The Corporate Attorney-Client Privilege: A Study of the Participants

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THE CORPORATE ATTORNEY-CLIENT PRIVILEGE: A STUDY OF THE PARTICIPANTS

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INTRODUCTION

Empirical research on the practical effects of the attorney-client privilege in the corporate context has been almost nonexistent. This Article seeks to help fill the gap by synthesizing traditional doctrinal analysis with the results of a survey of individuals with first-hand information about the subject: corporate attorneys, corporate management, and federal judges and magistrates. The survey, which consisted of 182 interviews in New York City, produced a broad range of information about some of the assumptions underlying the corporate privilege, the forms and processes of corporate attorney-client communications and the adjudication of privilege claims.

The first Tentative Draft of the Restatement of the Law Governing Lawyers recognizes at the outset that the scope of the attorney-client privilege for corporate clients continues to be a
source of controversy. In precluding compelled disclosure of attorney-client confidences, the privilege is intended to foster candid communications that will lead to well-informed legal advice. The factual premise upon which the privilege is based, however, is largely a matter of faith that is supported only by a minimal amount of empirical evidence. Furthermore, by blocking access to relevant testimony and documents, the privilege clashes with the public's right to every person's evidence and violates the precept of modern pretrial discovery that "[m]utual knowledge of all the


A frequently quoted formulation of the privilege was penned by Judge Wyzanski:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. Id. at 358-59. See also 8 J. Wigmore, Evidence, § 2292, at 554 (McNaughton rev. ed. 1961):

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

Id. In another section of his treatise, Wigmore recognizes the crime/fraud exception that Judge Wyzanski incorporated into his definition. See 8 J. Wigmore, supra § 2298.

The rationale of the privilege is discussed in detail infra notes 63-92 and accompanying text.

3 Prior empirical research with respect to the attorney-client privilege is limited principally to a survey reported in Note, Functional Overlap between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 Yale L.J. 1226, 1269-73 (1962) [hereinafter Yale Study]. The findings of the Yale Study, which do not distinguish between individual and corporate attorney-client communications, are discussed infra notes 38-40 and accompanying text.

4 Trammel v. United States, 445 U.S. 40, 50 (1980). Statements to counsel might otherwise be admissible evidence either as party admissions or prior inconsistent statements. See, e.g., Fed. R. Evid. 801(d) (excluding admissions and prior inconsistent statements from hearsay definition). In addition, the content of the legal advice received by a client might bear on such questions as the client's good faith, knowledge or intent. See, e.g., Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 484-85 (E.D. Pa. 1978) (since plaintiffs' claims in shareholder action against corporation appeared bona fide and honest, and due to difficulty of proving scienter, attorney-client privilege held not bar to disclosure of information requested in interrogatories).
relevant facts gathered by both parties is essential to proper litigation.” Although for many years the balance has been struck in favor of the privilege, particular tension arises in the corporate setting. Unlike the individual client, a corporation can "speak" to counsel only through agents—its officers and employees. In a large corporation, cloaking all such communications with an inflexible privilege may produce a veil of darkness so impenetrable in some cases as to preclude effective discovery of the truth. The modern trend toward increased participation of house counsel in the day-to-day affairs of large corporations makes this prospect all the more likely.

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6 Hickman v. Taylor, 329 U.S. 495, 507 (1947). Discovery under modern rules is not restricted to material that would be admissible at trial. See, e.g., Fed. R. Civ. P. 26(b)(1). The scope of discovery is often described as encompassing nonprivileged information “reasonably calculated to lead to the discovery of admissible evidence.” Id.; see also King v. Conde, 121 F.R.D. 180, 194 (E.D.N.Y. 1988).

* In criminal cases, the privilege may have constitutional underpinnings that would require its recognition regardless of the obstructive impact on the fact-finding process. See, e.g., United States v. Henry, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting) (sixth amendment); Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 CALIF. L. REV. 1061, 1062-63 (1978) (fifth and sixth amendments); Uviller, The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel’s Idea, 123 U. PA. L. REV. 1067, 1078 (1975) (due process). On the civil side, despite misgivings about the value of the privilege, Professor Edmund Morgan conceded that any proposal for its abolition would arouse “such strenuous opposition from the Bar that it would be futile to attempt its enactment.” Morgan, Foreword, MODEL CODE OF EVIDENCE 28 (1942). See also Hazard, supra at 1062 (issue is not whether privilege should exist, “but precisely what its terms should be”).

7 See Simon, The Attorney-Client Privilege as Applied to Corporations, 65 YALE L.J. 953, 955 (1956) (“Where corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large”).

* See Chayes & Chayes, Corporate Counsel and the Elite Law Firm, 37 STAN. L. REV. 277, 277-78 (1985). In the early 1970s, approximately 10% of all lawyers in the United States were employed as in-house counsel to corporations. Szabad & Gersen, Inside v. Outside Counsel, 28 BUS. LAW. 235, 235 (1972). In 1983, the figure was placed at 20%. Lynch, Moving the Law Inside at Mass Mutual, 70 A.B.A. J. 45, 45 (1984).

“Corporate counsel” is probably the preferred appellation for attorneys who serve in a corporation’s internal legal department. The term “house counsel” is used in this Article, however, to distinguish a corporation’s internal lawyers from attorneys in law firms. I refer to the latter as “outside counsel.”

No distinction exists in the United States between house counsel and outside counsel as to entitlement to privilege, provided the lawyer is acting as legal adviser. See, e.g., In re Sealed Case, 737 F.2d 94, 101 (D.C. Cir. 1984) (conversations between senior executive and general counsel qualified for privilege where lawyer rendered legal advice based on confidential information disclosed to him); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 360 (D. Mass. 1950) (where inside counsel functions as legal adviser, communications with management should not be treated differently from communications between outside counsel and management); Rossi v. Blue Shield of Greater New York, Inc., 73 N.Y.2d 598, 593-94, 540 N.E.2d 703, 708, 542 N.Y.S.2d 508, 511 (1989) (privilege applies to memoran-
An adversary may, of course, question the corporation’s officers and employees about their personal knowledge because the privilege can only immunize their discussions with counsel, not the facts themselves. In some cases, however, eliciting the facts from individual employees may prove unduly difficult as a result of failed memories, evasiveness or unavailability. Additionally, some adversaries may not have the resources to unearth the essential facts that were collected through attorney-client communications.

These potential obstacles, however, did not deter the Supreme Court in *Upjohn Company v. United States* from taking a broad approach to the corporate privilege. The Court held that the representatives of a corporation whose communications with counsel qualify for protection are not limited to those in the corporate “control group”; communications at lower levels of the corporate hierarchy are also eligible. While the decision may bring a certain degree of comfort to corporate attorneys, *Upjohn* nevertheless fails to resolve many of the problems raised by the privilege in the corporate setting. The opinion leaves the exact scope of the corporate privilege uncertain, and the Court was dealing with the privilege only as applied in federal courts; a number of states continue to adhere to the control group standard. *Upjohn* also left untouched the “good cause” exception to the privilege that several courts have applied in shareholder suits. Other issues the Court did not resolve include how confidentiality—the sine qua non of the privilege—should be measured within a corporation and how courts should handle communications that contain a mixture of business and legal matters. Additionally, the Court has recently stressed that a corporation’s attorney-client privilege may be waived over the objections of the individuals whose communications with counsel are involved. This raises questions about the attorney’s ethical responsibility to explain to corporate employees the entity concept of corporate representation. Finally, the factual premise that cor-

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9 See infra note 71 and accompanying text.
11 See infra note 359 and accompanying text.
12 *Upjohn Co.*, 449 U.S. at 390-91; see infra notes 377-93 and accompanying text.
13 See infra note 361.
porate representatives will communicate less openly and less frequently with counsel in the absence of privilege continues to be a matter of speculation.

My field study sought to produce a more solid empirical basis than has previously been available for analyzing these issues. Most literature relating to the attorney-client privilege in the corporate context has been limited to doctrinal analysis. I felt that the views and experience of corporate attorneys, executives and federal judges would add new knowledge concerning the validity of some of the assumptions upon which the corporate privilege is based and suggest solutions to questions regarding its operation and proper scope.16

On the other hand, I harbored no illusions that the type of information that I was likely to obtain in interviews of corporate lawyers and executives was the ideal form of empirical data about the corporate privilege. While these individuals may have had extensive experience with the subject matter, they also have a personal stake in the preservation of the privilege and the expansion of its scope.17 As a consequence, I doubted that their answers to my questions would debunk the fundamental empirical propositions upon which the corporate privilege is based. Not surprisingly, the attorneys and executives proved to be generally enthusiastic about the benefits of the privilege, but some of their responses do

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16 The value of obtaining the views of persons affected by rules of privilege was recognized by Justice Potter Stewart in a case involving proposed changes in the marital privilege against a spouse's adverse testimony: "It would be helpful . . . to have the benefit of the views of those in the federal system most qualified by actual experience with the operation of the present rule—the district judges and members of the practicing bar." Hawkins v. United States, 358 U.S. 74, 82 n.4 (1958) (Stewart, J., concurring).

17 A leading treatise observes that "Upjohn has substantial economic implications for the legal profession. It makes it highly advantageous to use lawyers, or paraprofessionals acting under their direction, for investigations with some possible governmental regulatory impact on the corporation." 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)(04), at 503-50 (1989).

Professional bias may have played a role in development of the attorney-client privilege from its inception. See infra notes 75-77 and accompanying text. Edward Livingston, a leading nineteenth-century writer on the law of evidence, conceded that his commitment to the privilege may have been attributable, in part, to such bias: "[I]t is yet possible . . . that ideas entertained during a professional course of more than forty years may have so fastened themselves upon the mind, as to give them a force they are not entitled to, and induced me to retain a provision which ought to be abolished." 1 E. LIVINGSTON, THE COMPLETE WORKS 459 (1873); see also Waits, Work Product Protection for Witness Statements: Time for Abolition, 1985 Wis. L. Rev. 305, 342 ("lawyers, like all other human beings, tend to rationalize, to convince themselves that what is good for them and their profession is good for society").
have negative implications for the scope of the privilege. Even the judicial participants in the study, who have no personal interest in preserving the secrecy of attorney-client discussions, displayed a generally pro-privilege attitude. This was somewhat surprising. Because the attorney-client privilege can be an obstacle to the ascertainment of truth in the adjudicatory process, judicial opinions often reiterate Wigmore's view that the privilege should be "strictly confined within the narrowest possible limits consistent with the logic of its principle." On the other hand, judges have a background in the practice of law and cannot be expected to have shed entirely their professional bias upon their ascent to the bench.

That the participants may have been biased, however, does not necessarily invalidate those results which are supportive of the privilege. An element of caution is simply counseled in their interpretation. Furthermore, professional bias does not by any means imply dishonesty. Having observed the participants in a confidential interview setting, I have little doubt that they expressed honestly held beliefs. In any event, not all of the information they provided was favorable to arguments in support of broad approaches to the corporate privilege.

One may fairly question the value of undertaking a study in which the views of the participants about the effects of the privilege must be read with some degree of skepticism. Four reasons explain the approach that I took. First and foremost, despite whatever bias they may have, the fact remains that business executives, corporate attorneys and federal judges and magistrates have valuable first-hand experience with privileged communications. Second, the survey was not limited to questions calling for subjective analysis. I also sought a great deal of descriptive data, such as the frequency with which privilege issues are discussed and the methodology of maintaining the privilege, as to which the potential for biased results is sharply reduced. Third, alternative methods of studying the impact of the privilege were not readily available. Ob-

18 J. WIGMORE, supra note 2, § 2291, at 554. See, e.g., Fisher v. United States, 425 U.S. 391, 403 (1976) (privilege protects "only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege"); United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983) (same); In re Horowitz, 482 F.2d 72, 81 (2d Cir.) (same), cert. denied, 414 U.S. 867 (1973).

