of litigating a case can be substantial.
suggest that when they consult with counsel they know that their communications could be damaging to both the corporation if it is sued and to them as individuals if they are sued. Once this point is understood, it is clear that a choice must be made: Either corporate officials are to be given an incentive (which is what the privilege is all about) to talk freely without fear of how their statements might be used by third persons, or they are to understand that there is little security for their statements to counsel and that disclosure is a real possibility.

*Garner* fails to acknowledge the need to choose, but the effect of the decision is to have made a choice—the wrong choice. The first option—to protect, as in any other case, communications between corporate officials and counsel—permits officials to talk candidly, to discuss problems and concerns honestly, and as a result, to make the decisions that they believe are best for the corporation based upon counsel's advice. At the same time, however, the facts and data upon which decisions are based would not be privileged. Nor would the business reasons for decisions be privileged. In contrast, the second option—not to protect such communications—denies the comfort of the privilege and informs officials that they should be reluctant to be open and forthright with the corporation's counsel, for their communications may come back to haunt them in subsequent litigation. The effect, I fear, is that the corporation will suffer because it will lose the capacity for unrestrained candor in attorney-client communications that the privilege assumes to be so valuable.

As a basis for creating this shareholder exception to the privilege, the *Garner* court analogized to the exception for communications made in furtherance of a crime or fraud. As noted above, I would apply the crime or fraud exception in shareholder actions the same way it is applied in other actions. If the prima facie test works in cases in which persons other than shareholders sue a corporation, it is not readily apparent why it should not be sufficient in shareholder suits.

The joint client exception might seem to be a better analogy, though only at first glance, since further examination reveals that the analogy is seriously flawed. Under the joint client exception, the attorney-client privilege will not attach when two clients share a lawyer in seeking legal assistance (assuming that there is no conflict barring this joint representation) and subsequently oppose each other.

119. 430 F.2d at 1102-03.
in litigation in which communications to their lawyer by one or both of them are relevant.\textsuperscript{120} Crucial to the joint client situation is the notion that the clients enter into the arrangement having agreed that they are sharing the lawyer and the lawyer's services. As between equal partners there is no reason to prefer the one who wants to invoke the privilege over the one who wants to waive it. Evidence writers suggest that the partners intended that the privilege not attach to disputes between them,\textsuperscript{121} when, in fact, they probably never thought about what would happen if they had a falling out. Once they are suing each other, it is difficult to inhibit one from reporting the other's communications and impossible to prevent each from using the other's communications in preparing for trial. Thus, courts recognize that disclosure is likely to result and, therefore, create an exception to the privilege.\textsuperscript{122}

These same assumptions do not apply, however, in shareholders' suits against their corporation. By definition, if the corporate privilege is raised, it is because the officers selected by controlling persons have decided that the corporation is better served by its invocation than by its waiver. The corporate structure recognizes control and lack of control. Purchasers of corporate stock know that there will be decisions on which reasonable people may differ and that their corporation might make decisions with which they do not agree. The entire structure depends upon those in control having the capacity to act. If they believe that candid consultation with counsel is in the corporation's best interest, there is reason to respect the judgment as much as any other they might make.

My judgment, then, is that Garner was wrong and that the attorney-client privilege in shareholder cases should apply just as it does in any other litigation. Nevertheless, assuming that the Garner exception is utilized, I do believe that Garner correctly implied in its famous footnote that the result should not depend on whether the suit is derivative (technically on behalf of the corporation) or simply against officers of the corporation.\textsuperscript{123} If a special rule is to be created that gives shareholders access to corporate officials' communications to counsel, it must be because the shareholders are viewed as sharing the right to claim the privilege. And although there is a technical argument that the derivative suit warrants special treatment because

\begin{itemize}
\item \textsuperscript{120} See C. McCormick, supra note 41, § 91, at 189-90.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} E.g., Valente v. Pepsico, Inc., 68 F.R.D. 361, 369-70 & n.16 (D. Del 1975).
\item \textsuperscript{123} 430 F.2d at 1097 n.11. See supra note 50.
\end{itemize}
the benefits will inure to the corporation, it is the shareholders who ultimately seek those benefits. Either shareholders should have the benefit of a special rule or they should not. Similarly, lines should not be drawn between shareholders who sue claiming they bought their stock because of actions by defendants and those who claim they were already shareholders when they were injured by the defendants' actions. Any unique relationship between management and shareholders that warrants a special rule ought to include any shareholders who claim to have been hurt qua shareholders as a result of the action of corporate officials.

