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CORPORATE AND RELATED ATTORNEY-CLIENT PRIVILEGE CLAIMS: A SUGGESTED APPROACH

Stephen A. Saltzburg*

Corporations are often entitled to the same kinds of protection that the law affords natural persons. For example, such constitutional provisions as the first amendment protection of speech,1 the fourth amendment protection against unreasonable searches and seizures,2 and the protection against undue interference by state government in interstate commerce,3 are all applicable to corporations. Statutes like the Sherman Antitrust Act4 and various labor laws5 impose constraints and afford protections that are similar for corporations and natural persons. In certain areas, however, corporations are treated differently under the law than are natural persons. For instance, the fifth amendment protection against self-incrimination6 and the privileges and immunities clause of article IV7 do not extend to corporations. In addition, tax laws may differentiate between corporations and natural persons,8 while other statutes may impose special burdens on corporate enterprises.9

In the law of evidence, corporations are generally treated simi-
larly to natural persons; corporations bear no special burdens and claim no special privileges. One particular privilege corporations and natural persons claim in common is the attorney-client privilege, the oldest and most secure evidentiary privilege. While the scope of this privilege for natural persons is now fairly well established, there has been sharp disagreement over the best way to implement the privilege so that corporations receive appropriate, but not excessive, protection. Two competing approaches—one often referred to as the “control group” approach, and the other probably best described as a “scope of employment” approach—have predominated. Recently, the United States Supreme Court rejected the control group concept for federal courts, thereby agreeing with most of the commentators who have made recent proposals regarding the corporate attorney-client privilege. Contrary to the suggestion of such writers, however, the Supreme Court failed to adopt a scope of employment test to govern future federal litigation. Instead, it left lower federal courts with little to guide them in their determinations of the scope of the corporate privilege.

State courts have also struggled to delineate the proper parameters of the corporate attorney-client privilege. Some states have

10. For example, both natural persons and corporations can produce business records that are admissible as evidence, See Fed. R. Evid. 803(6), and statements by a natural person's agent relating to his agency are as readily admitted against the principal as are statements by a corporation's employees against the corporation, See Fed. R. Evid. 801(d)(2)(D).


12. Almost every major article on corporate privilege begins by indicating the disagreement among various courts on the scope of the privilege. See, e.g., Gergacz, Attorney-Corporate Client Privilege, 37 Bus. Law. 461 (1982).

13. For an explanation of this approach, see infra text accompanying notes 40-49.

14. There are variations on the scope of employment test. It may also be referred to as the "subject matter" test. See Gergacz, supra note 12, at 491-96. This is why the word "a" is used, and not the word "the".

15. The scope of employment approaches are described infra text accompanying notes 50-63.


adopted the control group approach, by rule19 or by judicial decision,20 while others have adopted a scope of employment concept by judicial decision.21 There are also states that have tried (as has the United States Supreme Court) to avoid stating a general rule for corporate privilege.22 As a result, there is continuing uncertainty as to how much protection the attorney-client privilege should provide corporations.

No matter what scope the attorney-client privilege is ultimately afforded, it is clear that it is intended to assure clients that the information they communicate to their attorneys in confidence will not be disclosed to others. The less certain the scope of the privilege, the less reliance clients can place upon it. An ill-defined attorney-client privilege thus complicates the lawyer-client relationship and frustrates the very goal such a privilege is intended to achieve—to facilitate attorney-client communications. There is, therefore, a need for a clear rule of corporate privilege. This article attempts to state such a rule, providing corporations with the appropriate amount of protection, as measured by the basic rationale that supports the privilege for both natural persons and artificial entities.

The article takes six analytical steps to justify its suggested approach to the corporate attorney-client privilege. First, it briefly discusses the rationale that justifies affording any person the privilege.23 Second, it applies the rationale to corporations in order to explain why they should be entitled to the same sort of protection as natural persons.24 Third, it explains the factor that complicates implementation of the privilege in the corporate context.25 Fourth, it demonstrates that what appears to be a special problem for corporations is

19. See, e.g., Alaska R. Evid. 503; Me. R. Evid. 502; N.D. R. Evid. 502; see also Unif. R. Evid. 502(a)(2), 13 U.L.A. 249 (1980) ("A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client."); Unif. R. Evid. 502(b), 13 U.L.A. 250 (1980) ("General rule of privilege," equating communications by "representatives of the client" with those of the client himself, for purposes of determining when privilege will attach.).
23. See infra notes 29-36 and accompanying text.
24. See infra notes 36-37 and accompanying text.
25. See infra notes 37-84 and accompanying text.
really not very different from a problem that confronts all clients who employ lawyers. 26 Fifth, it shows why neither the control group concept nor a scope of employment test of corporate privilege is consistent with the rationale for the privilege. 27 Sixth, it recommends a new approach, which is subsequently applied to the cases discussed throughout the article. 28 A brief explanation is then presented as to how the approach may be extended in certain situations to control the scope of the attorney-client privilege for noncorporate clients that use agents to seek legal advice. 29

I. THE RATIONALE FOR THE PRIVILEGE GENERALLY

In our legal system, people are presumed to know the law and are expected to obey it. The law is complicated, however, and without adequate legal advice, it is doubtful that many nonlawyers would find it easy to conduct their affairs in conformity with legal rules. For most people, therefore, reliance on counsel is essential if they are to comply with legal requirements.

Furthermore, in our system, persons who believe that the law has been violated and who wish to see the law enforced against a violator are required to specify the alleged violation in accordance with certain designated procedures. Similarly, those charged with the law are expected to answer charges brought against them in a designated manner. Some knowledge of the law is necessary, of course, to formulate charges and responses, both to assure that there is substance to the position asserted and to conform to procedural requirements. Because the law is complex, and procedures are often intricate, most people need the help of a lawyer to initiate and to defend against legal proceedings.

The attorney-client privilege is some recognition of how essential legal advice may be when people attempt to learn about legal requirements or to dispute whether legal rules have been violated. It is a promise that when people seek advice from someone trained in the law, they can be candid; they can express their beliefs, fears, concerns, and facts without fear of disclosure, as long as they seek in good faith to conform their conduct to legal requirements, either in presenting a claim that someone has failed to comply with the law,
or in defending against such a claim.\(^{30}\)

Without this promise, people who seek legal advice might reasonably be concerned that every communication with an attorney could possibly create "evidence" that might be used by others against them. Such concern could lead to suppression of information which, in turn, could lead to poor legal advice. If there were no privilege, conscientious lawyers, employed to provide assistance to clients, might well warn their clients to be careful about what they say. To avoid creating adverse evidence, clients and their lawyers might make an extensive effort to cast statements in a hypothetical form, in the hope that any person with an adverse interest would find the statements too nebulous to be useful. Fear of creating adverse evidence might lead clients to refrain from revealing facts that would actually be helpful to them if only disclosed to their lawyers.\(^{31}\)

The attorney-client privilege represents a policy judgment that clients should be encouraged to seek legal advice and that lawyers should be fully and completely informed by their clients when rendering that advice. Although it is conceivable that if there were no privilege clients would reveal almost as much information to their attorneys as they would when a privilege protects them, it is not unreasonable to assume that some communications would be repressed. Indeed, some potential clients might avoid lawyers altogether, either because of misinformation about the law or because of a misguided notion as to how the information they possess might affect their legal position. Moreover, it is not unreasonable to assume that clients

\(^{30}\) It is important that the litigant use the privilege in good faith. If a client seeks an attorney's help in what the client knows or should know is a criminal or fraudulent effort, the privilege will not attach. See 2 J. Weinstein & M. Berger, supra note 17, \(\S\) 503(d)(1)(i)(ii); S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 248 (3d ed. 1982). Where the crime or fraud exception deprives a litigant of the privilege, he is also likely to lose work product protection. See, e.g., In re Grand Jury Proceedings, 604 F.2d 798, 802-03 (3d Cir. 1979); see infra text accompanying notes 168-72.

\(^{31}\) The need for confidentiality is discussed at greater length in Saltzburg, supra note 11, at 605-09.

As this article proceeds, it might appear that too much emphasis is being placed on clients who seek legal advice with an eye toward possible or actual litigation. This emphasis, however, is for good reason. If litigation—including various public investigations in which witnesses are called to testify and documents are sought—never eventuates, the privilege is irrelevant. The privilege only has relevance when someone wants disclosure in a tribunal of some sort of what the client has said. Outside of formal proceedings, the attorney is expected by the canons of professional conduct to preserve confidentiality, Model Code of Professional Responsibility Canon 4 (1980), and failure to do so might result in disciplinary action or even tort liability. If someone is guaranteed that no tribunal will ever seek to discover confidential communications, that person has no need to be concerned about the presence or absence of a privilege.
might be inclined to reveal only that information about which they were absolutely certain, fearing that premature communications might adversely affect them in the future. To encourage full disclosure of information by clients, the attorney-client privilege creates a zone of confidentiality in which clients and lawyers may communicate, free of concern that their communications will become available to persons with an interest in using the communications as evidence against the clients.

Nothing in the attorney-client privilege, however, allows clients to withhold answers to questions, during discovery or other proceedings, about events or facts of which they may have knowledge. Rather, the privilege only guarantees that the clients' specific statements made in confidence to counsel about those events or facts can be kept secret.

An example will not only illustrate this point, but will also highlight its importance. Assume that Shirley owns a bar, that she recently did some repair work on the sidewalk in front of that bar, and that several customers subsequently tripped on the sidewalk where the repairs had been made. Shirley, who had decided that she would not pay high insurance premiums on the establishment, is a self-insurer concerned about her potential liability to injured customers. She meets with her lawyer to discuss the repairs, the accidents, and whether she should do additional repair work on the sidewalk.

Shirley's specific conversations with her attorney are privileged. She has the right to refuse to reveal and to prevent the attorney from revealing the communications she made to her attorney in seeking legal advice. If Shirley is sued by the customers, the privilege does

32. See Trammel v. United States, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."). It is not always the case, however, that a lawyer's communications will be privileged. Since the purpose of the privilege is to encourage the client to be open and candid, disclosure of attorney communications that might tend to reveal the client's statements are protected, but other attorney communications may not be. See, e.g., In re Fischel, 557 F.2d 209, 212 (9th Cir. 1977) ("summaries of a client's business transactions with third parties compiled by an attorney from unprivileged facts" are not entitled to the protection of the attorney-client privilege); Attorney Gen. of the United States v. Covington & Burling, 430 F. Supp. 1117, 1121-22 (D.D.C. 1977) (privilege denied where protecting communications would not significantly "benefit the administration of justice").