19 See, e.g., Waits, supra note 17, at 342 n.178 ("attorney-client issues strike a very personal chord in the judiciary").
serving actual attorney-client communications was out of the question. Comparing conduct with and without the corporate privilege would be nearly impossible because of the long-standing applicability of the privilege in one form or another throughout the United States. Although it might be feasible, a systematic comparison of the conduct of counsel and corporate employees in the United States with that of their counterparts in foreign jurisdictions in which the privilege is not recognized would be extremely difficult because of the need to account for wide variations in the nature of the foreign legal profession, attorney-client relationship and procedural system. Superior sources of empirical data, therefore, were not easily obtainable. Finally, there is instructive value simply in confirming the views of the business and legal community.

Another source of uncertainty, of course, is whether the experience of executives and corporate attorneys in New York City with respect to the attorney-client privilege is typical of that elsewhere in the country. I suspect that the results of a geographically broader survey would not differ significantly, except perhaps as to information concerning the effects of the control group standard. In some states, the law is clear that the control group standard governs the scope of the corporate privilege, whereas the issue in

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20 The presence of an outsider would destroy the element of confidentiality upon which the privilege depends, see, e.g., In re Grand Jury Subpoena Duces Tecum, 406 F. Supp. 381, 386 (S.D.N.Y. 1975), making it highly unlikely that either corporate attorneys or their clients would consent to the procedure. See, e.g., Danet, Hoffman & Kermish, Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure, 14 LAW & Soc'y REV. 905, 912-13 (1980) (description of researchers' failed attempt to observe private lawyer-client conversations because of lawyers' refusal to risk loss of attorney-client privilege). Some authority exists recognizing a qualified privilege for the confidential aspects of academic field research. See, e.g., Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 390-91 (N.D. Cal. 1976) (due to public interest in encouraging confidential relationships between academic researchers and their sources, plaintiff not entitled to disclosure absent prima facie showing of defamation of plaintiff). I doubt, however, that many corporate lawyers would be willing to place much faith in any such privilege. See In re Grand Jury Subpoena Dated Jan. 4, 1984, 750 F.2d 223, 224 (2d Cir. 1984) (refusal to recognize academic research privilege on basis of sparse record).

21 Although the scope of the corporate privilege may be narrower in some states than others, see infra note 361, none have disavowed the corporate privilege in its entirety.

22 Some of these problems are described infra notes 178-80 and accompanying text. A limited amount of comparative international experience was sought and obtained in my study, but it was not intended to be the main thrust of the study for the reasons indicated in the text.

23 See infra notes 398-403 and 420-21 and accompanying text.

24 See infra note 361.
New York is unresolved.25 The approach taken in federal courts, however, even if somewhat inconsistent from district to district,26 is a common denominator. In addition, many of the participants in the survey had dealt with attorney-client communications at several locations throughout the country. In any event, New York City has a large concentration of corporations and corporate attorneys, making its corporate legal community worthy of study in its own right.27

Thus, I believe that the systematically collected views and experience of the participants in my study will shed some much-needed light on the subject. This study is a beginning, and perhaps it will inspire others to pursue more refined research techniques. The data that I have obtained provide a basis for tentative conclusions about the realities surrounding the corporate attorney-client privilege and its proper scope.

Section I of the Article describes my research design and gives a profile of the samples in the study. Sections II, III and IV deal with fundamental questions about the rationale of the corporate attorney-client privilege. Section II provides the history and theoretical background of the attorney-client privilege, in general, and as applied to corporations. Section III reports the results of questions put to the lawyers and executives regarding the purposes and benefits of the corporate privilege and its impact on their behavior. This section also contains information obtained from the judges and magistrates about the cost of the privilege in the adjudicatory process.

The empirical findings concerning the basic rationale of the privilege are analyzed in Section IV. I conclude in this section that the corporate attorney-client privilege, despite lingering doubts, may perform a useful function by enhancing candid disclosure between attorneys and corporate management. For this reason, and because of its potential contribution to corporate legal compliance, it is worthy of continued recognition in most circumstances. The findings raise doubts, however, about the broad scope that often is given to the corporate privilege. The analysis thus focuses on the questionable value of the privilege as an inducement to candor in particular types of legal counseling and in communications be-

25 See infra note 398.
26 See infra notes 431-49 and accompanying text.
27 See infra notes 29-30 and accompanying text.
tween house counsel and corporate employees. In this section I also argue that existing ethics codes should pay closer attention to the need for lawyers to warn corporate employees that the corporation's attorney-client privilege does not belong to them personally.

Each of the remaining sections of the Article deals with a discrete problem area in application of the attorney-client privilege to corporations. Section V addresses the question: Who speaks for the corporate entity for privilege purposes? After tracing the background of the Supreme Court's *Upjohn* opinion, I examine responses that the participants in the survey gave to questions about the impact of the control group standard in comparison to the broader approach taken in *Upjohn*. The results, although mixed, suggest that permitting the privilege to extend to lower levels potentially serves the valuable goal of voluntary legal compliance by corporations. In this section, I offer suggestions for resolution of some of the questions that were left unanswered in the *Upjohn* opinion.

Section VI contains descriptive information about two very practical matters that play a role in the analysis of privilege issues in the corporate context: (1) how corporations maintain the confidentiality of documentary attorney-client communications; and (2) the extent to which business and legal matters are mixed in communications with counsel. In the analysis of the findings, I suggest that the adjudication of these issues should take account of actual corporate practices. Section VII examines the "good cause" qualification to the corporate privilege in shareholder litigation. Because the findings suggest that it does little damage to the instrumental benefits of the privilege, and because the doctrine is sound, I argue that the good cause qualification deserves continued recognition.

The final section explores the potential impact of a hypothetical qualified approach to the corporate privilege. Based on the answers given by the participants to questions about such an approach, and drawing upon data obtained in earlier portions of the survey, I conclude that the goals of the corporate attorney-client privilege can be adequately achieved in many circumstances without the necessity of applying the same absolute privilege that applies in the case of an individual client. Maximizing the potential benefits of the corporate privilege by extending its coverage to the lower levels of the corporate hierarchy, which may be appropriate as a general matter, will nevertheless have the inevitable effect in some cases of creating an unacceptable barrier to truth. Thus, I
argue that the corporate privilege should be relaxed in favor of a qualified privilege with respect to communications between counsel and employees who are not in the corporate control group. The corporation’s privilege for lower-level communications should yield when a particularized showing by the adversary of a compelling need for such communications outweighs the corporation’s interests in confidentiality.

I. METHODOLOGY OF THE STUDY

A. Research Design

The survey was designed to obtain interviews of individuals most likely to have engaged in attorney-client communications in the corporate context on a fairly regular basis and to have had the greatest depth of experience. Emphasis was placed on seeking the participation of partners in large law firms and lawyers and business executives in corporations large enough to have house counsel. New York City was an ideal site. At or about the time of the survey, Manhattan contained the largest concentration in the United States of corporate headquarters with internal legal departments on the premises. Manhattan was also domicile of the greatest number of large law firms in the United States.

Three distinct populations were defined for the study. The house counsel segment consisted of the highest-ranking lawyers, or their designees, in the legal departments of large corporations with headquarters in Manhattan. To qualify as “large,” the corporation must have had either average annual revenue (or assets) of at least $100 million or at least 1,000 employees in addition to an internal legal department. The second group, outside counsel, was comprised of partners in large Manhattan law firms (twenty or more partners) who represent principally corporate clients. The third population, corporate executives, consisted of the senior management of large corporations with an internal legal department and

28 Studies have shown the correlation between size of law firm and type of client. See, e.g., J. CARLIN, LAWYERS’ ETHICS 23-25 (1966) (New York City law firms of 15 or more partners principally serve large corporate clients); J. HEINZ & E. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 36-83 (1982) (lawyers in Chicago who represent large corporations are usually affiliated with firms of 30 or more partners).

29 See 1986-1987 DIRECTORY OF CORPORATE COUNSEL 1631-72 (Corporate Index by Geographic Location).

30 See THE LAWYER’S ALMANAC 1986, at 2-78 (Survey of 500 Largest Firms).
headquarters in Manhattan. "Senior management" included any member of the class of executives immediately below the corporation's chief executive officer or equivalent. Heads of corporations were excluded on the assumption that they were not likely to grant a personal interview or, at best, would seek to delegate participation to a lower-level executive. The latter prospect was undesirable for the client segment of the study. With respect to the clients, it seemed particularly important to interview individuals whose answers would be free of direction or influence from superiors. This concern was of lesser magnitude in the case of the lawyers. Thus, referrals were accepted from a corporation's chief counsel to a subordinate lawyer, or from one partner to another partner in the same law firm, but not from one business executive to another.

A total of 208 corporations and seventy-nine law firms were identified as falling within the definitions for the target populations. Thirty pretest interviews were then conducted with lawyers and executives affiliated with organizations in Manhattan and surrounding areas that were not within the target populations. The final research design called for samples of fifty individuals within each of the three population categories—house counsel, outside counsel and corporate executives.

Respondents were selected pursuant to a two-stage random sampling technique. First, using a computer-produced list of random numbers, all eligible organizations for each population were listed in random order for the purpose of solicitation in the given sequence. The second stage consisted of the selection of appropriate individuals as prospective respondents within each organization.

31 The same definition of "large" corporation was used for both the house counsel and corporate executive samples.

32 In most of the corporations, this class consisted of individuals with the title of Senior or Executive Vice President.

33 The relevant institutions were culled from three sources: 1986 and 1987 STANDARD & POOR'S REGISTER OF CORPORATIONS, DIRECTORS & EXECUTIVES; 1986-1987 DIRECTORY OF CORPORATE COUNSEL; and 1987 MARTINDALE-HUBBELL LAW DIRECTORY.

34 For the final sampling, approximately 150 interviews were deemed feasible for the private sector portion of the study. (An additional twenty-to-thirty interviews were contemplated for the judicial segment). The use of interview assistants, such as law students, might have permitted larger samples, but this approach was rejected. The issue under investigation—corporate client confidentiality—was a sensitive one, and assuring a sense of trust in the interviewer would be important in obtaining candid answers. As it was thought that the participants would be more responsive to a law professor than to lay assistants, I decided to conduct all interviews myself.
In the house counsel survey, this person was always the head of the legal department of the particular corporation. In the outside counsel and corporate management surveys, the names of potential respondents within each organization were listed in random order by means of a table of random numbers, and respondents were to be approached in the given sequence. Beginning at the top of the list of each category of organization, a letter was sent to the first prospective respondent within that organization explaining the project; a follow-up telephone call was made seeking an appointment. In the house counsel survey, if the chief legal officer declined to participate either personally or through a designee, the next corporation on the list was approached. In the outside counsel and corporate management surveys, if the first individual on the list of prospective respondents for the particular organization declined to grant an interview, a request was sent to the second person on the list. If the second individual refused, no further approaches were made to the particular organization.

Response rates varied depending on the population category. For the house counsel portion of the survey, the cooperation rate of the corporations that were approached was 57%. The rate for the law firms in the outside counsel survey was 69%, and the rate was 41% for the corporations in the management survey. A total of 154 interviews were conducted in the private sector: fifty house counsel, fifty-two law firm partners and fifty-two corporate executives. The sampling was structured in a manner that would avoid the conducting of multiple interviews in any one organization. If the house counsel of a particular corporation granted an interview, no business executive in that company was solicited. Similarly, once a law firm partner granted an interview, no requests were

35 The head of the legal department of each corporation (usually bearing the title of General Counsel) was readily ascertainable as were the members of senior management. Appropriate law-firm partners—those who represented primarily corporate clients—were identified on the basis of biographical entries in the Martindale-Hubbell Law Directory, bar association membership lists and inquiries made by the author of personal acquaintances at the firms in question.

36 Not surprisingly, the response rate of the lawyers was higher than the response rate of the business executives. The subject matter undoubtedly was of greater interest to the lawyers, and they also may have been motivated in part by a sense of professional obligation or courtesy to assist in the project.