Having criticized the Fifth Circuit’s opinion in Garner, I now focus on the case on remand. As noted above, the district court found that good cause had been shown by the shareholders and denied the corporate privilege. I believe that the decision to deny the privilege was probably correct on the facts, but not because of the good-cause reasoning that I criticize. There were several factors present that should have been sufficient to satisfy the prima facie fraud standard: (1) the shareholders demonstrated that the insurance company engaged in a public offering of stock without registering it with the Securities Exchange Commission (“SEC”); (2) corporate counsel had received a letter from the SEC refusing his request for a “no-action” ruling regarding the offering; (3) salesmen employed by the company continued to sell the stock after the SEC staff requested assurances that the public offering would be discontinued; (4) the prospectuses used to sell the stock contained recitals that Schweitzer’s own law firm had considered the legality of the issue; (5) the law firm never filed with the state securities commission a written consent for use of its name in the prospectus; (6) a former president of the company stated that it was run for the benefit of a parent company; (7) some defendants had received payments in connection with the registration of the stock with the state commis-

126. Id. at 504.
127. Id. at 503.
128. Id.
129. Id.
130. Id.
131. Id.
132. Id.
sion; and (8) the defendants had invoked their privilege against self-incrimination and refused to answer questions in depositions. Thus, if these circumstances are sufficient to satisfy the prima facie fraud standard, there was no need in this case for any special exception for shareholder suits.

Furthermore, even without the prima facie fraud showing, questions to Schweitzer about whether the firm had in fact granted permission for use of its name or whether it had objected at any point to its use should have been deemed to be beyond the protection of the privilege. They did not relate to communications made by persons seeking legal services. Nor should Schweitzer have been permitted to rely on the privilege to refuse to answer whether he knew about a certain option having been granted, unless he could have demonstrated that any answer would require him to disclose communications made in confidence to him, as opposed to revealing information he might have become aware of while representing the corporation.

The various Garner opinions might be defended on the ground that the facts strongly suggested wrongdoing, which the courts did not want to protect. Although no one would fault the judicial desire to insure that justice is done, justice could as easily have been achieved by invoking more typical attorney-client privilege concepts without creating a doctrine that would take on a life of its own and threaten legitimate corporate interests.

If courts returned to a careful analysis of the basic rules of attorney-client privilege, they would see that they do not need Garner to do justice. Consider, for example, the case of In re TransOcean Tender Offer Securities Litigation, which arose out of a tender offer by Vickers Energy Corporation ("Vickers"), a wholly owned subsidiary of Esmark, Inc. ("Esmark"), for the minority shares of TransOcean Oil, Inc. ("TransOcean"). When the tender offer was initiated, Vickers was the majority shareholder of TransOcean. Minority shareholders brought three federal actions and a state claim, alleging that TransOcean, Vickers, and Esmark, as well as

133. Id. at 502-03.
134. Id. at 504.
135. See supra note 107 and accompanying text.
136. See supra note 108 and accompanying text.
138. Id. at 693.
139. Id.
officers and directors of all three companies, violated federal securities laws and common law fiduciary principles by making false and misleading representations of material facts in the tender offer circulation.\textsuperscript{140} The minority shareholders attempted to obtain discovery, but were confronted with a claim of attorney-client privilege.\textsuperscript{141} Of the ten categories of documents sought, the defendants agreed to supply only two.\textsuperscript{142} While the court noted that \textit{Garner} placed the burden of showing good cause on the plaintiff,\textsuperscript{143} it specifically refused to adopt this approach, stating that \textquoteright\textquotedblleft [u]nder the circumstances of this case, it is immaterial who has the burden on the good cause issue.\textquoteright\textsuperscript{144} In other words, the court was sympathetic to the idea that in shareholder actions disclosure of otherwise privileged communications would be presumed proper, unless \textit{the defendants} could show good cause why disclosure should be denied. The court ultimately found it unnecessary to decide who had to show good cause, since it decided that under any approach the plaintiffs should obtain disclosure.\textsuperscript{145}

\textit{TransOcean} is another example of relying on the \textit{Garner} rule where no such reliance is necessary. The eight categories of documents that the defendants claimed were privileged covered the original acquisition of a 51% interest in TransOcean by Swift & Company (\textquoteright\textit{Swift}'), a predecessor and later a subsidiary of Esmark; purchases and sales of TransOcean stock by officers of Swift; documents relating to Swift’s contemplated secondary offering of its TransOcean stock; filings by TransOcean with the SEC; transfer of Swift’s TransOcean stock to Vickers; plans never acted upon by Swift and Esmark to increase or decrease Esmark’s interest in TransOcean; open market purchases of TransOcean stock by Esmark; a proposed agreement involving a natural gas purchase by an Esmark subsidiary from TransOcean; and documents relating to purchases and sales of TransOcean stock by officers of Swift.\textsuperscript{146}

It should be plain that under a proper application of the privilege the defendants would have to answer questions concerning their purchases and sale of stock; the information they possess must be