33. See 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 . . .").

34. Id.; see Saltzburg, Communications Falling Within the Attorney-Client Privilege, 66 Iowa L. Rev. 811, 817-18 (1981).
not enable her to refuse, during discovery or trial, to answer ques-
tions about the repairs to the sidewalk or about what she observed at
or near the time of the accidents. Moreover, any knowledge that she
had before going to the attorney can also be explored. Thus, only her
communications to counsel are protected.\(^3\)

This illustrates that the attorney-client privilege enables clients
to communicate with lawyers with the assurance that their commu-
ications will not be used by others as additional evidence against
them, but does not conceal any information that would have been
available to other persons if legal advice had never been sought.\(^3\)
Shirley might never have chosen to seek legal advice if there were no
privilege available to protect her conversations. Since she did seek
legal advice, and the privilege protects her communications to coun-
sel, she benefits from the privilege, while any person with an adverse
interest is in no worse position than if Shirley had never talked to
counsel.

From this analysis, the basic rationale for the privilege emerges:
It encourages people who might be reluctant to seek legal advice in
the absence of such a privilege to consult and to be forthright with
counsel, without depriving others with adverse interests of any evi-
dence that would have been clearly available had legal advice not
been sought.

II. THE RATIONALE APPLIED TO CORPORATIONS

To best illustrate the rationale of the attorney-client privilege as
it is applied to corporations, a variation of the previous hypothetical
is helpful. Assume that Shirley, anxious to avail herself of the lim-
ited liability feature of a corporate structure, has incorporated her
bar business. All of her assets are devoted to the corporation and any
litigation will be against the corporation. Shirley has, of course, vir-
tually the same need for legal advice whether her business is a sole
proprietorship or a corporation. Absent a privilege, her fears about
having her communications used as evidence against her would be

\(^3\) The Supreme Court emphasized this fact in Upjohn Co. v. United States, 449 U.S.

\(^3\) A more lengthy discussion of why the privilege should be designed to encourage new
communications, but not to hide existing information and evidence, may be found in
Saltzburg, supra note 34. No one can deny, of course, that unscrupulous lawyers may work
with perjurious clients to foster and suborn perjury under the secrecy of the privilege. The
existence of the privilege suggests that lawyers are assumed trustworthy in a system of justice
that makes it so essential for them to be consulted by lay persons. If this assumption were not
made, the privilege probably could not be justified.
approximately the same whatever the form of the business. She is worried that she may suffer a loss if she or the corporation is sued successfully. Thus, she will want to be assured that she does not increase the likelihood that she will lose a lawsuit by making statements to counsel that may be used against her. The existence of a privilege enables her to communicate with counsel in order to defend any suit against the corporation, without making adverse parties any worse off than they would be were she a sole proprietor who consulted counsel. Thus, the argument for the applicability of the privilege seems strong in this example, even though the client is a corporation.

It is arguable, however, that when a business adopts a corporate form in order to secure whatever advantages that form has to offer, it should be forced to give up the attorney-client privilege. This argument might be warranted if corporations could not be sued or if they had no real need to seek legal advice. Since they can be sued and their liability can be substantial, they have at least the same need as—and as a result of the special legal requirements imposed upon corporations, probably even a greater need than—natural persons to obtain legal help in order to conform their conduct to the requirements of law, and to bring and defend against suits. Someone like Shirley has reason to be concerned about confidentiality, whether or not her business is incorporated, and without a privilege she may be reluctant to confide fully in her attorney. As long as Shirley has at least the same need for the protection of the privilege when incorporated as she had as a sole proprietor, and persons with adverse interests suffer no greater detriment when her corporation avails itself of the privilege to seek advice than when she herself does, the attorney-client privilege should be fully applicable to protect Shirley's confidential communications to counsel on behalf of her corporation. Shirley's is the strongest case for applying the attorney-client privilege to a corporation. She repaired the sidewalk, she decided whether or not to hire an attorney, and she must choose what to tell her lawyer about her actions and observations. It is difficult to see how her claim of privilege is any less compelling when the business is incorporated than when Shirley was a sole proprietor.

III. THE COMPLICATING FACTOR

If this scenario is changed slightly, however, the real problem of implementing the privilege for corporations becomes apparent. Assume that Shirley has incorporated her business and that she is the
chief officer of the corporation in charge of purchases, advertising, and other related concerns, but that she does not actually do the physical labor at the bar. Mary is the bartender, and Jean does the repair work. Mary reports to Shirley that customers have had accidents on the sidewalk after it was repaired. In this situation, although Shirley can count on her corporate structure to insulate herself from personal liability, she is still justifiably concerned that the corporation might be sued. Hence, she arranges for Mary and Jean to tell the corporation’s lawyer what they know about the customers’ accidents and the repair of the sidewalk.

The difference between this hypothetical situation and the preceding one is that while Shirley remains responsible for selecting the lawyer, paying for legal advice, and deciding whether or not to accept the advice, the communications to counsel will now be made by two other people. Because Mary and Jean are employed by the corporation, if they speak to counsel on behalf of the corporation at Shirley’s direction, it might seem that the communication is from the client, i.e., the corporation to its lawyer. On the other hand, Mary and Jean are not seeking legal advice, so they appear to have a motivation that is different from ordinary clients. For example, Mary may not have the same concerns as Jean, since Mary is not worried about being sued. Shirley may be more concerned than both Mary and Jean. Thus, the complicating factor arises when the simple situation of a corporation controlled by the very person who consults with counsel on the corporation’s behalf changes to a setting in which the person or persons who communicate with counsel are different from those who decide what counsel should attempt to learn and what counsel should do with any information that is learned. This factor is responsible for dividing the courts into two different conceptual approaches—namely, control group and scope of employment—in their attempts to define the limits of the corporate attorney-client privilege.

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37. Since Jean did the repair work, she would be personally liable for her own negligence. Although Mary does not have this concern, she might fear personal liability for failure to warn, but her fear is likely to be less than Jean’s.

38. Theoretically, Jean might be joined or made the exclusive defendant. In addition, the employer might theoretically have a right to indemnity from Jean if Jean was negligent. The employer’s concern for employee morale and the limitations on Jean’s resources, however, might make the employer reluctant to sue.

39. This complicating factor would also exist in the hypothetical in which Shirley is a sole proprietor if it is assumed that someone other than Shirley worked on the sidewalk and talked with counsel. Given the large number of natural persons who retain counsel, it is odd
A. The Control Group Approach

The control group test finds its origins in *City of Philadelphia v. Westinghouse Electric Corp. (Westinghouse II)*, decided in 1962. The plaintiff in an antitrust case sought detailed information from Westinghouse Electric Corporation ("Westinghouse") as to meetings attended by its officials and competitors during which prices, terms of sales, and territories might have been discussed. Westinghouse claimed attorney-client privilege on the ground that the information relevant to the plaintiff's questions was given to counsel by corporate officers and employees in confidence. The *Westinghouse II* district court adopted the view that:

"If the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply."  

Communications by other employees would not be privileged. This position, which the United States Court of Appeals for the Third Circuit approved as late as 1979 (shortly before the Supreme Court rejected the control group approach), is based on a concern that an excessively broad corporate privilege would give corporate parties an unwarranted litigation advantage and might permit a considerable amount of evidence to be concealed under the umbrella of that there are few reported cases on the attorney-client privilege, especially recent ones, involving natural persons whose employees or agents communicate with attorneys. For this reason, discussion of Shirley as a sole proprietor with employees is postponed until the proper scope of the corporate attorney-client privilege has been identified. At that point it will be clear how the sole proprietor with employees should be treated. See infra notes 161-78 and accompanying text.


42. See id. at 830-31.


the corporate attorney-client privilege.46

Although there is reason to be worried about the scope of corporate privilege, the district court in Westinghouse II may have been unduly concerned about the suppression of evidence that would flow from a broader view of the privilege.47 As noted earlier, corporate officials could have been compelled to answer any questions about meetings and discussions about which they had knowledge.48 Furthermore, the current Federal Rules of Civil Procedure would require a corporation to do some investigation in order to answer interrogatories.49 While specific communications to attorneys might be privileged, a corporation still may be bound to answer questions about who did what, when, where, and so on. Facts available to the corporation are not immune from discovery simply because they have been related to an attorney.

B. The Scope of Employment Concept

The broader view of the attorney-client privilege, referred to here as a scope of employment approach, is well illustrated by Harper & Row Publishers v. Decker,50 decided eight years after Westinghouse II. In Harper & Row, shortly after a number of present and former corporate employees testified before a federal grand jury investigating possible antitrust violations in the publishing industry, corporate counsel debriefed the employees and prepared memoranda relating to the debriefings.51 The plaintiffs in a civil antitrust case sought discovery of the debriefing memoranda, and the corporation resisted, inter alia, on the ground of attorney-client privilege.52 The court of appeals found that certain debriefing memoranda were privileged.53 It went beyond the control group test and

47. Of course, there is still good reason to be concerned about extending the corporate privilege beyond the rationale that supports it. See infra text accompanying notes 136-37.
48. That the corporation may have been trying to avoid answering questions about events, as well as trying to protect communications, is evident in an earlier opinion in the Westinghouse case. 205 F. Supp. 830, 831 (E.D. Pa. 1962) (Westinghouse I).
50. 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971).
51. Id. at 490.
52. Id.
53. Five of the six debriefing memoranda involved in the proceedings were held to be protected by the attorney-client privilege. As for the sixth, good cause was found to exclude it from work product protection. Id. at 492.
held that a communication by a corporate employee to counsel 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 the performance by the employee of the duties of his employment."54 The Supreme Court affirmed by an equally divided vote.55

_Westinghouse_ and _Harper & Row_ are important cases since they are seminal and oft-cited statements of the two most significant approaches to implementing the corporate attorney-client privilege. The division on the Supreme Court in _Harper & Row_ mirrored the division of authority in the lower courts.