The most frequent reason volunteered by the lawyers who did not participate was "lack of time." The reasons given by corporate executives included "lack of time," "too much travel," "not interested," "prefers not to," and "blanket corporate policy against interviews."
made of other partners in that firm. As a result, each of the 154 respondents was a representative of a different organization. Avoiding overlap proved especially valuable in the case of house counsel and corporate management because it maximized the amount of data obtained about systems and procedures used in large New York City-based corporations. This type of descriptive information was collected with respect to 102 (nearly one-half) of the 208 large corporations with headquarters in Manhattan.

In the judicial segment of the study, the objective was to interview those officials most likely to have frequent exposure to attorney-client privilege issues in the corporate context. The judges and magistrates of the Federal District Courts for the Southern and Eastern Districts of New York (whose main courthouses are in Manhattan and Brooklyn, respectively) provided an excellent population both because of geographical accessibility and potential experience with the subject matter. During 1986 and 1987, the Southern District of New York had the largest number among all ninety-four federal districts of filings of civil cases of the type that are likely to involve corporate litigants.37 The Eastern District of New York was not too far behind; only eleven other districts in the nation had higher relevant filings.38 The combined response rate of the judges and magistrates was 48% for a total of twenty-eight interviews.39

The interviews were conducted between October 1986 and

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37 The Administrative Office of the United States Courts classifies civil case filings in the district courts under twelve categories: Social Security; Recovery of Overpayments and Enforcement of Judgments; Prisoner Petitions; Forfeitures and Penalties and Tax Suits; Real Property; Labor Suits; Contracts; Torts; Copyright, Patent and Trademark; Civil Rights; Antitrust; and All Other Civil. See Administrative Office of the U.S. Courts, Federal Court Management Statistics 1986 and 1987, at 167 Fold-Out [hereinafter 1986 and 1987 Court Statistics]. Although any of these categories, with the exception of Social Security and Prisoner Petitions, could involve a corporate party, the three most likely to involve corporate litigants are Contracts; Copyright, Patent and Trademark; and Antitrust. The total number of these three types of cases filed in the Southern District of New York was 4,731 in 1986, see 1986 Court Statistics at 48; and 4,042 in 1987, see 1987 Court Statistics at 48. With respect to these three categories, the closest district in terms of volume to the Southern District of New York was the Central District of California with 2,976 such cases in 1986, see 1986 Court Statistics at 129; and 2,955 such cases in 1987, see 1987 Court Statistics at 129.

38 The total number of filings in the Eastern District in the relevant categories, see supra note 37, was 1,254 in 1986, see 1986 Court Statistics, supra note 37, at 47; and 1,081 in 1987, see 1987 Court Statistics, supra note 37, at 47.

39 "Time constraints" was the most frequent reason given by the judges who did not participate. A few said that their personal exposure to the issues had been so infrequent that they did not feel they would have anything to contribute to the study.
April 1988 in the offices of the participants. No one was present during the interviews other than the respondents and myself. Interview questionnaires, developed and refined during the pretest, were used to elicit the desired information. The questionnaires contained a combination of forced-response and open-ended questions and were designed to obtain both quantitative and qualitative data. The house counsel questionnaire appears in the Appendix; the other questionnaires were variations on this model.

B. Profile of the Samples

Each of the samples will be described separately in this section. In the balance of the Article, however, data obtained in the samples of house counsel and outside counsel are frequently pooled and reported as aggregate findings with respect to the 102 attorneys. Although each group of lawyers was sampled separately, the results are reported on a pooled basis when no statistically significant differences were found between the responses of the two groups. On the other hand, the data are reported separately if differences in the responses were found to be statistically significant. Descriptive information about the 102 corporations employing the respondents in the samples of house counsel and executives also is occasionally combined.

Turning first to the sample of house counsel, the fifty respondents were employed by corporate clients with a median annual revenue of $500 million and a median of 5,000 employees. The average length of time for each type of interview was as follows: house counsel, 67 minutes; outside counsel, 45 minutes; corporate executives, 39 minutes; judges and magistrates, 35 minutes. The total number of hours spent “in the field,” including the pretest, was approximately 700.

The author will provide copies of all four questionnaires upon request. Copies will also be kept on file in the offices of the St. John’s Law Review.

In general, differences in responses between any of the samples in the study and between any subgroups within samples will not be presented either in text or tables unless the differences are statistically significant at least at the 95% level of confidence as determined by the chi-square test of statistical significance. The 95% level can be considered conservative, as no correction was made for finite population size.

In some of the reported frequency distributions in tables and text, the total per cent occasionally may be 0.1% below or above 100.00 due to rounding.

Pooling of descriptive information about the 102 corporations employing the respondents in the samples of house counsel and corporate executives was feasible because both samples were randomly selected from the same population of 208 large, New York City-based corporations. See supra notes 29-33 and accompanying text.

The median number of attorneys in the legal departments of these corporations was six. The staffs ranged in size from one to over 300 attorneys.
fifty corporations employing the house counsel were engaged in the following types of business (with a parenthetical indication of the number of corporations in each category): manufacturing (twelve); commercial services, such as retail, advertising, management consulting (nine); insurance (seven); commercial banking (six); publishing or broadcasting (five); investment banking, stock brokerage or other financial services (four); oil, gas, metal or mining (three); transportation or utility (two); miscellaneous (two). The median number of years of professional experience of the respondents was twenty-four,\textsuperscript{45} and thirty-seven of the lawyers had the title of General Counsel.\textsuperscript{46}

In the sample of outside counsel, each of the fifty-two respondents had represented more than one corporate client during the five years preceding the interviews, the total median range being twenty-one to forty different corporate clients.\textsuperscript{47} All of the outside counsel were partners in their law firms, the median size of which was 125 lawyers.\textsuperscript{48} The median number of years of professional experience of the respondents was twenty.\textsuperscript{49}

\textsuperscript{45} The in-house lawyers' median length of affiliation with their corporate employers was 12 years, and their median age was 47.

\textsuperscript{46} Seven bore the title of General Counsel by itself; another thirty were entitled General Counsel and, in addition, were officers of the corporation at the rank of Vice President or above; five were entitled Associate or Assistant General Counsel and, in addition, held a corporate position of Vice President or above; six were entitled solely Associate or Assistant General Counsel; one was called General Attorney and another was called Chief Litigation Counsel.

\textsuperscript{47} The partners were asked to estimate the number of different corporate clients, within given ranges, that they had represented during the past five years. Fourteen of the lawyers (26.9\%) had represented 1-20 different corporations) 16 (30.8\%) indicated the 21-40 range; 10 (19.2\%) indicated the 42-60 range; two (3.8\%) indicated the 61-80 range; and nine (17.3\%) said they had represented over 100 corporations. Only one of the lawyers was unable to provide an estimate.

The types of business in which their corporate clients were engaged, with a parenthetical indication of the percentage of respondents who had represented clients engaged in the particular type of business, were as follows: manufacturing (78.8\%); commercial banking (75.0\%); investment banking, stock brokerage or other financial services (61.5\%); diversified or conglomerate (59.6\%); commercial services, such as retail, advertising, management consulting (42.3\%); insurance (40.4\%); publishing or broadcasting (40.4\%); transportation or utility (40.4\%); oil, gas, metals or mining (7.7\%); miscellaneous (13.5\%).

The median percentage of time that the attorneys had devoted to the representation of corporate clients was 95.5\%.

\textsuperscript{48} The firms represented in the sample ranged in size from 28 lawyers to over 500. The partners' median period of affiliation with their firms was thirteen years.

\textsuperscript{49} The median age of the outside counsel was 44. When the samples of house counsel and outside counsel are combined the median number of years of professional experience is 21 and the median age is 46. All of the participating lawyers were males.
Both samples of lawyers contained a mix of litigators and non-litigators. Among the house counsel, eleven (22.0%) had devoted primarily all of their time during the past five years to matters relating to litigation; twenty-four (48.0%) said that their work had involved primarily nonlitigated matters; and fifteen (30.0%) said that their work had been about equally divided between litigation and nonlitigation.\(^5\) There were more “pure” litigators in the sample of outside counsel: twenty-two (42.3%) had devoted primarily all of their time during the past five years to litigation; twenty-five (48.1%) had been primarily nonlitigators; and five (9.6%) had divided their time about equally between litigation and nonlitigation. The subgroup of respondents in both samples who had devoted primarily all of their time to litigation or whose work had been about equally divided between litigation and nonlitigation will be referred to as “litigators” throughout this Article. There were twenty-six litigators in the sample of house counsel and twenty-seven in the sample of outside counsel, a total of fifty-three litigators in the survey of attorneys as a whole. The remaining forty-nine lawyers in the survey (twenty-four in the sample of house counsel and twenty-five in the sample of outside counsel) will be referred to as “nonlitigators.”

The litigation handled by the fifty-three litigators was almost exclusively civil in nature, usually involved representation of corporations in a defensive posture and most often took place in federal tribunals.\(^1\) More specifically, during the five years preceding the interviews, the median percentage of litigation time devoted by the litigators to civil matters was 98%; the median percentage of litigation time spent in representing corporate clients as defendants was 75%; and the median percentage of litigation time devoted to matters in federal tribunals was 65%. The litigators were also asked to indicate the types of cases they had handled in the five years prior to the interviews. The type of case handled by the

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\(^5\) All but one of the 37 house counsel with the title of General Counsel had worked principally on nonlitigated matters or their work had been about equally divided between litigation and nonlitigation. The precise litigation-nonlitigation breakdown of the 37 respondents with the title of General Counsel is as follows: one was primarily a litigator, 21 were primarily nonlitigators, and 15 had divided their time about equally between litigation and nonlitigation.

\(^1\) The fact that the litigators had spent most of their time in federal courts is another potential source of bias because the corporate attorney-client privilege is generally given broader scope under the Federal Rules of Evidence than under the law of some states. See infra notes 398-401 and accompanying text.
largest percentage of litigators involved the law of commercial transactions (83.7%), followed by business fraud (66.0%) and anti-trust (60.1%). The types of cases that were handled in significantly greater proportion by litigators in the house counsel sample than by those in the outside counsel sample involved administrative law (76.9% house counsel vs. 37.0% outside counsel), employment discrimination and related personnel matters (65.4% vs. 37.0%), and labor law (61.5% vs. 18.5%). Significantly greater percentages of outside litigators than in-house litigators had handled securities (77.8% outside counsel vs. 50.0% house counsel) and banking matters (55.6% vs. 23.1%).

The forty-nine nonlitigators were asked to indicate the types of nonlitigated corporate matters they had handled during the five years preceding their interviews. Contract preparation and review comprised a part of the work of all of the nonlitigators. Other types of matters handled in significant proportion by the nonlitigators as a group were acquisitions and mergers (85.7%), financing (81.6%), corporate governance (75.5%), securities (71.4%) and international (67.3%). Significantly greater percentages of nonlitigators in the house counsel sample than in the outside counsel sample had handled miscellaneous government compliance (e.g., FDA, OSHA, EEOC) (95.8% house counsel vs. 36.0% outside counsel), antitrust/trade regulation (66.7% vs. 32.0%), trademarks (66.7% vs. 40.0%), labor relations (62.5% vs. 12.0%), and tax (62.5% vs. 36.0%).

The fifty-two respondents in the business executive sample were employed by corporations with a median annual revenue of $2.4 billion and a median of 10,000 employees. The fifty-two cor-

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52 No statistically significant variation was found between the percentages of litigators in the samples of house and outside counsel who had handled these three types of cases, thus allowing a pooling of the data. The same holds true with respect to the following types of cases handled by the indicated percentages of litigators: insurance (49.1%); products liability (49.1%); corporate governance (41.5%); trademarks (41.5%); business crime (39.6%); environmental (34.0%); copyright (30.2%); patents (26.4%); admiralty (17.0%); miscellaneous, e.g., bankruptcy, personal injury, real estate, tax (34.0%).