\textsuperscript{140} \textit{Id.} at 693 & n.1.
\textsuperscript{141} \textit{Id.} at 694.
\textsuperscript{142} \textit{Id.} at 695 & n.2.
\textsuperscript{143} 430 F.2d at 1103-04.
\textsuperscript{144} 78 F.R.D. at 696.
\textsuperscript{145} \textit{Id.} at 696-97.
\textsuperscript{146} \textit{Id.} at 695 n.2.
revealed.\textsuperscript{147} Similarly, the defendants would have to answer questions concerning any facts or data that supported or failed to support their SEC filing, since such information is not privileged. Moreover, they would have to answer questions about whether they had made plans for a secondary offering of stock and had attempted to arrange the natural gas purchase. They would have to answer all these questions concerning these facts, because the privilege does not cover what they know, only what they said to counsel.\textsuperscript{148} Thus, even if the defendants did not have to produce documents, the minority shareholders could have obtained much discovery. It appears likely, in fact, that the shareholders could have obtained most, if not all, of the documents under a standard analysis of the privilege. It is doubtful that many of the documents would have revealed confidential communications made for the purpose of obtaining legal services. Thus, the court could have ordered much discovery without relying on \textit{Garner}. This is probably true in most of the cases that have relied upon \textit{Garner}. The significance of this, of course, is that rejection of a special rule for shareholder cases is not likely to result in corporate wrongdoing going undiscovered.

Too many decisions have followed \textit{Garner} without carefully examining the need for a special rule in shareholder suits. Few courts have taken the time to observe that shareholders often are denied access to sensitive corporate information,\textsuperscript{149} and that denial represents a judgment by the corporate majority that the corporation will benefit from a certain amount of confidentiality being maintained. As long as the attorney-client privilege is limited to the rationale giving rise to it, and the limitations that I have described are applicable, shareholders will not be unfairly treated in litigation even if \textit{Garner} is rejected.

VI. EXTENSION OF \textit{Garner} BEYOND SHAREHOLDER SUITS

Since \textit{Garner} used a fiduciary analysis, it is not surprising that courts that were quick to follow it in shareholder suits would extend it to other fiduciary contexts. In \textit{Donovan v. Fitzsimmons},\textsuperscript{150} for ex-

\begin{itemize}
  \item \textsuperscript{147} See supra note 26 and accompanying text.
  \item \textsuperscript{148} Id.
  \item \textsuperscript{149} \textit{Garner} mentioned in a footnote that shareholders had access to some corporate records, but not all. 430 F.2d at 1104 n.21. That corporate shareholders have some common law or statutory rights of access to nonprivileged material means they have less, not more, need than other litigants for discovery against their corporation.
  \item \textsuperscript{150} 90 F.R.D. 583 (N.D. Ill. 1981).
\end{itemize}
ample, the Secretary of Labor ("Secretary") sought discovery in an action his department had filed under the Employee Retirement Income Security Act of 1974,\footnote{29 U.S.C. §§ 1001-1461 (1976 & Supp. V 1981).} alleging that former officials of a pension fund had violated their fiduciary responsibilities.\footnote{90 F.R.D. at 584.} The court relied upon Garner to hold that "it is apparent that the pension fund trustee analogue to the derivative action is particularly well-suited to the [Garner] rule's application."\footnote{Id. at 586.} No one doubts that the Secretary was well intentioned, but the fact remains that if he is entitled to invade the lawyer-client relationship, pension fund trustees might be discouraged from being candid when seeking legal advice. The court observed that the former trustees, who no longer possessed the right to claim the privilege, intended to raise advice of counsel as a defense,\footnote{Id. at 588. See supra note 111 and accompanying text.} and I believe that they should have been permitted to reveal confidential communications necessary for their defense.\footnote{Id. See supra notes 110-111 and accompanying text.} The Secretary would, thus, have had the opportunity to discover those communications. There is, however, no greater reason to adopt a special rule for pension fund cases than for other cases. Nor is there a reason to deny the current trustees the benefit of the privilege.\footnote{The current trustees, like corporate officers, might assert the privilege to demonstrate for themselves and for future trustees that confidential communications would not be readily disclosed. See supra note 101.}