Eight more years passed with no consensus developing as to the preferable approach to corporate privilege when an en banc United States Court of Appeals for the Eighth Circuit, in _Diversified Industries v. Meredith_,56 made an effort to establish a test of privilege that might receive wider acceptance. The court endeavored to restate the scope of employment test to assure that the privilege did not provide corporations with a device to hide information under the guise of seeking legal advice.57

_Diversified Industries_, Inc. ("Diversified"), which engaged in the manufacturing and processing of nonferrous metals, was concerned that its employees may have maintained a "slush fund" to bribe purchasing agents of its customers.58 It hired outside counsel to conduct an investigation and to report its findings to the board of directors.59 Diversified's president advised employees that "he would take any steps necessary or appropriate to insure employee cooperation" with the investigation.60 Counsel interviewed employees, compiled a report, and submitted it to the board.61 Discovery of this report was sought in a lawsuit by one of the customers, who alleged

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54. _Id._ at 491-92.
55. 400 U.S. 348 (1971). Because of the divided vote, the Advisory Committee that submitted proposed rules of evidence to the Supreme Court, after first proposing a control group test in a draft of its rules, see _Fed. R. Evid._ 503 advisory committee note, 51 F.R.D. 315, 363 (1971) (rev. draft of proposed rule, not enacted), decided not to write a test for corporate privilege into its proposed attorney-client privilege rule. See _Fed. R. Evid._ 503 advisory committee note, 56 F.R.D. 183, 237 (1972) (proposed rule, not enacted).
56. 572 F.2d 596 (8th Cir. 1978) (rehearing en banc).
57. _See id._ at 609.
58. _Id._ at 607.
59. _Id._
60. _Id._
61. _Id._ at 607-08.
that Diversified had conspired with the customer's employees to defraud the customer. The court set forth the following test for privileged communications:

We feel that the ... attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Applying this test to the facts, the court found that the report, which summarized the interviews with the employees, was privileged.

While the decision was welcomed by some commentators, it failed to persuade those courts preferring the control group test. The Supreme Court had the opportunity to resolve the conflict in the circuits in Upjohn Co. v. United States.

Upjohn Company ("Upjohn"), which manufactured and sold pharmaceuticals in the United States and abroad, became aware that some of its employees might have been making "questionable payments" to foreign officials in order to secure business. Pursuant to Upjohn's request for an investigation, the company's attorneys prepared a letter containing a questionnaire which was sent, over the signature of the Chairman of the Board, to all general and area

62. Id. at 606-07.
63. Id. at 609.
64. Id. at 611.
65. See 2 J. Weinsteiın & M. BERGER, supra note 17, ¶ 503(b)(4), at 503-54 (noting that Diversified "explicitly adopted the modified subject matter test proposed in this Treatise"); Graham, Evidence and Trial Advocacy Workshop: The Lawyer-Client Privilege, 19 CRIM. L. BULL. 513, 518 (1983) (Diversified characterized as an "appealing resolution").
67. 449 U.S. 383 (1981). One commentator referred to the Upjohn case as the perfect vehicle for litigating the corporate privilege. Recent Developments, Evidence—Upjohn v. United States—Corporate Attorney-Client Privilege, 7 J. CORP. L. 359, 378 (1982). In fact, it may have been the worst possible set of facts for dispassionate consideration of the scope of the privilege as could be imagined. See infra note 81.
68. Upjohn, 449 U.S. at 386.
managers. The letter, stating that the Chairman had asked counsel to conduct an investigation into certain payments, instructed employees to respond, but to keep all information "highly confidential." Counsel also interviewed the recipients of the questionnaire as well as other officers and employees. Subsequently, Upjohn submitted a preliminary report to the Securities and Exchange Commission and forwarded a copy of the report to the Internal Revenue Service ("IRS"). The report revealed that certain questionable payments were made. Upjohn also supplied IRS agents with the names of all those interviewed and all those who had responded to the questionnaire. Afterwards, the IRS, which had initiated an investigation into the tax consequences of the payments, attempted to subpoena all the written questionnaires as well as notes and memoranda of the interviews with the employees. Upjohn resisted the subpoena, claiming that the documents were protected by both the attorney-client privilege and the work product doctrine. When Upjohn sought review of the district court decision rejecting the privilege claim, the United States Court of Appeals for the Sixth Circuit adopted a control group approach and remanded the case with the instruction that the district court apply that approach to the facts. Dissatisfied, Upjohn sought and obtained a writ of certiorari in the Supreme Court, which proceeded to strike a death blow to the control group test in federal courts. Unlike the equally divided Court that left the court of appeals' decision in Harper & Row undisturbed, the Upjohn Court was almost unanimous. Justice Rehnquist reasoned for the Court as follows:

69. Id.
70. Id. at 387.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id. at 387-88.
76. Id. at 388. Under the analysis of attorney-client privilege offered in this article, the work product argument is clearly better than the attorney-client privilege claim. The reason will be apparent shortly. See infra notes 99-123 and accompanying text.
79. There were no dissents. Only Chief Justice Burger departed slightly from the majority opinion when he concurred in part only and also concurred in the judgment. He agreed with the rejection of the control group test, but preferred to state a more definitive test of privilege than did the majority. Upjohn, 449 U.S. at 402 (Burger, C.J., concurring in part and concurring in the judgment).
The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law". . . . The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. . . . The very terms of the test adopted by the court below suggests the unpredictability of its application. . . .

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . .

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern the challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. . . . While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" sanctioned by the Court of Appeals in this case cannot, consistent with "the principles of the common law as . . . interpreted . . . in the light of reason and experience," Fed. Rule Evid. 501, govern the development of the law in this area.80

Fed. R. Evid. 501 provides in relevant part that:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political
At first, this reasoning might appear to incorporate the basic rationale for the privilege as set forth earlier: The privilege encouraged Upjohn to provide information to its counsel without placing other persons, particularly the IRS, in a worse position than if Upjohn had never asked counsel to prepare a report concerning the "'questionable payments.'" The Upjohn reasoning, however, appears to be strikingly similar to an analysis appropriate in typical work product claims. This similarity, once fully developed below, will explain why ultimately Upjohn inadvertently departs from the true rationale for the attorney-client privilege. This similarity will also indicate why the scope of employment test is not consistent with the basic rationale for the attorney-client privilege. Although the Supreme Court has not adopted this or any other test, there are signs that the factors identified by the Seventh Circuit in Harper & Row Publishers v. Decker, and by the Eighth Circuit in Diversified Industries v. Meredith may be the same as, or at least very similar to, the factors that the Supreme Court would use to assess corporate
claims of attorney-client privilege.\textsuperscript{84} Once the scope of employment test is rejected, it will become plain that, \textit{Upjohn} notwithstanding, the control group test, though flawed itself, comes closer to being right than its principal competitor.

\section*{IV. The Work Product Doctrine}

The problem with the \textit{Upjohn} analysis is best understood by reviewing one of the Supreme Court's earlier statements on the attorney-client privilege as enunciated in \textit{Hickman v. Taylor}.\textsuperscript{85} \textit{Hickman} arose when a tug sank while towing a railroad "car float" across the Delaware River, drowning five of nine crew members.\textsuperscript{86} The tug owners hired counsel, who "privately interviewed the survivors and took statements from them with an eye toward \ldots anticipated litigation."\textsuperscript{87} Counsel also interviewed other persons who may have had information about the accident and, in some instances, prepared memoranda recording the statements obtained.\textsuperscript{88} Of the five claims made on behalf of the deceased workers, four were settled and one resulted in litigation in federal district court.\textsuperscript{89} The plaintiff requested copies of any written statements taken from crew members and detailed summaries of any oral statements the crew members made to defense counsel.\textsuperscript{90} Additional discovery requests sought other defense memoranda concerning the case, as well as all oral or

\begin{itemize}
  \item \textsuperscript{84} The test proposed by the Chief Justice in his \textit{Upjohn} concurrence is very similar to that adopted in Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (rehearing en banc). \textit{Upjohn}, 449 U.S. at 402-03 (Burger, C.J., concurring in part and concurring in the judgment). In addition, the majority noted that the \textit{Upjohn} employees spoke to counsel at the direction of their superiors, for the purpose of having the corporation obtain legal advice, when the information the employees had was unavailable from top management and related to the duties of the employees, and that the employees knew that they were speaking to enable the company to obtain legal advice. \textit{Id.} at 394. Even though the Court did not say that these factors were all necessary or that they would be sufficient in all cases, they are the only factors with which the lower courts can work. Furthermore, these factors resemble those used in \textit{Diversified Industries}, 572 F.2d at 609, and are not very different from those first developed in \textit{Harper & Row}, 423 F.2d at 491-92.
  \item \textsuperscript{86} 329 U.S. 495 (1947).
  \item \textsuperscript{87} \textit{Id.} at 498.
  \item \textsuperscript{88} \textit{Id.}
  \item \textsuperscript{89} \textit{Id.}
  \item \textsuperscript{90} \textit{Id.} at 498-99.
\end{itemize}
written statements obtained by defense counsel.91

The defendant resisted discovery, claiming privilege and invasion of the attorney's private work.92 Although the Hickman defendant failed to persuade the district court,93 it ultimately was successful in both the court of appeals94 and the Supreme Court.95 The Supreme Court devoted little space in its opinion to a discussion of attorney-client privilege,96 concluding that:

[I]t suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.97

In so concluding, the Supreme Court essentially agreed with the plaintiff's argument that the attorney-client privilege was inapplicable because the statements obtained by the lawyer were secured from third persons instead of from the attorney's clients.98

After finding that the attorney-client privilege was not available,99 the Court sustained the judgment of the court of appeals by relying on what is now known as the work product doctrine. The Court reasoned that "[i]n performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free

91. Id. at 499.
92. Id.
94. Id. at 498-99.
95. Id. at 498-99. Although the Hickman plaintiff did, in fact, sue the corporate railroad defendant, the issue of privilege arose specifically only in the context of the interrogatories directed at the tug owners, a partnership. Id. at 498-99. The court's language about the corporate attorney-client privilege was, therefore, dicta.
96. Id. at 508.
97. See id. at 506. Some commentators have questioned why the Court reached this result. See, e.g., Weisenberger, Toward Precision in the Application of the Attorney-Client Privilege for Corporations, 65 IOWA L. REV. 899, 908 n.47 (1980); Simon, The Attorney-Client Privilege as Applied to Corporations, 65 YALE L.J. 953, 959 n.20 (1956). It is only possible to speculate at this point as to what the Court had in mind, but this article concludes that the Court was correct in its approach. See infra text accompanying notes 179-83.
98. Hickman, 329 U.S. at 508.
from unnecessary intrusion by opposing parties and their counsel.\textsuperscript{100} The Court found that lawyers’ work is reflected in “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways.”\textsuperscript{101} Although it recognized the need for lawyers to be able to work privately, the Court stopped short of affording absolute protection against discovery of work product, especially written statements and memoranda:

Where relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty.\textsuperscript{102}

The Court seemed especially reluctant, however, to require an attorney to produce memoranda of oral statements made by witnesses or to require an attorney to testify about them.\textsuperscript{103} The Court concluded that no “showing of necessity can be made under the circumstances of this case so as to justify production,”\textsuperscript{104} thereby implying that in some cases a showing might justify discovery. For a party to be successful, however, in justifying production, any showing would probably have to be stronger for discovery of oral statements than would be required for discovery of written statements made by a witness to an event.\textsuperscript{105}

\begin{itemize}
  \item[100.] Id. at 510-11.
  \item[101.] Id. at 511.
  \item[102.] Id.
  \item[103.] Id. at 512-13.
  \item[104.] Id. at 512.
  \item[105.] The Hickman Court expressed several reasons for its particular reluctance in requiring an attorney to produce memoranda of oral statements obtained from witnesses. “[F]orcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness.” Id. at 512-13. Such practice would also force an attorney to testify, making the attorney “much less an officer of the court and much more an ordinary witness.” Id. at 513. According to the Court, “[s]uch testimony could not qualify as evidence.” Id. But see infra note 143 (discussing circumstances under which such testimony could be admissible). The Court also expressed, throughout the opinion, a general concern for protecting the lawyer’s mental processes. See, e.g., 329 U.S. at 511, 514.

  With the codification of more liberal evidentiary rules, which make it more likely that oral statements would be admissible as evidence, see infra note 143, the most compelling of

\end{itemize}
The work product doctrine, a version of which is incorporated in rule 26 of the Federal Rules of Civil Procedure, proved in the *Upjohn* decision to be as important as the attorney-client privilege. To the extent that the attorney-client privilege did not cover the lawyer's work in *Upjohn*, the Court suggested that the work product doctrine might be applicable. Relying on *Hickman*, the *Upjohn* Court emphasized the heavy burden that must be borne by any litigant seeking to discover summaries of, or testimony about, oral statements made to opposing counsel, leaving open the possibility that it might never be possible to make a sufficient showing of necessity.

The work product doctrine rests on an assumption concerning the way lawyers and their clients behave that is related to, but different from, the rationale for the attorney-client privilege. Underlying the work product rule is the belief that lawyers need to be able to prepare for possible litigation by interviewing witnesses, preparing memoranda, and doing other tasks without exposing their work to opposing parties and their counsel. This belief is consistent with a view of the adversary system that posits that a fair result is most likely to be achieved if both sides work hard to prepare their cases for presentation to a tribunal. When both sides seek out evidence and develop approaches to a case, the tribunal that is called upon to

106. *Fed. R. Civ. P.* 26(b)(3) reads in pertinent part as follows:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only 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 materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.


108. *Id.*

109. In *Upjohn*, the Supreme Court cited both lower court authority that holds “that no showing of necessity can overcome protection of work product which is based on oral statements from witnesses,” and conflicting authority that holds that there is no absolute bar to discovery. *Id.* (emphasis in original) (citations omitted). It declined to resolve the conflict, however, assuming that if discovery would ever be allowed, “a far stronger showing of necessity” would be required than the government attempted to make in *Upjohn*. *Id.* at 401-02.
decide the case is likely to discern opposing strengths and weaknesses. Furthermore, according to this adversarial notion, parties should be encouraged to do independent work and should be able to protect their work until such time as they are prepared to show it to an opponent, which is often at trial. Although discovery inevitably invades the privacy of preparation to some extent, as Justice Jackson stated in his concurring opinion in *Hickman*, "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

The principal difference between the attorney-client privilege and the work product doctrine, in terms of the protection each provides, is that the privilege cannot be overcome by a showing of need, whereas a showing of need may justify discovery of an attorney's work product. An attorney may accurately tell a client, therefore, that communications made in confidence are absolutely protected. Such a statement would be incorrect if made to a nonclient witness.

Why does an attorney's work product receive less protection than privileged communications? The answer to this inquiry has two parts. First, the attorney who seeks information from a nonclient witness, as did the lawyer in *Hickman*, may want to use the information, perhaps even the very statement made by the witness, as evidence for his client and possibly against the witness. Were the work

110. 329 U.S. at 516 (Jackson, J., concurring).

*Garner* issues may also arise where beneficiaries seek discovery of communications between their fiduciaries and the fiduciaries' lawyers. See, e.g., *Quintel Corp. v. Citibank*, 567 F. Supp. 1357 (S.D.N.Y. 1983); see also Saltzburg, *supra*.

112. There are, of course, exceptions to the attorney-client privilege. For a discussion of communications that are exempted from the privilege, see R. LEMPERT & S. SALTZBURG, *A Modern Approach to Evidence* 697-98 (2d ed. 1982); see also Fed. R. Evid. 503(d) advisory committee note, 56 F.R.D. 183, 236-37, 239-40 (1972) (proposed rule, not enacted; detailing five "well established exceptions").
product doctrine to guarantee witnesses that unless they consented nothing they told counsel could be used as evidence, it would not only undermine the incentives lawyers need to gather the information, but would frustrate clients in their efforts to prove their cases and to refute those of their opponents. Second, witnesses who are not clients are ordinarily not concerned in the same way that clients are about the possible use of their statements against them. Although the inconsistent testimony of a witness may damage the party who urges the jury to believe the witness, the witness suffers little more than embarrassment. The client usually is a party or potential party who fears appearing inconsistent and is especially wary of saying something that he might later contradict. A trier of fact may be quicker to hold a person to what he has said when he is a litigant rather than when he is a mere witness.

This analysis demonstrates that the witness who communicates with counsel in the typical work product situation is not guaranteed that the communications will remain private. Such a person could be told that work product is not often disclosed, but conscientious counsel would have to add that disclosure will depend more on his client’s interest in using the communications, or on the need of an adverse party for information, than on any privacy interest of the person interviewed.

The lawyer who generates work product always does so at some risk. For example, counsel may regret seeking information that is ultimately more helpful to an opponent than to his client. The very fact that there is a process for discovery, however, signifies that very often counsel will not know ahead of time whether a nonclient witness is more likely to have helpful or harmful information. Arguably, counsel should seek information even if he knows it to be harmful, since an opponent may ultimately come upon it and the earlier it is known, the more time his client has to cope with it. Of course, it is also possible that in generating work product, a lawyer may discover and may ultimately be forced to reveal information that an adversary might have otherwise missed. This is why lawyers who investigate run certain risks.

These risks may, in fact, inhibit some investigation. There may be times, for example, when a lawyer will refrain from contacting a potential witness out of fear that disclosure of the results of the contact may be required, and that disclosure may strengthen the opponent’s case. It would be surprising, however, if the nonabsolute nature of the work product doctrine caused many lawyers to refrain
from such investigation. This is true for two reasons: (1) the difficult burden of establishing a need to discover work product rests on the party who requests disclosure, and (2) the lawyer who generates the work product has some control over the product through the way he asks questions of witnesses. In fact, even though the Supreme Court in both Hickman and Upjohn expressed concern over too liberal discovery of attorneys’ work, the Court nevertheless retained the nonabsolute character of the work product rule. This suggests that at least the Supreme Court believes that reasonable discovery of work product will not unduly impair the functioning of an adversary system.

This discussion of the work product doctrine helps to identify what was missing in the Supreme Court’s analysis of attorney-client privilege in Upjohn. Justice Rehnquist reasoned that by upholding the privilege claim the Court did not leave the government in a worse position than it would have been had Upjohn never conducted its investigation. Although this is undoubtedly true, its importance in an analysis of attorney-client privilege is distorted. Previously, it was demonstrated that the attorney-client privilege rests on not one, but two principal assumptions: first, that the person communicating with the lawyer—i.e., the client—might not be totally forthright absent a privilege; and second, that the recognition of a privilege to foster communication places an adverse party in no worse position than if the client withheld information from his lawyer. Only the second assumption is applicable in Upjohn, and is, by itself, insufficient to warrant recognition of a privilege. In fact, it is the same assumption that applies in all work product situations.

Every time an attorney obtains witness statements that are work product, a claim could be made that had the statements not been obtained, an adverse party would have been unable to discover them. Therefore, discovery should never be permitted, since it would only place an adverse party in a better position than he reasonably could expect to be in. This reasoning, however, has not prevailed. A non-client witness who gives a statement to an attorney cannot assume that the statement will not be disclosed. The party who obtained it

113. See Upjohn, 449 U.S. at 397-400; Hickman, 329 U.S. at 510-11.
114. See Upjohn, 449 U.S. at 401-02; Hickman, 329 U.S. at 511-12.
115. See Upjohn, 449 U.S. at 395.
116. See supra notes 29-36 and accompanying text.
may choose to disclose it and an adverse party may possibly discover it. Where the witness is willing to give a statement under these circumstances, courts do not confer an absolute right of nondisclosure upon the party who obtained the statement. An opponent who demonstrates sufficient need may discover the statement, because courts assume that the statement was not dependent on confidentiality. In the noncorporate context, the only statements that courts treat as absolutely privileged are those made by persons who understood that their statements would not be disclosed without their consent—i.e., communications between clients and their attorneys. Absent this understanding, witnesses' statements to attorneys are classified, as were the statements in Hickman, as work product, and thus are not afforded absolute confidentiality.

Therefore, the distinction between the work product doctrine and the attorney-client privilege does not turn on the lawyer's fear of creating potentially adverse evidence, which is present every time the lawyer interviews any witness—client or not—but rather, on the need to guarantee confidentiality as a condition of a person's talking with a lawyer.

The defect, then, in the approach of the courts adopting a scope of employment test as well as in Upjohn, is that the wrong question is asked, at least implicitly, and that the question reflects an incorrect assumption. In their search to expand the privilege beyond the narrow control group formulation, the courts seem to inquire whether, without a guarantee of confidentiality, a lawyer will be reluctant to talk with employees of a corporation who have information—i.e., witness-employees. The courts arrive at an affirmative answer. In the process, the courts assume that if lawyers would be

given to an attorney.