53 No statistically significant variation existed between the proportion of nonlitigators in the samples of house and outside counsel who had handled these types of matters. Similarly, no variation was found with respect to the following types of matters that the indicated percentages of nonlitigators as a group had handled: banking (49.0%); environmental (28.6%); patents (12.2%); miscellaneous, e.g., real estate, ERISA (20.4%).

54 When the data of the house counsel and executive samples are pooled, the 102 corporations in the combined samples have a median annual revenue of $2.4 billion and a median of 9,000 employees.
porations employing the executives were engaged in the following types of business (with a parenthetical indication of the number of corporations in each category): manufacturing (fourteen); commercial banking (eight); publishing or broadcasting (six); commercial services, such as retail, advertising, management consulting (five); transportation or utility (five); investment banking, stock brokerage or other financial services (four); oil, gas, metals or mining (four); diversified or conglomerate (three); insurance (three). All of the respondents held high managerial positions in their companies and were well-educated. Interestingly, eight of the respondents had law degrees, five of them having practiced law in the corporate sphere. Most of the executives had communicated on a frequent basis with lawyers for their companies during the five years prior to the interviews. Thirty of the fifty-two executives had communicated with attorneys more often than once a week, twelve had done so about once a week, seven about once a month, two at the rate of three-to-six times per year, and one on three-to-six occasions. Forty executives said that most of their communications had been with house counsel, while only three said that they had communicated most often with outside counsel. Nine stated that their communications were about equally divided between house counsel and outside counsel.

For the most part, the executives were not "coached" prior to their interviews. Fifty stated, in response to a direct question on this point, that they had received no pre-interview briefing from a

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The legal departments of the corporations in the executive sample ranged in size from one to 140, and the median size was eight attorneys. When pooled with the data in the house counsel sample, the median size of the legal staffs of the 102 corporations in the survey is seven attorneys.

All of the house counsel and corporate executives indicated that their corporations refer a certain amount of legal work to outside counsel. Litigation was identified by the largest number of respondents (92.0% house counsel and 75.0% executives) as the type of legal matter that is most often referred to outside counsel. Other principal areas of referral that were mentioned include specialty matters, e.g., tax, patents, trademarks, pensions (59.8% of 102 respondents); major transactions (37.3% of 102 respondents); and government regulatory matters, e.g., SEC, FTC, EEOC compliance (32.4% of 102 respondents).

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The distribution by title is as follows: Senior Executive Vice President, 3; Senior Vice President, 13; Executive Vice President, 26; Vice President, plus Financial Officer, 4; Vice President, 3; Other, 3. Eighteen of the executives were also members of their companies' boards of directors. Four years was the median length of time that the respondents had held their current positions. The median age of the executives was 54, and all of them were males.

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The distribution by highest degree attained is as follows: B.A. or B.S., 21; M.B.A., 12; Other Master's Degree, 7; J.D. or LL.B., 8; Ph.D., 4.
lawyer. The two who had been briefed said that house counsel had merely refreshed their recollection as to the basic rule of attorney-client privilege. Thus, the views of the executives in the survey should be of special significance in light of the fact that they were essentially unprepared.

In eighty-eight of the 102 corporations in the combined house counsel and executive samples (86.3%), members of middle management were authorized to seek legal advice for the company from house counsel without the need to obtain permission from their superiors. In fifty-two of the corporations (51.0%), employees below middle management shared the same authority.

There were twenty-eight respondents in the sample of federal judges and magistrates. Eleven judges and seven magistrates were located in the Southern District of New York, and six judges and four magistrates in the Eastern District of New York. Their median length of time on the bench was ten years. One unexpected datum in the sample of jurists was the seemingly low frequency with which many of them had been called upon to decide questions of attorney-client privilege in the corporate context. Four of the district court judges had never been required to decide an issue involving the corporate attorney-client privilege. The other twenty-four judges and magistrates estimated that they had decided corporate attorney-client privilege questions with the following degrees of frequency: less often than once a year, six respondents (25.0%); once a year, five (20.8%); two-to-three times a year, six (25.0%); four-to-six times a year, one (4.2%); seven-to-twelve times a year, four (16.7%); over twelve times a year, two (8.3%).

The six respondents in the two ranges of greatest frequency were all magistrates. This fact was not surprising, since the privilege issue most often arises in pretrial discovery; magistrates in both the Southern and Eastern Districts of New York exercise a great deal of responsibility over the discovery phase of civil litigation.

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57 Three of these judges had been on the bench less than six years. The fourth had been on the bench for over 25 years.

58 The judges' estimates were the best available source of information. An analysis of court records would not have provided any greater accuracy than the judges' recollections because adjudications of pretrial discovery issues are not always recorded.

59 The four magistrates who had decided the issue in the range of 7-12 times a year were all located in the Southern District of New York, and one magistrate from each district fell in the range of over 12 times a year.

60 See, e.g., 1987 COURT REPORT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK 13; Weinstein & Wiener, Of Sailing Ships and Seeking Facts:
As between the Southern and Eastern Districts, respondents in the Southern District had adjudicated the issue with greater frequency. In terms of the total number of occasions on which the twenty-four respondents with relevant experience had decided an attorney-client privilege issue in the corporate context, the median range was seven to twelve times.

The reported frequency of adjudication of issues involving the corporate attorney-client privilege understates somewhat the judicial respondents' exposure to the matter. Although no specific inquiries were directed to the frequency of informal or “off-the-record” resolution of privilege disputes, eight of the judicial respondents volunteered that they seek as often as possible to avoid the need for actual adjudication through informal conferences with the lawyers. Some of the techniques identified by the respondents include the encouraging of compromise and reciprocal exchanges of factual information; allowing the opponent to look at selected privileged documents on a “lawyer's-eyes-only” basis to enable counsel to determine whether pursuit of the particular discovery is worth it; and simply telling the opponent, after the jurist's preliminary in camera review, that the documents are “of no interest” or contain “no smoking guns.” Two of the magistrates said that in disputes involving numerous documents, they first outline for the parties their own views regarding the definition of the attorney-client privilege. The parties are then instructed to “work out disputes between themselves” in accordance with the given guidelines and only thereafter to present specific disagreements to the magistrate. Another magistrate uses the threat of sanctions in an attempt to reduce the need for adjudication. Local pretrial discovery rules requiring documentary substantiation of privilege claims were also said by some to be effective in obviating the need for judicial resolution of disputes.

II. RATIONALE OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE: THEORETICAL FRAMEWORK

A. Rationale of the Attorney-Client Privilege, In General

The principal justification for the attorney-client privilege in

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* See infra note 183.

* See infra notes 184-88 and accompanying text.
modern times is based on the instrumental argument that the privilege promotes candor in the attorney-client relationship. The argument begins with the assumption that laypersons need to consult lawyers in order to cope with society's complex laws and regulations. Lawyers cannot, so the argument goes, adequately vindicate their clients' rights and advise them how best to conduct their affairs if clients do not make all pertinent facts known. Such facts will not be revealed, it is said, if clients are fearful that the lawyer can later be compelled to disclose the communications in litigation. Absent privilege, clients will be inhibited from disclosing not only adverse facts but also favorable information that the client mistakenly believes is damaging. At the extreme, they might refrain from consulting lawyers altogether.

Thus deprived of complete information, the attorney cannot

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Instrumental argumentation for privileges—the attorney-client privilege as well as others—was advocated by Wigmore. He posited four prerequisites for the recognition of any class of privileges for confidential communications: (1) the communication must originate in an assurance of nondisclosure; (2) confidentiality must be "essential" to the "satisfactory maintenance" of the relationship; (3) the relationship must be one that society seeks "sedulously" to foster; and (4) the injury to the relationship from disclosure "must be greater than the benefit thereby gained for the correct disposal of litigation." 8 J. Wigmore, supra note 2, § 2285, at 531. It bears emphasizing that the cost-benefit analysis advocated by Wigmore is not a case-by-case exercise. Rather, once a privilege category is recognized, the privilege generally operates in an absolute manner, absent the applicability of some pertinent exception. See Berger, Comment: The Privileges Article in the New York Proposed Code of Evidence, 47 Brooklyn L. Rev. 1405, 1405 n.6 (1981). The instrumental model, which has also been called "utilitarian," see Louisell, Confidentiality, Conformity and Confusion: Privileges in Federal Court Today, 31 Tul. L. Rev. 101, 111 (1958), justifies privileges for socially desirable relationships in which the potential for disclosure of confidential communications in subsequent litigation would chill candor and openness between the parties. See Berger, supra at 1405-06.

Noninstrumental arguments, in contrast, generally do not depend upon such factual premises. Rather, compelled disclosure of the communication is seen as a harm in itself, regardless of whether the privilege actually serves to encourage communications. See 23 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5422, at 671-72 (1980); id. § 5422.1, at 163 (Supp. 1989).
give the most competent legal advice, and the administration of justice will suffer either because of the perpetuation of meritless litigation or noncompliance with the law. Furthermore, an attorney who is called upon to give testimony that is prejudicial to the client, such as damaging admissions by the client, is disqualified from serving as trial advocate. Such disqualification would interfere with the client’s freedom to choose counsel and delay the progress and efficiency of litigation while new counsel became acquainted with the case. By assuring clients that disclosure of confidential communications with counsel cannot be compelled without their consent, the law of privilege is intended to reduce these adverse consequences.

To be distinguished from the attorney-client privilege are two doctrines that are sometimes confused with the privilege: the attorney’s ethical duty of confidentiality and the work product immunity. Whereas the privilege is a rule of evidence that permits the testimonial exclusion of confidential attorney-client communications, the ethics of the legal profession require attorneys to maintain client confidences and secrets even outside the arena of litigation. A second discrete concept is the work product doctrine, which provides qualified protection against an adversary’s discovery of materials prepared by a lawyer or other agent of the client in anticipation of litigation, regardless of the source of the information. Whereas the purpose of the attorney-client privilege is to

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65 See Model Code of Professional Responsibility EC 4-4 (1981); Model Rules of Professional Conduct Rule 1.6 comment ¶ 5 (1983). In legal proceedings, the attorney also has an ethical duty to assert the privilege on behalf of the client, absent instructions to the contrary. See Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.), cert. denied, 352 U.S. 833 (1956).

encourage clients to be candid in their communications with lawyers, the work product immunity is intended to encourage lawyers to be diligent in their case preparation.\(^1\) Statements of witnesses obtained in anticipation of litigation, for example, would not fall within the attorney-client privilege but would be prima facie nondisclosable under the work product doctrine. The immunity for such work product, however, may be lifted by the court upon a showing by the adversary of substantial need for the materials and the inability without undue hardship to obtain their equivalent through other means.\(^6\) The attorney-client privilege, in contrast, traditionally has been treated as an absolute privilege once all of its definitional elements are satisfied.\(^3\)

As to the costs of the attorney-client privilege, its proponents argue that the court’s loss of potentially valuable evidence is outweighed by the social benefits of well-informed legal advice and good advocacy.\(^7\) In addition, the overall damage to the fact-finding process is thought to be minimal because the client, at least as to matters with no criminal implications, may be compelled to testify as to all facts within his knowledge, even if they have been communicated to the attorney. Only the version of the facts given to the attorney, i.e., the attorney-client communication itself, is privileged.\(^7\) Proponents also argue that the cost of the privilege to
truth is negligible in the long run because absent the privilege, no communications of evidentiary value to the adversary would come into existence in the first place.\textsuperscript{72} The privilege thus conceals only communications that would not otherwise occur. Furthermore, the privilege may not be used to shield attorney-client communications that were made in furtherance of a future crime or fraud.\textsuperscript{73} Communications in aid of ongoing or future wrongdoing represent an abuse of the attorney-client relationship that public policy will not condone.\textsuperscript{74}

Justification for the attorney-client privilege has not always been based on instrumental arguments regarding candor in attorney-client communications. The privilege first emerged in England during the reign of Elizabeth I at about the time when witnesses were first made subject to compulsory process.\textsuperscript{75} Attorneys who were called as witnesses invoked their "oath and honor as gentlemen" not to answer questions that would require them to reveal matters confided by clients, and courts upheld these claims of privilege."\textsuperscript{0} By 1776, however, the oath of honor—whether invoked by question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." Id; see also Grant v. United States, 227 U.S. 74, 79-80 (1913) (pre-existing documents in hands of client, such as corporate books and records, do not become privileged by transfer of possession to counsel); In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) (facts learned by attorney from independent sources and then reported to client are not within privilege); Kenford Co. v. County of Erie, 55 App. Div. 2d 466, 469, 390 N.Y.S.2d 715, 719 (4th Dep't 1977) (client-party may be compelled to state the facts, regardless of client's source of information).