Yet another unfortunate application of Garner is Quintel Corp., N.V. v. Citibank, N.A.,\footnote{567 F. Supp. 1357 (S.D.N.Y. 1983).} a suit arising from a real estate transaction. Quintel Corporation, N.V. ("Quintel"), a Netherland Antilles corporation, was wholly owned by one Gajria. Gajria contracted with Citibank, N.A. ("Citibank") for purposes of acquiring certain property. Quintel sued Citibank, claiming that Citibank had breached its fiduciary duty and alleging securities violations, fraud, and negligence.\footnote{Id. at 1359.} Gajria, on behalf of Quintel, deposed a Citibank vice-president; Citibank objected to numerous questions on attorney-client privilege grounds.\footnote{Id. at 1359-60.} The court stated, of course, Wigmore's test of attorney-client privilege,\footnote{Id. at 1360.} discussed Garner,\footnote{Id. at 1360-62.} and then proceeded to hold that since it was clear that Citibank was a fiduciary for the

\begin{thebibliography}{99}
\bibitem{152} 90 F.R.D. at 584.
\bibitem{153} Id. at 586.
\bibitem{154} Id. at 588. See supra note 111 and accompanying text.
\bibitem{155} See supra notes 110-111 and accompanying text.
\bibitem{156} The current trustees, like corporate officers, might assert the privilege to demonstrate for themselves and for future trustees that confidential communications would not be readily disclosed. See supra note 101.
\bibitem{157} 567 F. Supp. 1357 (S.D.N.Y. 1983).
\bibitem{158} Id. at 1359.
\bibitem{159} Id. at 1359-60.
\bibitem{160} Id. at 1360.
\bibitem{161} Id. at 1360-62.
\end{thebibliography}
plaintiff, "the fiduciary's duty to exercise its authority without veiling its reasons from the grantor of that authority outweighs the fiduciary's interest in the confidentiality of its attorney's communications."\textsuperscript{162}

Although the court recognized a privilege for communications made before and after Citibank agreed to work with Quintel,\textsuperscript{163} it would not accept Citibank's argument that it was entitled to claim the privilege for legal advice sought regarding its fiduciary responsibilities while it was under a duty to the plaintiff.\textsuperscript{164} Based on my previous arguments,\textsuperscript{165} I think that Citibank should have prevailed.

The word "fiduciary" has no talismanic quality that dictates abdication of the usual approach to attorney-client privilege whenever the word is invoked. Those who have fiduciary responsibility often want legal advice concerning their responsibilities. They should have the same opportunity to consult with counsel and to speak freely and without fear of making admissions as any other clients. In Quintel, the plaintiff could have asked Citibank's officers what they did regarding the purchase, whether they complied with their agreement with the plaintiff, and any other questions concerning the underlying facts of the land acquisition that the plaintiff cared to propound. Permitting Citibank to have a privilege would not interfere with discovery; it simply would treat Citibank like any other person or entity who has felt the need to seek legal help in confidence. Furthermore, the plaintiff in Quintel would have been no worse off if Citibank's privilege claim had been accepted than any litigant who is prevented from discovering what an opposing party has told his lawyer in confidence.

A sounder decision than both Quintel and TransOcean is Commodity Futures Trading Commission v. Weintraub,\textsuperscript{166} a case in which the Community Trading Future Commission ("Commission") sued a brokerage corporation for alleged violations of federal law.\textsuperscript{167} The parties agreed to a consent decree that provided for the appointment of a receiver and an investigation by the Commission.\textsuperscript{168} The federal district court appointed a receiver who filed a voluntary peti-
tion in bankruptcy on behalf of the corporation before he was named trustee in bankruptcy. 169 When the Commission sought to subpoena records held by a former corporate counsel, counsel invoked, on the corporation’s behalf, the attorney-client privilege. 170 Although the trustee in bankruptcy agreed to waive the privilege, 171 the court of appeals held that it was the corporation’s directors and officers who possessed the right to make the waiver decision. 172 This result, I suggest, recognizes the importance of permitting entities, as well as individuals, the opportunity to consult with counsel and to have their officers feel secure that the consultation is confidential.

VII. CONCLUSION

An understanding of the incentive effects of the attorney-client privilege informs decision-making when the privilege is claimed in new and different settings. I believe that in securing legal advice, corporations, other entities, and fiduciaries should all be able to claim the privilege in situations where they can demonstrate that persons communicating with counsel have reason to be concerned about possible disclosure of their communications and that without the privilege they may be reluctant to give, fully and openly, the information that their lawyers need to provide intelligent and prudent legal services. Out of respect for the rationale that supports the privilege, entities should not be permitted to claim the privilege for communications made by persons who speak without a guarantee of confidentiality. The work product doctrine will provide sufficient protection for those communications. At the same time that the rationale suggests limits on the scope of employee statements that should be within the privilege, it also strongly supports the notion that once the privilege does attach, it should be respected, even though a person seeking to invade it utters the word “fiduciary.” Fiduciary relationships may create special duties that require professionals to exercise unusual or special care. That is more, not less, reason to give fiduciaries full opportunity to consult openly with counsel. The limits on the attorney-client privilege that apply in all cases work to assure that litigants have access to facts and other evidence necessary to expose wrongdoing. The attorney-client privilege should therefore, be permitted to operate in shareholder and other fiduciary cases as it

169. Id.
170. Id.
171. Id.
172. Id. at 342-43.
operates in all other cases. In short, Garner's exception to the privilege should be reexamined and rejected.