118. See, e.g., Hickman, 329 U.S. at 511-12.
119. See id. at 509-10.
120. See, e.g., Diversified Indus. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (rehearing en banc), wherein the court criticized the control group test because

[the attorney dealing with a complex legal problem is . . . faced with a 'Hobson's choice'. If he interviews employees not having 'the very highest authority', their communications to him will not be privileged. If, on the other hand, he interviews only those with 'the very highest authority', he may find it extremely difficult, if not impossible, to determine what happened."

Id. at 609, quoting Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, 12 B.C. INDUS. & COM. L. REV. 873, 876 (1971) (emphasis in original).

Assuming arguendo that the implicit question asked by the courts who employ a scope of employment test is different than the one posed in text, it is, nevertheless, clear from these courts' analyses that a focus on the privilege's rationale is lacking.
reluctant to talk with employees, employees would be equally reluctant to talk with lawyers. These courts fail to understand that the premise of the nonabsolute character of the work product doctrine is that lawyers who need information to provide legal advice will seek it from knowledgeable witnesses, even without an absolute privilege protecting their work. The courts also overlook the fact that an employee willing to talk with corporate counsel, who does not represent the employee, is unlikely to be told that he has the right to control the use of his statements. Because the employee may have different interests from the corporation and its lawyer, if the employee-witness is not assured that the lawyer represents his interests and will not disclose his communications, then the lawyer and the employee have different motivations. Therefore, the employee who talks without being a client might suffer for his cooperation. Such an employee, who is actually willing to talk without protection of the privilege, is like any witness who is willing to talk. The lawyer's apprehensiveness about possibly finding out information that might turn out to be detrimental to the corporation would be no different when he seeks out an employee than when he seeks out any other witness. The correct question for courts to ask, therefore, is whether a witness insists upon establishment of an attorney-client relationship and, thus, the protection of a privilege, before speaking with the corporation's attorney. Only where the answer to this question is affirmative is the attorney-client privilege properly applicable.\textsuperscript{121}

It could be argued that there is no proof that noncorporate clients—e.g., natural persons—would refrain from talking with their lawyers absent a privilege; indeed, there is no empirical evidence on the point. The law of evidence assumes, however, that clients need a privilege to encourage candor in their communications with counsel.\textsuperscript{122} As long as people seek advice and avail themselves of the priv-

\textsuperscript{121} The different rationales for attorney-client privilege and the work product doctrine may explain why waiver rules for the two concepts also may differ. Many courts have adopted a strict view that once privileged communications are disclosed to third parties, the privilege is lost. \textit{See}, e.g., \textit{In re John Doe Corp.}, 675 F.2d 482 (2d Cir. 1982) (waiver by disclosure of privileged report to underwriter). Privileged communications may not be revealed selectively to third parties. Even where the privilege is waived, the work product doctrine may still be available. \textit{See}, e.g., Connecticut Mut. Life Ins. Co. v. Shields, 16 F.R.D. 5, 8 (S.D.N.Y. 1954); Vilastor-Kent Theatre Corp. v. Brandt, 19 F.R.D. 522, 524 (S.D.N.Y. 1956). Since the work product doctrine is fashioned to provide parties with an incentive to gather information for use against others, who are expected to do their own work, the fact that a party shares information with some third parties does not necessarily mean that it must also share with those against whom it has gathered the information.

\textsuperscript{122} \textit{See} C. McCormick, McCormick's Handbook of the Law of Evidence § 92,
ilege by not revealing what was said to counsel, courts may assume that the privilege has worked as intended. When nonclient witnesses talk to lawyers without any promise of confidentiality, the assumption must be that they are willing to talk, since that is precisely what they are doing. It is difficult to argue, therefore, that nonclient witnesses would not speak without a privilege when, in fact, they often do.\textsuperscript{123} Thus, a proper analysis of corporate attorney-client privilege requires an examination of whether corporate employees insist upon confidentiality as a condition to speaking with corporate counsel.

V. REFINING THE SCOPE OF CORPORATE ATTORNEY-CLIENT PRIVILEGE

Under the control group test, and especially under the scope of employment approach, corporations are able to have the best of two worlds. First, their attorneys have an advantage over other lawyers in securing statements, since the corporate employer is able to exert a coercive influence on employees to “encourage” them to talk with its counsel. Consider \textit{Diversified Industries v. Meredith},\textsuperscript{124} for example, where the corporation’s president indicated he would do whatever was necessary to get employees to communicate with the corporation’s counsel.\textsuperscript{125} Similarly, in \textit{Upjohn Co. v. United States},\textsuperscript{126} the letter bearing the signature of Upjohn’s Chairman, which instructed all employees to cooperate fully with counsel’s investigation, must have had an obvious influence on its recipients. The threat of discharge, demotion, or simply disapproval can be used to influence employees to say things that may be adverse to them personally. Lawyers who are not employed by the corporation are unlikely to have this kind of influence to assure witness cooperation.\textsuperscript{127}

\hspace{1em} at 192 (2d ed. 1972).

\textsuperscript{123} It is possible that more witnesses would come forward or would reveal additional facts if they were treated as if they were clients and thus covered by the privilege. If they were covered by the privilege, however, presumably they could insist that the party who obtained their statements does not use them, which would mean that a party’s proof would depend on witnesses’ willingness to have their statements disclosed. Moreover, the work product doctrine implicitly rejects the idea that the danger of witnesses’ lack of cooperation is sufficiently great to provide them with the protections associated with a privilege. Witnesses who are uncooperative may be deposed in civil cases and might find themselves before grand juries or in preliminary hearings in criminal cases, where they can be compelled to provide information.

\textsuperscript{124} 572 F.2d 596 (8th Cir. 1977) (rehearing en banc).
\textsuperscript{125} \textit{Id.} at 607.
\textsuperscript{126} 449 U.S. 383 (1981); see supra text accompanying notes 69-70.
\textsuperscript{127} A certain element of coercion is evident in the early control group decision in City
Second, once the corporation obtains employee communications, it freely uses them in any manner it chooses while simultaneously claiming a privilege to prevent anyone else from using them. The corporation may fire the employee because of what it learns. In addition, it may sue the employee for any damages that it suffers as a result of the employee's actions, using the communications in the suit against the employee. Alternatively, it may turn the communications over to the government in an effort to use the employee as bait for an arrangement that is favorable to the corporation. Moreover, if the employee is sued or prosecuted, the corporation may prevent corporate counsel from providing the employee with a copy of his state-


128. In Upjohn, the company argued that to focus on the possibility of disclosure as a reason for limiting the scope of the privilege is to ignore reality, since corporations almost never disclose communications to the detriment of their employees. Brief for Petitioners at 39 n.41, Upjohn Co. v. United States, 449 U.S. 383 (1981). The government responded that an employee cannot rely on past experience when speaking with counsel who represents only the corporation. See Brief for the United States and the Federal Respondent at 27 n.18, Upjohn. In Upjohn, some of the information that the company learned as a result of counsel's investigation was turned over to the government as a result of a high level corporate decision, not a decision by those who spoke with counsel, see Upjohn, 449 U.S. at 387, suggesting that where the corporation will benefit from disclosure it will disclose. In fact, management probably must do so to protect its shareholders. The company suggested that the employees' concern could be alleviated if the Court expanded the scope of the privilege; the employees would then be confident that their communications would be more likely to be protected. See Brief for Petitioners at 39 n.41, Upjohn. This argument, however, is unpersuasive for two reasons. First, the corporation will still be inclined to waive the privilege where it works to its own advantage. Second, and more importantly, if there is any substance to internal corporate investigations, then they must be conducted to expose and to eradicate wrongdoing, fraud, crime, and other acts that might subject the corporation to liability, prosecution, and perhaps even embarrassment. This cannot be done if the employees and officials responsible for a corporation's problems never suffer as a result of an investigation. If they may suffer, then they may be hurt by communicating with counsel. Moreover, if they are promised that they cannot be hurt, then there is little reason to afford a privilege, since the corporation apparently is simply going through the motions and not really trying to improve things. Either way, there is no reason to extend the privilege to employees who are not guaranteed control over the use and distribution of their statements to counsel.

In Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 51 N.Y.U. L. Rev. 443, 465 (1982), the suggestion is made that absent a privilege, a corporate employee would fear that he could not be candid with the corporation. Since the corporation can coerce employee statements and is not required to refrain from using them to the employee's disadvantage, it is difficult to see how a corporate privilege protects the employee. Moreover, in the situation where the employee is likely to be most concerned about disclosure—where he has engaged in gross misconduct—the corporation is more likely to use the information to his detriment. A privilege will not give him an incentive to tell the truth. He will have an incentive to lie to protect himself whether or not there is a privilege.
ment.129 Similarly, others desiring to use the employee's statements must also surmount the privilege claim.

There is a way, however, of defining the scope of the corporate attorney-client privilege so that it is consistent with its basic rationale and so that it provides sufficient, but not excessive, protection for communications by corporate employees to corporate counsel. The privilege should cover all communications made for the purpose of securing legal advice for the corporation and in confidence to corporate counsel by a person or group of persons who have the authority to control the subsequent use and distribution of the communications. Communications by other employees may be protected by the work product doctrine, if made while the corporation is contemplating possible litigation.130

This approach is certainly narrower than any scope of employment test of attorney-client privilege and is distinguishable from a control group approach. As long as the person who communicates with counsel is given authority to determine whether counsel may share the communications with others, such person need not be part of what might normally be thought of as the control group to claim the privilege for the corporation. Furthermore, someone who is in the traditionally perceived control group for most purposes, but who is under investigation by the corporation, would be unable to claim the privilege for the corporation where others are to decide what to do with his communications.

Only where control over the use of the communications is provided to the employee who speaks with counsel is it possible to make one of the assumptions necessary to justify an absolute corporate attorney-client privilege: namely, that the client might not be forthright without a privilege. This approach is similar to requiring that to claim the privilege an employee must also be an independent client of the corporation's counsel. Of course, an employee who is a joint client can claim the privilege to prevent disclosure of his state-

129. This might not appear important, since it might be assumed that the employee must know what he told counsel. A prior statement might be useful, however, as a prior consistent statement, see Fed. R. Evid. 801(d)(1)(B), or as a statement of state of mind, see Fed. R. Evid. 803(3), and might be important to an employee's case. If the corporation has the privilege, it may decide whether to disclose the statements.