\textsuperscript{73} See, e.g., Pritchard-Kesang Nam Corp. v. Jaworski, 751 F.2d 277, 281 (8th Cir. 1984); In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1038 (2d Cir. 1984); In re Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979). The crime/fraud exception has no application to communications relating to past misdeeds, as to which the seeking of legal counsel is entirely legitimate. See Alexander v. United States, 138 U.S. 353, 360 (1891).

\textsuperscript{74} See Clark v. United States, 289 U.S. 1, 15 (1933). "The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." Id. Some courts have suggested that the exception includes not only crimes and frauds but also any other intentional misconduct. See, e.g., In re Sealed Case, 754 F.2d 295, 299 (D.C. Cir. 1985); Irving Trust Co. v. Gomez, 100 F.R.D. 273, 277 (S.D.N.Y. 1983); Diamond v. Stratton, 95 F.R.D. 503, 505 (S.D.N.Y. 1982).

\textsuperscript{75} 9 W. Holdsworth, A History of English Law 201-02 (7th ed. 1956). Wigmore asserted that the attorney-client privilege was the oldest of the common law privileges. 8 J. Wigmore, supra note 2, § 2290, at 552.

\textsuperscript{76} See, e.g., Walford v. Ward, 82 Eng. Rep. 853 (K.B. 1654). See generally 8 J. Wigmore, supra note 2, § 2290, at 543; Hazard, supra note 6, at 1070-71. Indeed, until the mid-
attorneys or other "gentlemen"—had been repudiated as a basis for any type of evidentiary privilege. Judicial interest in the ascertainment of truth had become a paramount concern, necessitating an alternative rationale if the privilege for attorney-client communications was to survive. According to Wigmore, the new theory was that of social utility—the promotion of client candor; possession of the privilege thus shifted from the attorney to the client.

Noninstrumental justifications, however, have re-emerged in recent times. Under noninstrumental rationales, compelled disclosure of client confidences is considered intrinsically wrong, regardless of whatever effect the privilege may have on client candor and regardless of the cost to society's interest in accurate adjudication.

Perhaps the leading noninstrumental rationale is based on the client's right of privacy—the ability to determine "when, how, and to what extent information about [oneself] is communicated to others." In preserving the confidentiality of information disclosed

1700s, English courts exempted almost any "gentleman" from testifying if such testimony would violate a private vow of secrecy. W. Holdsworth, supra note 75, at 202; J. Wigmore, supra note 2, § 2285, at 581.

Professor Radin suggested that the roots of the attorney-client privilege may be traceable to the notion in Roman law that advocates were incompetent to testify against their clients because of the immoral breach of fidelity that would be involved. Radin, The Privilege of Confidential Communication Between Lawyer and Client, 16 Calif. L. Rev. 487, 488-89 (1928). The incompetency apparently was based on the irrebuttable presumption that an advocate who would testify against his client was a "disreputable" person and therefore not worthy of belief. Id.

Trial of the Duchess of Kingston, 20 How. St. Tr. 355, 586, 589 (1776) (in bigamy trial, court rejected Lord Barrington's claim that as "man of honor" he could not reveal whether defendant had confided in him fact of her prior marriage); Trial of James Hill, 20 How. St. Tr. 1317, 1362-63 (1777) ("the wisdom of the law knows nothing of that point of honour"). See W. Holdsworth, supra note 75, §§ 2286, 2290.


See Berger, supra note 63, at 1408; Louisell, supra note 63, at 110-12.

A. Westin, Privacy and Freedom 7 (1970). Privacy, as defined by Sissela Bok, is "the condition of being protected from unwanted access by others—either physical access, personal information, or attention. Claims to privacy are claims to control access to what one takes ... to be one's personal domain." S. Bok, Secrets: On The Ethics of Concealment and Revelation 10-11 (1982). She notes that secrecy (defined as intentional concealment) is a means of enhancing one's control over privacy. Id. at 11-13.

Drawing upon such "control-over-access" definitions of privacy, Professor Thomas Krattenmaker explains the connection between privacy and testimonial privileges as follows: "The rejection of a claim of privilege destroys the claimant's control over the breadth of the audience receiving personal information as well as his control over the timing and conditions of its release." Krattenmaker, Testimonial Privileges in Federal Courts: An Alternative to
in the privacy of a legal consultation, the privilege shows respect for the client's autonomy. Although the lawyer is ethically bound in any event to preserve client confidences outside the arena of legal proceedings, the evidentiary privilege broadens the circumstances in which the client's privacy interests are protected. The privilege thus reflects governmental respect for the exchange of information that occurs in the privacy of the attorney-client relationship.

Another noninstrumental argument bears traces of the original concept that the attorney's honor would be diminished by a duty to reveal client confidences. Wigmore observed that the privilege may be justified, at least in part, by the "sense of treachery" that the lawyer would experience if compelled to testify against a client, thus creating "an unhealthy moral state in the practitioner." As noted above, lawyers are disqualified from representing clients against whom they must give adverse testimony. The privilege may be worth preserving, therefore, "[i]f only for the sake of the peace of mind of the counselor." Finally, public confidence in the


The privacy banner has been carried by several commentators in support of other privileges, such as the husband-wife and doctor-patient privileges. See, e.g., Black, The Marital and Physician Privileges—A Reprint of a Letter to a Congressman, 1975 Duke L.J. 45; Gardner, A Re-evaluation of the Attorney-Client Privilege (pts. I & II), 8 Vill. L. Rev. 279 (1963); Krattenmaker, supra at 91; Louisell, supra note 63; Saltzburg, supra note 72, at 618.

Professor Charles Fried argues in favor of the attorney-client privilege on the moral ground that in giving legal advice, the lawyer is helping the client to learn his rights under the law; the government thus has no right to interfere in the process of communication. See Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060, 1073 (1976) [hereinafter Lawyer as Friend]; Fried, Correspondence, 86 Yale L.J. 584, 586 (1977).

See Saltzburg, supra note 72, at 609-10. State v. Sugar, 84 N.J. 1, 417 A.2d 474 (1980), is one of the few judicial opinions expressly endorsing a privacy rationale for the attorney-client privilege:

The necessity of full and open disclosure by a defendant ... imbues that disclosure with an intimacy equal to that of the confessional, and approaching even that of the marital bedroom ....

Any interference with the intimate relationship between attorney and client may do profound violence to the individual privacy of the client .... The privacy between attorney and client is but an extension of the client's personal privacy. Id. at 12-13, 417 A.2d at 479-80 (citations omitted).

See supra note 64 and accompanying text.

See also Louisell, supra note 63, at 112 (attorney's adverse testimony would be morally repugnant because attorney would "know that he was perverting the function of counseling"). Professor Radin observed that although the original rationale for the privilege—the attorney's honor as a gentleman—had long since
fairness of the adjudicative process might also suffer if attorneys became "informers" for the adversary.\textsuperscript{37} As one commentator expressed it, a client should be entitled to "rely on his attorney without question or doubt" and to take comfort in knowing "that giving the truth to his attorney will not hurt him."\textsuperscript{38} For criminal defendants, the privilege might even be justified on constitutional grounds.\textsuperscript{39}

There is no reason why instrumental and noninstrumental rationales must be viewed as mutually exclusive; it is perhaps a matter of emphasis. For example, the instrumental argument is bolstered if consideration is given to the notion that the protection of privacy and autonomy is another social benefit fostered by the privilege.\textsuperscript{40} The privacy argument, in turn, may require some degree of utilitarian analysis to justify extension of an evidentiary privilege to the attorney-client relationship while denying it to other relationships that are more intimate in nature.\textsuperscript{41}


\textsuperscript{39} See supra note 6. In the nineteenth century, Jeremy Bentham argued that the common good would be much better served if attorneys could be compelled to disclose their clients' confessions of guilt. 7 J. BENTHAM, THE WORKS OF JEREMY BENTHAM 473-79 (Bowring ed. 1842). Edward Livingston countered such criticism of the privilege, in part, with the noninstrumental argument that an attorney's incrimination of his client would be a "repugnant" means of destroying "[a] public enemy . . . by poisoned weapons." 1 E. LIVINGSTON, supra note 17, at 464-65. Today, Livingston's moral argument might be premised on a confluence of the fifth and sixth amendments. In order to obtain effective legal counsel, which requires making full disclosure of all relevant facts, the defendant should not have to waive the right to remain silent, which would be the result if the attorney could be compelled to testify to the disclosures. See Hazard, supra note 6, at 1062-63.

\textsuperscript{40} See, e.g., Developments in the Law, supra note 79, at 1504-07.

\textsuperscript{41} For example, the privacy argument, standing alone, does not answer the question why an evidentiary privilege has not been extended to the parent-child relationship. Although a few courts recently have recognized a parent-child privilege principally on privacy grounds, see, e.g., In re Agosto, 553 F. Supp. 1298, 1325 (D. Nev. 1983); In re A & M, 61 App. Div. 2d 426, 428, 403 N.Y.S.2d 375, 381 (4th Dep't 1975), most courts adhere to the common law view that denies the existence of any such privilege. See United States v. Davis, 768 F.2d 893, 899 (7th Cir. 1985).

The usual answer to the "picking and choosing" that occurs under a privacy rationale is that privacy is not an absolute right, and society is therefore entitled to extend greater protection to some relationships than to others. See, e.g., Ruebhausen & Brim, Privacy and...
more, under both rationales, the values advanced by the privilege arguably must be weighed against the cost of potentially inaccurate fact-finding when society determines whether the privilege should be recognized. When the instrumental and noninstrumental arguments are combined, they may strengthen the case for continued recognition, despite the costs, of the attorney-client privilege. Whether the balance produces the same outcome for corporate as well as individual clients, however, is another question.

B. Should the Privilege Apply to Corporations?

The most frequently litigated questions about the corporate privilege concern its operation and scope, not whether the privilege should exist. English courts have applied the attorney-client privilege to corporations since at least 1833 without questioning the appropriateness of so doing, and American cases involving claims of privilege by corporations date from the late nineteenth century.

In 1962, however, the district judge in Radiant Burners, Incorporated v. American Gas Association declared that he could find no precedent specifically holding that the privilege applied to corporations. Considering the question an open one, he concluded that in the absence of legislation, corporations were not entitled to claim the privilege because, like the privilege against self-incrimi-
nation, the attorney-client privilege was "historically and fundamentally personal in nature." An additional reason was the impossibility, in the judge's view, of maintaining confidentiality for documentary communications with counsel in the corporate setting.

The Seventh Circuit Court of Appeals reversed, holding that the corporate privilege had been in existence "for more than a hundred years." Without denying that the privilege first emerged in one-to-one relationships between attorneys and individual clients, the court of appeals stressed that the principle underlying the privilege—facilitation of the administration of justice by encouraging full disclosure by clients—was just as applicable to corporate clients as to individuals. In response to the district

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97 Id. at 773. Since the corporation was a "mere creature of the state and not a natural entity," it could not, in the absence of legislation, take advantage of a privilege "historically created only for natural persons." Id.

The district court was correct, of course, that corporations are not entitled to assert the privilege against self-incrimination. See Hale v. Henkel, 201 U.S. 43, 74-75 (1906). It is believed that one of the original reasons for the privilege against self-incrimination was to protect against confessions coerced by physical torture, see C. McCormick, Evidence § 114 (E. Cleary 3d ed. 1994), which corporations are incapable of experiencing. See also Greensward, Silence as a Moral and Constitutional Right, 23 WM. & MARY L. REV. 15, 39 (1981) (privilege against self-incrimination is essentially protection against cruel affront to human dignity). In denying the privilege to corporations, the Supreme Court may have been influenced by this consideration, as well as the view that the corporation, as a creature of the state, is subject to limitations on its rights when deemed necessary for effective law enforcement. See Braswell v. United States 108 S. Ct. 2284, 2294 (1988) ("recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white collar crime'"); Hale v. Henkel, 201 U.S. 43, 70 (1906) (antitrust laws would be "nullified" if fifth amendment could "close the door of access to every available source of information upon the subject"); cf. United States v. White, 322 U.S. 694, 698-702 (1944) (privilege denied to labor union because of "impersonal" nature of its records and documents and necessity of government access to organization's records and documents for law enforcement purposes).

98 Radiant Burners, 207 F. Supp. at 773-75. Oddly, the court indicated that the traditional rationale for the privilege—promotion of open communication between client and attorney—would warrant extension of "a similar privilege" to a corporation, but insisted that it was precluded by the common law requirement of absolute secrecy and the "purely personal" origin of the privilege from so doing. Id. at 775. See also Radiant Burners, 209 F. Supp. at 325.

99 Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963).

100 Id. at 323.

101 Id. at 322. That the original privilege may have contemplated only clients who were natural persons is probably explained by the historical fact that publicly held business corporations did not become an active part of English or American society until the late nineteenth century. See Werner, Corporation Law in Search of Its Future, 81 COLUM. L. REV. 1611, 1641-42 (1981). There is no reason why the privilege should not have evolved to embrace new circumstances if there was an appropriate rationale for doing so. To suggest oth-
court's concern over lack of confidentiality, the court of appeals saw no reason why this problem could not be addressed on a case-by-case basis, noting that the nature of the requisite confidentiality would vary with the size of the corporation.\footnote{Radiant Burners, 320 F.2d at 323-24.}

Since the Radiant Burners litigation, no reported decision has ever explicitly rejected the corporate privilege, and in 1985 the Supreme Court considered it "by now well established" that corporations may claim the privilege.\footnote{Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985).} That the privilege is justifiable in the corporate context, however, is not self-evident. Setting aside questions concerning scope, is there sufficient justification for extending the privilege, in general, to corporations? The determination of this question depends on a weighing of benefits and costs.

1. The Benefits of the Corporate Privilege

Proponents of the corporate privilege usually advance an instrumental justification along the following lines.\footnote{See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); A.B. Dick Co. v. Marr, 95 F. Supp. 83, 102 (S.D.N.Y. 1950); Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913-914 (1969); Kobak, The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts, 6 Ga. L. Rev. 339, 339-40 (1972).} Because the laws and regulations governing modern business corporations are complicated, corporations need sound legal advice. Such advice is more likely to produce appropriate corporate behavior if based on full disclosure of the facts rather than incompleteness, half-truths and distortions prompted by the apprehension of revelation in litigation. The privilege encourages corporations to provide their attorneys with all of the facts necessary for the rendering of competent legal advice, and this, in turn, will help ensure corporate legal compliance.\footnote{See Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985).} The Commodity Futures Court wrote: "Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice." \textit{Id.}
nations. It might be argued, for example, that the attorney-client privilege protects the right of privacy of a corporation just as it does that of an individual client. But the concerns about human dignity and autonomy that have prompted most writings about privacy are minimal in the corporate context. For example, in connection with the fourth amendment right against unreasonable searches and seizures, the Supreme Court has said that "corporations can claim no equality with individuals in the enjoyment of a right to privacy" because "[t]hey have a collective impact upon society from which they derive the privilege of acting as artificial entities." As an artificial entity, the corporation would be incap-

106 Cf. Allen & Hazelwood, Preserving the Confidentiality of Internal Corporate Investigations, 1987 J. Corp. L. 355, 357 (corporate right to privacy suggested as rationale of emerging privilege for corporate self-evaluation). No court has explicitly relied upon a privacy rationale for the attorney-client privilege as applied to corporations, but the opinion in State ex rel. Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 383-85 (Mo. 1978) (en banc), comes close to doing so in the course of criticizing Wigmore's instrumental argument. See supra note 63.

Existing privacy protections for corporations include the fourth amendment prohibition against unreasonable searches and seizures, see, e.g., G.M. Leasing Corp. v. United States, 429 U.S. 338, 353-54 (1977), and laws protecting trade secrets, see, e.g., 5 U.S.C. § 552(b)(4) (1988) (Freedom of Information Act exempts trade secrets and confidential commercial information from disclosure); 2 J. Weinstein & M. Berger, supra note 17, ¶ 508[02]-[03] (qualified evidentiary privilege for trade secrets).

107 See R. Stevenson, Jr., Corporations and Information 51 (1980). In his book on corporate secrecy, Professor Russell Stevenson wrote:

Certainly corporations do have legitimate interests in preserving some degree of secrecy with respect to their operations. It is, however, fallacious to assume that those interests are identical to or deserving of the same protection as the interests of living and breathing persons as it is to treat corporate wrongdoing as if it were the act of some sort of evil or antisocial being. The social conventions and legal rights we have established to protect personal privacy are founded on human values and human traits shared by the members of every society. Corporations—and other organizations—can make no direct claim to the benefits of those social and legal rules, for their fictional "personalities" do not partake of the characteristics wherein the rules find their basis.

Id. (emphasis in original); see also S. Bok, supra note 81, at 110 ("It is fallacious to argue . . . from individual privacy to corporate privacy").

In Gardner, A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?, 40 U. Det. L. Rev. 299, 323-25, 353-54 (1963), the author argues that the only proper rationale for evidentiary privileges in modern times is privacy and human dignity, and for this reason, he concludes that corporations should not be entitled to the attorney-client privilege.

ble of experiencing a sense of betrayal or loss of autonomy if counsel to the corporation were compelled to testify to information acquired in confidence while performing legal services for the corporation.

On the other hand, the corporation is a vehicle through which real persons seek personal objectives. Directors, officers, employees and shareholders might indeed feel betrayed if the corporation's lawyer were required to reveal confidential communications made by representatives of the corporation. But the attorney's duties of loyalty and confidentiality are owed to none of these persons individually. As will be further developed below, ordinarily the corporate lawyer's sole client is the organization—not its individual representatives or shareholders. Thus, any breach of privacy experienced by the persons "behind" the corporation would be merely vicarious because the only cognizable attorney-client relationship exists between the collective entity and the attorney. The privacy interests at stake in the corporate context, therefore, are of an entirely different nature from those of individual clients. As Wigmore argued, however, the attorney-client privilege

Corporations are not entitled to assert the privilege against self-incrimination, see supra note 97, and they have been largely unsuccessful in obtaining recognition of a tort cause of action for invasion of privacy. See RESTATEMENT (Second) of TORTS § 651(I) comment c (1981); but see Allen, Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandaries [sic] for the Common Law, 20 J. MARSHALL L. REV. 607, 626-39 (1987) (arguing in favor of corporate privacy actions).

See Fried, Lawyer as Friend, supra note 82, at 1076 (arguing that rights-based rationale of autonomy applies to both individual and corporate attorney-client relationships); see also Alschuler, supra note 87, at 73 n.29 (fairness rationale of attorney-client privilege applies to corporations).

See infra notes 117-25 and accompanying text.

See 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 208 at 732 (1985) ("the privacy factor looms larger in the relationship of the individual to his personal attorney than in the more impersonal relation of an organization"); C. WOLFRAM, MODERN LEGAL ETHICS § 6.5.3, at 283-84 (1986) ("[t]he corporation as an entity has no legal or moral claims to dignity").

A distinction that is relevant to privacy interests, however, might properly be drawn between large, publicly held corporations and small, closely held corporations. Sole proprietors or small partnerships, in order to give their enterprise the advantage of limited liability, perpetual life and the other benefits that the separate-entity concept of corporation law provides, may incorporate their businesses for the sake of convenience. Under law, all corporations, regardless of the number of shareholders, are treated alike in the sense that, upon incorporation, a separate and distinct entity springs into existence. See 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 25, at 306 (1933 perm. ed.). The sole proprietor or small group of partners who are doing business in a formal and legalistic sense through a corporation may nevertheless experience a personal sense of privacy in their dealings with counsel "to the entity." See, e.g., Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987).
may be justified, in part, by the "sense of treachery" that the attorney would feel if routinely required to testify against the client. This burden could weigh heavily on the attorney irrespective of the type of client involved.

In any event, few writers have advocated noninstrumental rationales for the corporate privilege. The debate has been waged almost exclusively in functional terms. Concentrating, then, on the instrumental rationale, a serious question is presented as to whether the privilege has any actual role in accomplishing the benefits that are attributed to it in the modern corporate context. Obviously, since the corporation itself is an inanimate entity, it is the conduct of corporate representatives—directors, officers and employees—that either is or is not affected by the privilege. The argument that the privilege is necessary to induce the corporation's agents to confide in counsel rings somewhat hollow. Because a vast array of laws and regulations must be taken into account in the accomplishment of business objectives, and because these external forces present a grave potential for liability, corporate managers would appear to have no practical choice but to consult lawyers. In so doing, it would seem that they must, out of business necessity, disclose all relevant facts about the corporation's past and prospective conduct if they wish to obtain the informed legal advice required to properly manage the corporation's affairs.

112 See supra note 84 and accompanying text.


114 See Nath, Upjohn: A New Prescription for the Attorney-Client Privilege and Work Product Defenses in Administrative Investigations, 30 Buffalo L. Rev. 11, 41-47 (1981); Sedler & Simeone, The Realities of Attorney-Client Confidences, 24 Ohio St. L.J. 1, 23-25 (1963); Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. Rev. 443, 464 (1982); Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 Harv. L. Rev. 424, 428 (1970); The Supreme Court, 1980 Term, 95 Harv. L. Rev. 91, 276-77 (1981); cf. In re Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979) ("the potential costs of undetected noncompliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inabil-
fear of disclosure of legal consultations will no more bring an end to such consultations, it is argued, than the absence of the fifth amendment privilege for corporate documents has caused corporations to stop retaining general business records. Thus, in the daily routine of corporate decision-making, good business judgment—not an implied or explicit promise of secrecy in possible subsequent litigation—may be the inducement to disclose facts to lawyers.

On the other hand, it may be that some corporate officers and employees would hesitate to reveal certain facts to counsel if they believed them to be derogatory and possible cause for corporate liability. Such agents, particularly at lower levels of the corporation, might also fear punishment by the corporation in the form of discipline or loss of employment. Knowledge that the revelation of such information would remain privileged might very well provide an incentive to disclose in such circumstances.