130. To qualify as work product, material must be prepared when litigation is viewed as reasonably possible, see, e.g., United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981), not simply as a remote possibility, see, e.g., In re Special September 1978 Grand Jury (II), 640 F.2d 49, 65 (7th Cir. 1980).
ments to outsiders. As a joint client, the corporate employee would share control over the use of his communications with the corporation and could prevent disclosure to third parties. He could use his communications in litigation between himself and the corporation. In addition, the lawyer asking him questions would owe him the same fiduciary duty owed to any other client.

It should not be necessary, however, for the employee also to be a client for the corporate privilege to be applicable to his statements, as long as the employee has the authority on behalf of the corporation to decide whether his communications may be disclosed. If the

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131. In a case like Upjohn, this might have been very important. Were the employees joint clients, they would have the right to prevent any communications from being revealed to the government and they could have insisted that their lawyer not volunteer information based on their communications to the government. The attorney would have owed them a fiduciary responsibility that he did not owe to them under the actual facts of Upjohn. In Sexton, supra note 128, at 505, 508-10, the argument is made that employees should have the right to assert the privilege. If they are co-holders, it is clear that they have this right. Of course, if they are deemed co-holders, then there is not much need to worry about the scope of the privilege, for natural persons can become joint clients and share a privilege. See, e.g., Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964). The significant thing about the broad corporate attorney-client privilege, however, is that it gives the corporation protection, but not the employee.

If the corporation holds the privilege, not the employee, it can choose whether or not to waive its protection without any concern for the employee. See, e.g., In re Grand Jury Proceedings, 570 F.2d 562 (6th Cir. 1978) (former corporate vice-president could not claim privilege after corporation waived it); United States v. Piccini, 412 F.2d 591 (2d Cir. 1969), cert. denied, 397 U.S. 917 (1970) (corporate officer could not claim privilege with respect to his communications to attorney for corporation); see also United States v. De Lillo, 448 F. Supp. 840 (E.D.N.Y. 1978) (former trustee of pension fund could not claim individual privilege after present board waived it).

132. See, e.g., Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964).

133. See, e.g., Fed. R. Evid. 503 (d)(5), 56 F.R.D. 183, 237 (1972) (proposed rule, not enacted) (The rule would have permitted joint clients to offer communications made in confidence in an action between themselves, but would have recognized the privilege in an action between one joint client and a third party.).

134. There is a danger confronting the employee in the joint client situation. The employee might want legal advice that may be premised upon information that could result in disciplinary action against him or in his discharge, if disclosed to corporate officials. Naturally, the corporation might want to distribute this information to its officials so that appropriate disciplinary measures are taken. If counsel for the corporation fully considered the possible conflicts of interest at the outset of an investigation, before taking any statement from an employee, counsel could avoid representing both the employee and the corporation where their interests were potentially divergent. Yet, counsel paid by the corporation may tend to overlook some potential conflicts, and employees may not realize until disciplined or discharged that information given to counsel accounted for the action taken against them. It would seem that a joint client arrangement should require that the employee be told who in the corporate structure will receive information concerning the employee’s communications. Only these persons would share the privilege on behalf of the corporation with the employee. Disclosure to other corporate officials would be improper.
corporate employee is told that counsel will not disclose his communications without his consent, it is reasonable to assume that the employee will be as candid as he otherwise would be were he also a client of the lawyer. Although the corporation's lawyer may not be rendering advice to the employee personally, the corporation may still allow the employee to control the distribution of his communications.

In many situations, the corporation will want to give someone other than the employee who makes the communications the decision on how to use them, since, as previously discussed, it might want to take corrective action against wayward employees and even assist outside agencies in remedial actions against such employees. In many instances, control over communications would be limited to persons who fall within what has become traditionally known as the control group. It is inevitable that what might be in the best interests of an individual employee, especially a lower echelon employee, might not be in the best interests of the corporation. Nothing in the approach proposed here would require corporations to afford all employees control over distribution of their communications to counsel. Yet, where the employees are not assured that they will control distribution of their communications, the corporation will be able to claim, at most, work product protection for statements that are made.

A claim might be made that this proposed approach ignores the fact that when corporate counsel talks to a corporate employee it is as if the corporation were talking to itself. The truth is, however, that the corporation and the employee may have very different interests. For example, there have been frequent problems of conflict of interests for attorneys who represent both a corporation and its employee, where the employee might be personally vulnerable. A corporation knowing that an employee might be in a better position if he does not talk with corporate counsel, may, nevertheless, want to get information from the employee and may pressure the employee for information without affording him control over his communication. If it is successful, then the corporation will, ironically, claim privilege to protect whatever it learns. Under these circumstances it

135. See supra text accompanying notes 128-30.
136. On conflicts of interest, see Leary, Is There a Conflict in Representing a Corporation and Its Individual Employees? 36 BUS. L.W. 591 (1981); see also Nath, supra note 47, at 68-75 (ethical and constitutional dimensions of the conflicts of interest issue); supra note 134.
is obvious that the privilege would do little more than enable the corporation to conceal information, rather than encourage the employee to speak, since the employee is speaking at his own risk without any promise of confidentiality.

In addition to the foregoing claim against the proposed approach, advocates of a broader corporate privilege might assert that no real harm is done when the privilege for corporations is expanded to, for example, a scope of employment test, since adverse parties can engage in discovery to obtain the facts they need to know. When a natural person asserts attorney-client privilege, it may be fair to assume that adverse parties may discover needed facts with reasonable ease. In the noncorporate situation, it would be clear from whom discovery should be sought; discovery through depositions and interrogatories directed at the party claiming privilege would be, in all likelihood, an efficient way to discover information. This may not be assumed, however, where a corporation is a party. The larger the enterprise is that invokes a privilege, the harder it becomes to take depositions, and the more likely it is that some people with information will be beyond the reach of the discovery process. This is not an argument against a privilege for corporations, but it is a reason not to expand a privilege beyond the rationale that supports it.

Advocates of a broader privilege for corporations might rely upon an evidentiary difference between statements made by a corporate employee to the corporation's lawyer and statements made by any other witness to that lawyer. Anything that the corporate employee says that is relevant to employment, if discovered and offered by an opponent, is likely to be admissible under recent evidence codifications as an agent's admission.\textsuperscript{137} It is less likely that statements by witnesses not employed by the corporation would be admitted as substantive evidence.\textsuperscript{138} Nevertheless, any statements that are discovered and used as admissions are admitted, not simply as a result of blind adherence to agency principles, but because they are made under circumstances that suggest they are sufficiently reliable to be used against a principal or employer.\textsuperscript{139}


\textsuperscript{138} These statements often will be hearsay. They will not become adoptive admissions under \textit{Fed. R. Evid.} 801(d)(2)(B) without some showing that the party who obtained the statements explicitly or implicitly accepted them as true.

\textsuperscript{139} In other words, the statements are not necessarily accepted on the theory that if principals are responsible for the acts of their agents, they should be responsible for their
The basic theories underlying the admissions exception are that the person who made the admission is hardly in a position to complain that he is unable to cross-examine himself about the out of court statement and that a person should be responsible for what he says. Naturally, when a statement by one person is admitted against another, this reasoning breaks down. One person is not always in a position to explain deficiencies in another's statement. The theory of admitting certain employee statements against an employer is that an employee is unlikely to make untrue statements that relate to his employment while he is employed. False statements might hurt the employer and may ultimately cost the employee his job, or, at least, may place the employee in a worse position than he otherwise would have been in if he did not make the statement. Whether employees of large corporations are always careful about what they say is debatable. Certainly, when they are asked leading questions, perhaps by skilled counsel in the course of an interview, they may make statements that they really do not intend. Yet, the trend is to permit the statements to be used against the employer. It should not be disturbing, therefore, that statements made by the corporation's employees to its counsel, if discoverable, might be used as admissions. The corporation can be protected if its counsel, who has every reason to act in the corporation's best interests, asks the employees to be careful in what they say to either the corporation's counsel or outside attorneys. It is especially important to note that the employee may be persuaded or compelled to explain any statements he makes to corporate counsel. Thus, there is every reason to conclude that these statements ought to be admitted as reliable if the work product doctrine does not prevent their discovery.

Even a nonemployee witness' statements, if discovered, may be admitted as evidence, though not necessarily substantively. They may be used to impeach the witness, or they may qualify under

agents' statements as well. The rationale for the rule is that a person has an incentive, while retained as an agent, not to say things that may hurt the principal; hence, when such statements are made their reliability is believed to be great. See Report, New Jersey Supreme Court, Committee on Evidence 165-67 (1963).

140. See R. Lempert & S. Saltzburg, supra note 112, at 383-84.
141. See supra note 139 and accompanying text.
142. See Fed. R. Evid. 801(d)(2)(D); see also cases cited supra note 137.
143. In Hickman v. Taylor, 329 U.S. 495, 511 (1947), the Supreme Court recognized the impeachment value of statements obtained in writing from a witness. At the same time, it suggested that oral statements recorded by counsel probably would not be admissible for any purpose. See id. at 512-13. This suggestion, though perhaps sound at one time, is no longer valid. It may be true that attorneys would have to authenticate memoranda summarizing or
some exception to the hearsay rule, though as previously mentioned, this would not be as likely. There is no rule, of course, that work product should be immunized from discovery simply because it might be useful as evidence for the discovering party. In fact, the more useful the work product would be as evidence, the easier it should be for a litigant to make the showing of need required to support discovery.

Therefore, the mere fact that employee statements may be admissible as evidence does not mean that they should be protected by the attorney-client privilege. As long as it is evident that a witness, whether an employee or not, will talk with counsel without a guarantee of confidentiality, the rationale for applying the privilege to the witness' communications disappears.

Thus, the proposed approach provides a corporate attorney-client privilege only in those instances where confidentiality, i.e., control over the subsequent use and distribution of communications, is promised to the person who makes the statements, thereby leaving work product to cover any other communications made in anticipation of litigation. Naturally, where a corporation obtains communications that are not protected by the attorney-client privilege at a time when no litigation is reasonably contemplated or threatened, it will have no doctrine on which to rely to resist discovery of those communications. Yet, when no litigation is reasonably contemplated or threatened, there is little need to provide an incentive for corporations to seek out information. It is to be expected that they will seek the legal advice they need, for they have little to fear where litiga-

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144. See supra note 138 and accompanying text.
tion is not in the offing. This places corporations in the same position as any other person who needs to rely on information that is not confidential at a time when litigation is not on the horizon.