The problem with this reasoning, however, is that any sense of personal security on the part of the employee may be illusory. The lawyer’s client is the corporation—the entity—not its constituents. Unlike the individual client who can control the decision as to whether and when to assert the privilege in his own behalf, the agents of a corporation have no such control. Thus, information conveyed to the company’s lawyer by an officer or employee may be reported by the lawyer to superior authorities within the corporation. Furthermore, several recent cases show that the corporation, despite the objections of the individual whose communications are involved, has the power to waive its privilege and permit

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117 See Evans v. Artex Sys. Corp., 715 F.2d 788, 792 (2d Cir. 1983) (in-house lawyers and law firms retained by corporation have duty to act in accordance with interests of corporate entity); U.S. Indus., Inc. v. Goldman, 421 F. Supp. 7, 11 (S.D.N.Y. 1976) (fact that individual was officer and director of companies represented by law firm did not create attorney-client relationship between him and firm); Model Code of Professional Responsibility EC 5-18 (1981) (“A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity”); Model Rules of Professional Conduct Rule 1.13(a) (1983) (“A lawyer employed or retained by an organization represents the organization, acting through its duly authorized constituents”).
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disclosure to outsiders.\textsuperscript{119} A potential waiver of this nature is most likely to cause concern to an individual involved in a matter with criminal or quasi-criminal implications. The employee may fear that the corporation, in exchange for favorable treatment by the government, will "hang him out to dry."\textsuperscript{120}

Even top-level executives, who might ordinarily have sufficient power to prevent the corporation from waiving the privilege for their communications, would not be able to override the company's board of directors or a subsequent management team. This point was recently underscored by the Supreme Court in \textit{Commodity Futures Trading Commission v. Weintraub},\textsuperscript{121} in which the trustee of a corporation in bankruptcy was held entitled to waive the privilege for management's prebankruptcy communications with counsel. Justice Marshall wrote for a unanimous Court: "Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties."\textsuperscript{122} The courts have given the individual a voice on the is-

\textsuperscript{119} See, e.g., \textit{In re Bevill, Bresler & Schulman Asset Management Corp.}, 805 F.2d 120, 124-25 (3d Cir. 1986); \textit{In re Grand Jury Subpoenas Duces Tecum}, 798 F.2d 32, 34 (2d Cir. 1986); United States v. Keplinger, 776 F.2d 678, 699-701 (7th Cir. 1985), cert. denied, 476 U.S. 1183 (1986); \textit{In re Grand Jury Investigation}, 599 F.2d 1224, 1236 (3d Cir. 1979); Odmark v. Westside Bancorporation, Inc., 636 F. Supp. 552, 555 (W.D. Wash. 1986); \textit{In re Grand Jury Investigation}, 575 F. Supp. 777, 779-80 (N.D. Ga. 1983); \textit{In re Grand Jury Proceedings (Jackier)}, 434 F. Supp. 648, 650 (E.D. Mich. 1977), aff'd per curiam, 570 F.2d 562 (6th Cir. 1978); cf. Dooley v. Boyle, 140 Misc. 2d 177, 186, 531 N.Y.S.2d 161, 167 (Sup. Ct. Suffolk County 1988) (county employee's revelation of personal wrongdoing to County Attorney may be disclosed by county to prosecuting authorities over objections of employee).\textsuperscript{120} See, e.g., \textit{In re Martin Marietta Corp.}, 856 F.2d 619, 622 (4th Cir. 1988) (corporation under investigation for fraud in performance of government contract entered into administrative settlement whereby it agreed to stop funding legal defense of employee, who subsequently was indicted). In the past, such waivers by corporations may have been rare. See Barnett, Leary & DeLone, \textit{Practical Aspects of Internal Antitrust Investigations in Light of the Upjohn Decision} (Panel Discussion), 51 \textit{ANTITRUST L.J.} 123, 145 (1982) (waiver by corporation for purpose of "ingratiate" itself with government said to be "highly unlikely"). Depending on relationships with the particular individuals involved, a corporation might offer to plead guilty or allow entry of a consent decree in exchange for the government's promise not to seek sanctions against the individuals. Recently, however, it has been said that corporations increasingly are using internal investigations "to exonerate the corporation and to implicate the employee." \textit{Internal Probes Becoming Part of Criminal Process}, Nat'l L.J., Jan. 9, 1989, at 24, col. 1; see also Arkin, \textit{The Individual and Internal Corporate Investigations}, N.Y.L.J., Feb. 9, 1989, at 3, col. 1.\textsuperscript{121} 471 U.S. 343 (1985).\textsuperscript{122} Id. at 349. See also Medcom Holding Co. v. Baxter Travenol Labs. Inc., 689 F. Supp. 841, 844 (N.D. Ill. 1988) (upon sale of stock of subsidiary corporation, former parent corporation relinquishes control over subsidiary's attorney-client privilege; new management
sue of waiver only where the attorney has undertaken joint representation of both the corporation and the employee in question.\footnote{123} Absent a finding of joint representation, the person whose candor is thought to be induced by the implied promise of nondisclosure ultimately has no control over the matter. This state of affairs tends to undermine the argument that the availability of the attorney-client privilege to the corporation provides an incentive to reticent employees to confide in corporate counsel.\footnote{124} With or without the privilege, employees communicate “at their own risk.”\footnote{125}

2. The Costs of the Corporate Privilege

Weighed against the putative benefits of the corporate attorney-client privilege are its potential costs in blocking discovery of the truth in the judicial process. Because of the privilege, a corporation’s adversaries generally must seek information directly from the corporate client, which theoretically they are able to do because the privilege protects only communications with the lawyer, not the client’s knowledge of the underlying facts.\footnote{126} An individual opponent usually can be questioned about his or her knowledge of subsidiary is generally free to waive privilege for subsidiary’s pre-sale communications with counsel); United States v. De Lillo, 448 F. Supp. 840, 841-43 (E.D.N.Y. 1978) (chairman and former trustee of union pension fund cannot prevent waiver of privilege by current board of trustees).

\footnote{123} See, e.g., In re Grand Jury Proceedings (Jackier), 434 F. Supp. 648, 650 (E.D. Mich. 1977) (corporate officer may assert privilege individually if he “makes it clear when he is consulting the company lawyer that he personally is consulting the lawyer and the lawyer sees fit to accept and give communication knowing the possible conflicts that could arise”), aff’d, 570 F.2d 562 (6th Cir. 1978); SEC v. Forma, 117 F.R.D. 516, 522 (S.D.N.Y. 1987) (outside counsel represented both corporation and chairman of board of directors as evidenced by fact that chairman sought advice from lawyer regarding sale of his own stock in the company). Even without actual joint representation, the individual employee might be entitled to claim the privilege against third parties if he “reasonably believed” that the company’s lawyer was providing individual representation. See United States v. Keplinger, 776 F.2d 678, 701 (7th Cir. 1985), cert. denied, 476 U.S. 1183 (1986); Odmark v. Westside Bancorporation, 636 F. Supp. 552, 555 (W.D. Wash. 1986). The employee might be able to claim the privilege at least for his initial communications if he was seeking to become an individual client of the corporation’s attorney. See In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 124 n.1 (3d Cir. 1986) (privilege includes communications between counsel and prospective client even if actual retainer does not result).


\footnote{125} In re Grand Jury Investigation, 569 F.2d 1224, 1236 (3d Cir. 1979).

\footnote{126} See supra note 71.
with relative ease. But in the case of a large corporation, unearth-
ing "corporate knowledge" may be quite difficult because of the
need to conduct depositions of numerous directors, officers and
employees.127 The less costly alternative of interviewing corporate
agents outside the formal deposition process—assuming willing-
ness on the part of an individual to cooperate—may be unavailable
because of an ethical rule that prohibits lawyers from communi-

cating on an ex parte basis with an adverse party who is represented

128 By counsel. When the adversary is a corporation, a number of
authorities have taken the position that the corporation’s manage-

129 Interrogatories may be a less expensive discovery method because the corporation can
be required to assemble and provide information in the possession of its employees. See,

c.g., Fed. R. Civ. P. 33(a) (corporate party served with interrogatories “shall furnish such

127 Ascertaining the identity of appropriate corporate representatives with knowledge of
relevant facts may be possible through pretrial discovery. See, e.g., Fed. R. Civ. P. 26(b)(1)
(parties entitled to discovery of “identity and location of persons having knowledge of any
disclosable matter”). The names of the particular individuals who were “interviewed by
counsel”, however, may qualify as attorney work product. Compare Massachusetts v. First
Sangamo Weston, Inc., 744 F.2d 1464, 1467 (11th Cir. 1984) (“The law is clear that [infor-
mation regarding the names and addresses of witnesses ‘already interviewed’] is subject to
(no work product protection for pre-existing list of employees who were interviewed).

omitted) (lawyer may not communicate “on the subject of the representation with a party
he knows to be represented by a lawyer in that matter unless he has the prior consent of the
lawyer representing such other party or is authorized by law to do so”); accord Model
Rules of Professional Conduct Rule 4.2 (1983). The rule seeks to prevent interference
with the adversary’s attorney-client relationship by giving the adverse party’s counsel con-
trol over negotiations and client disclosures. See Frey v. Department of Health & Human
Servs., 106 F.R.D. 32, 34-35 (E.D.N.Y. 1985); Uviller, Evidence from the Mind of the Crimi-
nal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 Colum. L.

129 The Model Code of Professional Responsibility is silent on the issue, but the com-
Thus, as a precondition to informal interviews, consent of the corporation's counsel must be obtained, which is an unlikely prospect. The corporation's lawyer, however, may have already accumulated important information from all of the corporation's internal sources. Although parties to litigation are expected to do their own discovery and not to "borrow the wits" of their adversary, access to a corporate agent's communications with counsel sometimes may be more than a mere matter of convenience. On occasion, such access may be closer to a matter of necessity.

Furthermore, the answers to questions submitted to the corporate agents in the course of formal pretrial discovery or at trial may prove to be of slight value due to failed memories or deliberate evasiveness. The problem is exacerbated if the activities that are the subject of a civil action involve any potential for criminal liability, because corporate employees may refuse to testify on the basis of their personal right against self-incrimination even though the corporation itself has no fifth-amendment privilege.
though an employee's invocation of the privilege against self-incrimination may support an adverse inference against the corporation, such an inference generally will not serve as a substitute for affirmative proof. Finally, the corporation's knowledge may be unobtainable for the additional reason that it lies in the memory of a former employee who cannot be located or one who is deceased or otherwise unavailable. If the forgetful, evasive, silent or unavailable employee had previously communicated the relevant information to the corporation's counsel, however, a basis would be available for testing credibility and filling the gaps of missing proof.

If one accepts the argument that absent an attorney-client privilege, communications between corporate employees and lawyers will either cease to exist or, at minimum, become incomplete and guarded, then the foregoing costs would become negligible. Without the privilege, the accessibility of lawyer-client communications in the future would often yield little of value to the adversary. The existence of the privilege, therefore, generally leaves the adversary in no worse position than if there were no privilege. The logic of this argument, however, rests upon the disputable assumption that the privilege in fact promotes open communications


See, e.g., RAD Servs., v. Aetna Cas. & Sur. Co., 808 F.2d 271, 275-77 (3d Cir. 1986) ("nothing forbids imputing to a corporation the silence of its personnel"); Brink's Inc. v. City of New York, 717 F.2d 700, 707-10 (2d Cir. 1983) (employees' refusal to respond to questions regarding pilferage of coin boxes allowed as circumstantial evidence of employer's negligent collection); United States v. Mammoth Oil Co., 14 F.2d 705, 729 (8th Cir. 1926) (defendant corporation's failure to call its negotiator as witness supported inference of fraud), aff'd, 275 U.S. 13 (1927); E.H. Boerth Co. v. LAD Properties, 82 F.R.D. 635, 644-45 (D. Minn. 1979) (inference could be drawn from refusal of financial agent to answer questions about financial matters). Since a claim of privilege is nearly invulnerable to challenge where the facts involve possible criminal liability, see Heidt, supra note 134, at 1071-80, "it would seem proper to afford a civil litigant stymied by his adversary's silence some means of moderating the potentially overwhelming disadvantage he faces in establishing his case." SEC v. Musella, 578 F. Supp. 425, 429 (S.D.N.Y. 1984).