Since most important corporate decisions requiring advice of counsel are likely to be made by people who have the authority to control the use of their communications, presumably communications to counsel in relation to important legal questions often will be privileged under the proposed approach. As in the control group and scope of employment approaches, corporate officers and corporate boards most in need of legal advice will be able to obtain that advice without losing the benefits of the privilege in most instances. The principal force of the analysis suggested here, however, is to prevent corporations from placing the umbrella of the privilege over the many lower echelon employees not promised confidentiality, whose information most often will be important when litigation is foreseeable and the corporation is seeking to prepare for it. In these situations, only the work product doctrine should apply. As demonstrated above, it provides sufficient incentives for corporations to gather information.

To the extent that corporations are decentralized and middle management consult with counsel, the privilege should attach to management communications in the course of seeking legal advice, since middle management will probably have control over the subsequent use of their communications. Only where middle level officials are investigated by higher level officials are communications by the middle level officials unlikely to be privileged. Yet, it is important to note that any investigation is likely to imply a possibility of future litigation, which may trigger work product protection.

Should a corporation desire to provide legal services to its officers or employees as a fringe benefit, the privilege will belong to the individual, not to the corporation; unless, absent a conflict of interest, corporate counsel represented the corporation and its officials simultaneously, which would mean that the individuals would share with the corporation authority to claim and waive the privilege.

As is the case under *Upjohn Co. v. United States*,145 if the corporation gathers information for business or commercial use, that information is not privileged. Similarly, such information is not work product since it is not gathered because litigation is reasonably foreseeable. Corporate officials who meet the privilege test proposed

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herein, however, may communicate with counsel for the purpose of obtaining legal advice or services concerning any aspect of the corporation's activities. The legal services, of course, may relate to either business or commercial matters. In the course of such discussions with counsel, corporate officials may talk about underlying facts that are not themselves privileged. The nonprivileged facts would be discoverable in subsequent litigation, since they cannot be immunized from discovery simply by a discussion about them in a privileged context. The actual statements, however, made by corporate officials to counsel about the nonprivileged facts would be within the privilege and, therefore, protected from discovery.

Under the proposed analysis, communications by counsel tending to reveal protected matters would also be privileged, as under current law. Thus, counsel's opinion would be privileged to the extent that it might reveal communications by a person with control over the use of his statements. Moreover, as is currently true, reports prepared by a corporation's outside consultants would not be privileged, while any communications by corporate officials or boards with counsel about the experts' reports would be privileged. Of course, if the reports were prepared for use in foreseeable litigation, they would be protected by the work product doctrine. Furthermore, all proprietary information might come within the trade secrets privilege, even if it is outside the attorney-client privilege.

In sum, the proposed approach would not inhibit corporate officials from seeking legal advice. In fact, it would afford substantial protection to the most important communications that corporate officials are likely to make to counsel. Simultaneously, the approach would refine the corporate privilege so that it does not extend to statements made by employees and officers whom the corporation is investigating.

Under this new analysis, the statements in Harper & Row Publishers v. Decker, Diversified Industries v. Meredith, and Upjohn Co. v. United States would not have been within the attorney-client privilege. They almost certainly would have been work

146. See supra notes 32-34 and accompanying text.
148. 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971); see supra notes 50-55 and accompanying text.
149. 572 F.2d 396 (8th Cir. 1978) (rehearing en banc); see supra notes 56-64 and accompanying text.
150. 449 U.S. 383 (1981); see supra notes 67-80 and accompanying text.
product, however, and it is doubtful that any necessity would have justified discovery of what the courts found to be privileged. As for City of Philadelphia v. Westinghouse Electric Corp., assuming that the privilege claim was directed at communications and was not an effort to resist questions about the events that occurred, a privilege would have existed if the persons who communicated with counsel had been guaranteed control over their communications. If they had not been promised such control, then the work product doctrine would, again, almost certainly have protected the communications from disclosure. This is important because it demonstrates that even where a corporate attorney-client privilege is not as broad as some corporations would prefer, the work product doctrine is likely to protect the results of most internal investigations of possible criminal acts by employees or other acts that might possibly result in liability on the part of the corporation. In addition, since corporations not only have reason to want to know as early as possible about potential liability, but also may have a special duty to their investors to make investigations, it is doubtful that, in the absence of an absolute corporate attorney-client privilege, corporations will lack the incentive to investigate, especially when the work product rule makes it likely that investigations will not be disclosed.

The difference between work product and attorney-client privilege protection may be important in some cases, since the work product doctrine will permit discovery where an absolute privilege would not. Consider, for instance, D.I. Chadbourne, Inc. v. Superior Court, which is similar to a hypothetical considered earlier. The case arose when Constance Smith fell on a sidewalk, and she and her husband sued D.I. Chadbourne, Inc., claiming that the fall was a result of its negligence. One of the company's employees had performed work on the sidewalk, but at the time of the litigation was stationed with the United States Armed Forces in Germany. The employee had previously given a statement to counsel, but the company refused to disclose it, claiming attorney-client privilege. In the course of denying a writ of mandate to overturn the lower court's


152. 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964).

153. The case is similar to the first hypothetical involving Shirley's repair of a sidewalk in front of her bar, see supra text accompanying note 35, except that Chadbourne involved a corporation.

154. Chadbourne, 60 Cal. 2d at 728, 388 P.2d 700, 703, 36 Cal. Rptr. 468, 471-72.
determination of the privilege claim, the California Supreme Court set forth an eleven part test that would have protected an employee's statements to corporate counsel if they were required by the corporation as part of its ordinary course of business.\(^{155}\) Such a test, however, extends the corporate privilege too far. If the employee made the statement without any guarantee that he would have control over its use, there is no reason to view it as privileged and to give the corporation the exclusive right to use it. Had the plaintiff taken the statement before the employee left the country and before filing suit, the corporation would have been able to obtain it upon a showing of hardship and need. Therefore, equity seems to require that the plaintiff should be given a similar opportunity under the work product doctrine to obtain the statement. \textit{Chadbourne} illustrates why the distinction between work product and attorney-client privilege is important and how an overbroad approach to the privilege could result in a significant loss of evidence.

Recently, the Minnesota Supreme Court recognized the need to avoid an overly broad definition of the privilege as it held that statements made to a railroad company's "investigator-employee" by members of a switching crew concerning an accident in which a fellow crew member was injured were not privileged, because the crew members were "witnesses" and not part of an attorney-client relationship.\(^{156}\) A dissenting opinion relied on \textit{Upjohn} to conclude that the statements were privileged.\(^{157}\) One concurring opinion voiced concern about small closely held corporations and suggested that statements by their owner-employees might be treated differently.\(^{158}\) Similarly, the California Supreme Court in \textit{Chadbourne} had also attempted to distinguish between employees who were mere witnesses and employees who communicated to counsel in the course of their employment.\(^{159}\) It is not surprising that these courts sought some way of limiting the scope of corporate privilege. The fact that a person is an employee of a corporation should not automatically entitle the corporation to claim a privilege for communications by that person to corporate counsel. Rather, something more is needed: namely,

\begin{itemize}
\item \textit{See id. at 737, 388 P.2d at 709-10, 36 Cal. Rptr. at 477-78.}
\item \textit{Id. at 310} (Otis, J., dissenting) ("Statements taken from those members of the switching crew whose negligence is alleged to have caused plaintiff's injuries" should be privileged.).
\item \textit{Id. at 309-10} (Simonett, J., concurring specially).
\item \textit{Chadbourne}, 60 Cal. 2d at 737, 388 P.2d 700, 709, 36 Cal. Rptr. 468, 477.
\end{itemize}
a showing that the employees were guaranteed confidentiality when they spoke to counsel. Where this is not the case, and the employees freely confided in counsel, the rationale for the attorney-client privilege is inapplicable.

If the approach recommended here is adopted, there will be little need to struggle with defining a control group or to develop complex rules to inhibit corporations from expanding a scope of employment test to the point where they insulate most corporate documents from disclosure. Furthermore, the new approach addresses the Supreme Court's concern for clarity\textsuperscript{160} more effectively than either of the leading tests of privilege and still supports the privilege's basic rationale. Thus, when clarity is provided in a manner which is consistent with the rationale of the attorney-client privilege, the resulting approach should be sound.

VI. APPLICATION OF THE APPROACH TO NONCORPORATE CLIENTS

This new approach is useful in governing the attorney-client privilege not only for corporations, but also for any other person or entity—i.e., a natural person, a partnership, an unincorporated association, or a union—using an agent while seeking legal advice. One of the reasons why the law of corporate privilege has been in disarray for so long is that most commentators and courts have never really paid sufficient attention to how agents are utilized in the course of a client's seeking legal advice. Upjohn cited authority in its brief to the Supreme Court that appeared to suggest that any time a person retained an agent and that agent talked with the client's lawyer as part of the agency arrangement, a privilege could be claimed by the client.\textsuperscript{161} Even Wigmore\textsuperscript{162} and McCormick\textsuperscript{163} can be read to support his argument. The rationale for attorney-client privilege, however, does not support it.

Courts and commentators have opined, with little apparent analysis, that the attorney-client privilege should be applied identically in four factually different situations where someone other than, or in addition to, the client communicates with counsel. These situa-

\textsuperscript{160} See Upjohn, 449 U.S. at 393.


\textsuperscript{162} 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2317, at 618-19 (J. McauNaughton rev. ed. 1961).

\textsuperscript{163} See C. McCORMICK, supra note 122, § 91, at 188-89.
tions will be more properly analyzed below, since one of these factual settings is distinguishable and should result in an application of the approach suggested herein.

First, there are situations in which a client utilizes assistance in communicating with a lawyer. For instance, a client who speaks only Spanish may need an interpreter to communicate with a lawyer who speaks only English. What the client says to the interpreter for transmission to the lawyer is privileged if it would have been privileged had the client spoken directly to the lawyer. The client decides how much information to disclose and the existence of the privilege can affect that decision. Similarly, if the client utilizes a stenographer or secretary to assist in recording a statement for transmission to counsel, as long as it would have been privileged had the client written it personally and handed it to counsel, the communication is still probably privileged. Once again, the client chooses what to tell the lawyer, and may not be forthright without the assurance of the privilege. The client—and no one else—controls the decision to speak as well as the distribution and the use of the statements made. Hence, the applicability of the privilege in these situations is clear.

Second, there are cases where the client communicates with the lawyer in the presence of a third party. In some situations, the third person may appear to be the equivalent of an interpreter and the above analysis would apply. In other situations, the client is too nervous or frightened to talk to the lawyer without the comfort of someone else. In these settings as well, the client makes a decision about what to disclose, and the privilege may be as important in the client's decision as it would be for a client in any other situation. The assumption of these cases appears to be that the other person who is present is simply an agent of the client who neither has control over the decision to speak nor any authority concerning the dis-

164. See generally id., § 91, at 187-89 (discussing the presence of third parties and agents during client communications).
165. See, e.g., United States v. Kovel, 296 F.2d 918, 921-22 (2d Cir. 1961) (drawing analogy between accountant and interpreter).
166. See 8 J. WIGMORE, supra note 162, § 2301, at 583.
167. See, e.g., Foley v. Poschke, 137 Ohio St. 593, 31 N.E.2d 845 (1941) (detective present during consultation by client with attorney).
168. See Saltzburg, supra note 11, at 643-45.
169. See, e.g., Bowers v. State, 29 Ohio St. 542 (1876) (mother present when daughter talked to lawyer about proceeding regarding indictment for seduction).
tribution and use of the statements made by the client.\textsuperscript{170} Similar to the first type of factual settings, the rationale for the privilege supports its application in these cases.\textsuperscript{171}

Third, there are cases where the attorney has a secretary, law clerk, or other professional present to help him ask questions or record information provided by the client.\textsuperscript{172} As in the first two lines of cases, the client decides what to tell the lawyer and the privilege remains applicable.\textsuperscript{173} The employee of the attorney is viewed as being bound by the ethical rules that govern the attorney,\textsuperscript{174} which means that the client retains control over the decision to speak as well as over the distribution and use of any statements made. Thus, throughout all three lines of decisions, the basic requirement that the client be the one to choose how much to disclose and also have control over distribution and use of whatever is said is satisfied.

This is not the situation, however, in the fourth line of cases where $A$ retains a lawyer and asks $B$ to tell the lawyer what $B$ knows. In the case of Shirley, the sole proprietor,\textsuperscript{175} for example, Shirley might ask Mary and Jean, her employees, to talk to her lawyer. If Mary and Jean decide for themselves whether to talk and how much to disclose, but Shirley alone controls the use and distribution of what Mary and Jean say, no privilege should attach. The rationale for the privilege is as inapplicable here as in the corporate setting where employees communicate with counsel without having control over their communications. This may have been why in \textit{Hickman} the Supreme Court was so quick to dismiss the privilege claim.\textsuperscript{176}

\begin{itemize}
\item\textsuperscript{170} \textit{See}, \textit{e.g.,} \textit{id.} at 546 ("the mother in such a case . . . [was] acting in the character of confidential agent of her daughter").
\item\textsuperscript{171} \textit{See also infra} note 173.
\item\textsuperscript{172} \textit{See} 8 J. \textit{Wigmore, supra} note 162, \textit{§} 2301, at 583.
\item\textsuperscript{173} \textit{See id.} Although courts do not always seem to insist upon it, it would appear that the use of agents to assist in communications and the sharing of communications with them should be limited to situations in which it is reasonably necessary for agents to be used or for them to know of communications. \textit{Cf.} Fed. R. \textit{Evid.} 503(a)(4), 56 F.R.D. 183, 236 (1972) (proposed rule, not enacted; defining a confidential communication and noting the necessary third parties to whom communication may be disclosed without loss of confidential status). This would insure that communications are not distributed so broadly that the case for a privilege to protect a private zone of communications cannot be made. Note that a similar restriction was placed on the distribution of statements made by corporate employees in \textit{Diversified Indus. v.} Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (rehearing en banc).
\item\textsuperscript{174} \textit{See}, \textit{e.g.,} Taylor \textit{v. Taylor}, 177 S.E. 582 (Ga. Sup. Ct. 1934) (attorney's confidential secretary).
\item\textsuperscript{175} \textit{See supra} text accompanying notes 34-35.
\item\textsuperscript{176} \textit{Hickman v. Taylor}, 329 U.S. 495, 508 (1947); \textit{see supra} notes 96-99 and accompa-
If the analysis proposed herein is rejected in this fourth category of cases, and a rule is applied that permits clients to claim the privilege for any statements of their agents, the consequences may be unfortunate. For example, conceivably all statements by witnesses, even those of nonemployees, could be transformed into communications protected by an attorney-client privilege. Since lawyers can offer reasonable witness fees to witnesses who talk with them, any witness who accepts a fee might be deemed an agent of the client on whose behalf the lawyer asks questions. Even without a fee, lawyers could ask a witness to give a statement on behalf of a client. If a principal can claim privilege for any statement by an agent, any witness’ statements may be absolutely privileged.\textsuperscript{177} Upjohn, and many other corporations, may respond that these witnesses may be agents of a sort, but that they are not employees. This tautology cannot be challenged, but it begs the real question: What difference does it make whether they are agents of a sort or employees if, at the time they talk to a lawyer, they understand that they are talking on behalf of the client? Why should a person be in a better position when his employees have information than when third parties, equally willing to cooperate, do? When people talk to counsel without relying on a guarantee of confidentiality, whether they are employees or merely agents of a sort, there is no reason to hold their communications to be privileged.

As the scope of \textit{corporate} attorney-client privilege becomes

\textsuperscript{177} Some cases, without much reasoning, would appear to be willing to extend the privilege this far. \textit{See}, e.g., State v. Bell, 212 Mo. 111, 111 S.W. 24 (1908) (wife's statement to husband's attorney privileged); \textit{In re Aspinwall}, 2 F. Cas. 64 (S.D.N.Y. 1874) (No. 591) (Statements by third party to attorney regarding his client held privileged). These are old cases, the first of which might have been justified by combining the marital communications privilege and the attorney-client privilege. Both cases were decided before the work product doctrine was well established. With the development of that doctrine, however, there is no longer any reason to extend the attorney-client privilege to cover such a situation.

Some writers after \textit{Upjohn}, nevertheless, appear willing to extend the privilege almost as far as the older cases. For example, in Hellerstein & Ringel, \textit{Current Problems about the Attorney-Client Privilege}, in 1 ALI-ABA, \textit{Civil Practice and Litigation in Federal and State Courts} 87, 96 (1981) (ALI-ABA Resource Materials), the argument is made that as to a number of people whom Upjohn interviewed after they left the company's employ, the company should still be able to assert a privilege to protect them because "the privilege belongs to Upjohn, not the employees." A similar claim is made in Richardson, \textit{Former Employees as Witnesses}, \textit{Litigation}, Summer 1983, at 35. Obviously, this begs the question whether there is a privilege for communications by ex-employees. They are almost certainly the equivalent of third party witnesses once their employment ends. An even broader claim of privilege is made by Sexton, \textit{supra} note 128, at 498-99, in an argument that potentially could extend the corporate privilege to almost anyone with whom a corporation deals.
clear, it should be easier to rule on the privileged status of other agents' statements. While there may be more recent cases involving corporations than noncorporate businesses and entities,\textsuperscript{178} the discussion of corporate privilege facilitates the consideration of privilege claims for other entities and natural persons that also employ agents.

VII. CONCLUSION

Some privileges are justified on the basis of notions about fundamental decency as well as on the basis of instrumental arguments.\textsuperscript{179} The attorney-client privilege, however, is different. Its reach in the noncorporate context is sharply confined. People who seek business advice from lawyers can claim no privilege.\textsuperscript{180} People who communicate information to lawyers that is unrelated to the legal services they seek similarly have no privilege.\textsuperscript{181} Where no privilege is needed to promote candid communications between a client and his lawyer, no privilege is provided. The same should be true in the context of corporations utilizing lawyers. A privilege should exist only where it is assumed to be indispensable to enhance candor on the part of the people from whom corporate counsel would seek information.

Neither the two major approaches to corporate privilege—the control group and scope of employment tests—nor the Supreme Court's recent opinion in \textit{Upjohn Co. v. United States},\textsuperscript{182} pays sufficient attention to the rationale for attorney-client privilege. By focusing on that rationale and by explaining that the important question in implementing a corporate attorney-client privilege is whether confidentiality appeared to be necessary to generate communications from employees to corporate counsel, this article offers a new approach.\textsuperscript{183} This approach identifies work product as the doctrine that

\begin{itemize}
  \item \textsuperscript{178} This may be explained by the fact that when a business is small and has few employees, generally they can be interviewed or deposed by an adverse party without great difficulty. Thus, the work product rule generally will protect an employer who has obtained employee statements, without relying on the privilege.
  \item \textsuperscript{179} The privilege against self-incrimination is perhaps the best example. In \textit{Murphy v. Waterfront Comm'n}, 378 U.S. 52, 55 (1964), the Court referred to the privilege as reflecting "our respect for the inviolability of the human personality."
  \item \textsuperscript{180} \textit{See}, e.g., \textit{United States v. Huberts}, 637 F.2d 630 (9th Cir. 1980).
  \item \textsuperscript{181} \textit{See generally C. McCormick, supra} note 122, § 88 (detailing the circumstances under which a "professional relationship" exists for purposes of invoking the privilege).
  \item \textsuperscript{182} 449 U.S. 383 (1981).
  \item \textsuperscript{183} The approach recommended here should enable courts to respond to new situations without much difficulty. For example, where special counsel is appointed whose duty is to the court and the public, \textit{e.g.}, \textit{SEC v. Canadian Javelin Ltd.}, 451 F. Supp. 594 (D.D.C. 1978),
\end{itemize}
is intended to provide parties and their counsel with an incentive to investigate and classifies the attorney-client privilege as the doctrine that is intended to promote candor on the part of clients who talk with attorneys. Therefore, the analysis proposed herein differentiates communications that properly fall within the work product doctrine, and are only conditionally protected against disclosure, from communications deserving of the absolute protection of the attorney-client privilege.

Communications by employees to such counsel will not involve a promise of confidentiality and no privilege should be available to the corporation with respect to such communications.