See Lefkowitz v. Cunningham, 431 U.S. 801, 808 n.5 (1977) (adverse inference based on party's refusal to testify in administrative disciplinary proceeding permissible provided it is "only one of a number of factors to be considered by the finder of fact"); Pagel, Inc. v. SEC, 803 F.2d 942, 946-47 (8th Cir. 1986) (drawing of adverse inference was appropriate where it "served only to support already established findings"); SEC v. Scott, 565 F. Supp. 1513, 1533-34 (S.D.N.Y. 1983) (court considered defendant's invocation of fifth amendment only after prima facie case against him was presented), aff'd sub nom. SEC v. Cayman Islands Reinsurance Corp., 734 F.2d 118 (1984).

See Alschuler, supra note 87, at 74.
in the corporate context.

III. **RATIONALE OF THE CORPORATE PRIVILEGE: EMPirical FINDINGS**

A. **Prior Empirical Research**

Instrumental arguments for and against recognition of the corporate attorney-client privilege are empirical in nature. The most controversial part of the debate is whether the privilege actually serves to increase the flow of communications between corporate employees and counsel. Because empirical evidence one way or the other has been scarce, a large portion of my study was devoted to this issue.

The only previous empirical study of direct relevance appears in a 1962 issue of the *Yale Law Journal*. In a questionnaire survey, fifty-five of 108 laypersons (50.9%) indicated that they would be less likely to make full disclosure to a lawyer in the absence of privilege. Of 125 lawyers, ninety (72%) said that the client's awareness of the privilege enhanced communications. Although these findings suggest that lawyers are more enthusiastic about the privilege than are potential clients, they do provide evidence supportive of the instrumental rationale for the attorney-client privilege in general. The data are not very helpful in gauging the effects of the corporate privilege, however, because the Yale Study does not indicate whether the participants based their views on individual or corporate attorney-client relationships.

A more recent survey concerning the ethics of corporate attorneys touched tangentially on the candor-inducing effect of the privilege. Twelve out of fifteen high-level business executives said that "an assurance of confidentiality" by counsel would make

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138 See Yale Study, supra note 3.
139 *Id.* at 1236 n.59, 1262 (question 6). The laypersons to whom the questionnaire was submitted were members of the middle-to-upper-class social and economic status "because it was thought that such people would be more likely to consult . . . professionals." *Id.* at 1227 n.6. They were geographically located in the eastern half of the country. *Id.*
140 *Id.* at 1236 n.59, 1270 (question 5). The lawyers were from Chicago, Atlanta, Detroit, New York City, New Haven, Miami and Philadelphia. *Id.* at 1269.
them "more willing to comply fully with an investigation." This finding is ambiguous with respect to the impact of the corporate attorney-client privilege, however, because the question presented to the executives did not indicate whether the confidentiality at issue concerned nondisclosure to superiors within the corporation, such as the board of directors, or to outsiders, such as the government.

On the cost side of the privilege issue, relevant data are contained in a 1979 interview survey of Chicago litigators by Professor (now United States Magistrate) Wayne D. Brazil. In his study of pretrial discovery problems, he found that 132 of 157 respondents (84%) thought that privileges, in general, were rarely the cause for an adversary's failure to discover "arguably relevant information." Although Professor Brazil's questions did not focus on any particular privilege in this section of his study, it is reasonable to assume that the practitioners did not view the attorney-client privilege as causing any significant reduction in the quantum of available evidence.

Aside from these studies, our beliefs about the effects of the corporate privilege have been largely dependent upon the scattered writings of practitioners and judges who seem firmly convinced, by intuition if not empirical evidence, that the privilege enhances

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142 Id. at 625 n.139. The survey consisted of a mail questionnaire to 200 chief executive officers of corporations on the Fortune 1000 list; 36 executives returned the questionnaire. Id. at 604 n.6. Only 15 answered the question regarding the effect of an assurance of confidentiality.


144 Id. at 822-23. The more common cause for an adversary's inability to obtain information was said to be the "failure to ask the right questions or for the right documents or to depose the right people." Id. at 822. Professor Brazil's findings are consistent with the views of lawyers and judges in the Yale Study. One hundred and seven of 132 lawyers in the Yale Study (81%) expressed the opinion that the attorney-client privilege does not significantly disrupt the administration of justice. See Yale Study, supra note 3, at 1271 (question 13).

Of the 47 judges who participated in the Yale Study, none thought that the privilege disrupted the administration of justice. Id. at 1272 (questions 10 and 11).

145 A separate issue from loss of evidence is the extent to which privilege claims cause "friction" between adversaries. In this regard, one of Professor Brazil's inquiries focused specifically on the attorney-client privilege. Brazil, supra note 143, at 841-42. He found that large-firm lawyers representing corporations in "big cases" were more likely to experience discovery disputes over the attorney-client privilege than were small-firm lawyers representing individuals in "small cases," such as personal injury lawsuits. Id. Nineteen small-case litigators said the privilege had caused friction in only 7% of their cases, whereas 32 large-case litigators indicated that the privilege had caused problems in 36% of their cases. Id. at 833 (figure 17).
communications and does little damage to the fact-finding pro-
cess. In light of the paucity of empirical data, I undertook to
ascertain through interviews of members of the corporate bar and
high-ranking corporate officials the extent to which the privilege
influences candor in corporate attorney-client communications. To
this end, I posed questions addressed to the following issues: To
what extent are corporate representatives aware of the existence of
the corporate attorney-client privilege? What do lawyers and exec-
utives believe about the relationship between the privilege and the
candidence of candor? Does the privilege have an effect on the
frequency with which legal advice is sought? Do corporate repre-
sentatives realize, without prompting, that the corporation's attor-
ney-client privilege is not their personal privilege? Have lawyers
with an international practice experienced any adverse effects on
attorney-client communications due to the absence of privilege in a
foreign jurisdiction? And finally, what is the experience of judges
and magistrates with respect to the costs of the corporate privilege
in the adjudicatory process?

B. Awareness of the Privilege Among Corporate Representatives

It is unlikely that the corporate privilege could have the in-
strumental effects that are attributed to it if corporate representa-
tives are unaware of its existence. A series of questions in the
survey of lawyers and executives sought to measure the extent of
knowledge of the corporate privilege through three indices: (1) the
lawyers' perceptions of such awareness; (2) the frequency with
which the privilege is explicitly discussed by lawyers and corporate
employees; and (3) what lawyers generally tell corporate employees
about the privilege.

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146 See, e.g., Miller, The Challenges to the Attorney-Client Privilege, 49 VA. L. REV.
262, 268 (1963); Sedler & Simeone, supra note 114, at 4-5; Simon, supra note 7, at 954 n.6.
The views of the organized bar were represented by the American Bar Association and
various local bar associations in amicus curiae briefs attesting to the utility of the privilege
Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971); and Radiant
Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929
(1963).

147 The term "corporate representative" was defined for the respondents as any director
or employee of a corporation other than house counsel. The point was stressed to respon-
dents in the sample of outside counsel that the questions were addressed only to their expe-
rience with the nonlegal personnel of their corporate clients.
1. Prevalence of Knowledge of the Corporate Privilege

According to the lawyers, a corporate representative's general awareness of the applicability of privilege is related to his or her rank in the corporate hierarchy. The lawyers were asked: "To what extent do you think that members of upper management, middle management, and those below middle management, respectively, believe, without any prompting, that their communications with you concerning the corporation are protected by the attorney-client privilege from disclosure to outsiders?" The respondents correctly interpreted the question as asking whether the employees in the three specified levels of the corporate hierarchy were aware of the privilege and its applicability, in general, to their communications with counsel.

As shown in table 1, awareness of the privilege was thought to be widespread among upper management and less prevalent among the lower ranks of the corporate hierarchy. Roughly 74% of the lawyers (75 of the 102 lawyers in the combined samples of house counsel and outside counsel) expressed confidence that all or nearly all members of upper management believed that their communications with counsel were covered by the privilege. Another 15.7% said that a majority of upper management held this belief. In volunteered comments, the lawyers attributed upper management's awareness to such factors as prior experience with litigation, the educational efforts of counsel, the status of some senior executives as former attorneys, and the general "sophistication" of upper-level managers. Interestingly, a dozen of the lawyers drew a distinction between the management of American corporations and those based in foreign countries. In foreign corporations, appreciation of the American rule of privilege was said to be minimal or nonexistent. Conversely, several lawyers observed that the upper managers of American companies assume that much more is encompassed by the privilege than is in fact the case.

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148 As addressed to house counsel, the question focused on awareness among the employees of the respondent's particular employer. The outside counsel were asked to express their opinion with respect to employees among all of their corporate clients.

149 The question contains a potential ambiguity in that it might appear to be asking how many corporate employees, within the three groups, think that everything they discuss with counsel is covered by privilege.
TABLE 1. Lawyers’ Perceptions of the Extent to Which Corporate Representatives at Three Levels of the Corporate Hierarchy Believe that Privilege Applies to Their Communications with Counsel.

<table>
<thead>
<tr>
<th>Perception</th>
<th>Upper Management</th>
<th>Middle Management</th>
<th>Employees Below Middle Management</th>
</tr>
</thead>
<tbody>
<tr>
<td>All or nearly all</td>
<td>73.5%</td>
<td>18.6%</td>
<td>4.9%</td>
</tr>
<tr>
<td>Majority</td>
<td>15.7%</td>
<td>21.6%</td>
<td>3.9%</td>
</tr>
<tr>
<td>About half</td>
<td>2.0%</td>
<td>8.8%</td>
<td>5.9%</td>
</tr>
<tr>
<td>A few</td>
<td>3.9%</td>
<td>8.8%</td>
<td>24.5%</td>
</tr>
</tbody>
</table>

Can’t say for sure about employees at this level, but awareness decreases when descending the corporate ladder: 25.5% 20.6%

Employees at this level do not think about the privilege: 3.9% 11.8% 23.5%

Can’t say: 1.0% 4.9% 16.7%

Totals: 100.0% 100.0% 100.0%
(N=102) (N=102) (N=102)

* See supra note 42.

The lawyers’ views were mixed regarding the extent of knowledge among middle management executives. Only 40.2% of the respondents were confident that middle managers were aware of the privilege on a widespread basis. Of the remaining attorneys, the largest percentage (25.5%) could only say that awareness of the privilege was less among middle management than among upper management. The attorneys who believed knowledge was widespread in the ranks of middle management volunteered that such executives often become heavily involved in litigated matters, have frequent contact with attorneys in routine corporate matters, or are “well-educated, M.B.A. types.”

As to employees below the level of middle management, 24.5%
of the lawyers thought that "only a few" employees believe privilege applies to their communications, 20.6% thought that knowledge at this level was less common than at the middle management level, and 23.5% opined that lower-level employees simply "don't think about privilege unless a lawyer brings it up." Some of the lawyers suggested that a lower-level employee's knowledge turns on his prior exposure to litigation. In a similar vein, others volunteered that the nature of the employee's work can be a factor. Insurance claims adjusters, newspaper reporters and editors, and personnel directors were given as examples of employees whose work brings them into frequent contact with attorneys. Thus, they are likely to have been advised about the privilege on numerous occasions.

Although these data reflect only the lawyers' perceptions of the matter, they do suggest that awareness of the privilege generally is high at the top of corporate hierarchies and gradually dissipates at the lower levels. If displayed graphically, the extent of knowledge would assume the form of an inverse pyramid.

2. Frequency of Privilege Discussions

The second avenue taken to explore the extent of corporate representatives' knowledge of the privilege was to ascertain the frequency with which the attorneys in the study had explicitly discussed it with their clients. The lawyers were asked to estimate how often, during the past five years, they had raised the issue of attorney-client privilege at the time of their communications with individual representatives, regardless of rank, of their corporate clients. Ninety-five of the lawyers (93%) had mentioned the privilege on at least one occasion. Almost half of them had brought up the issue at least twenty-five times, and nearly 23% (23 of 102) said that they had mentioned the privilege over 100 times. Table 2 displays the frequencies in detail.

160 Some of the lawyers who had raised the privilege with the greatest frequency included in their count the occasions on which they had placed stamps or labels saying "confidential" or "protected by attorney-client privilege" on documentary communications. This aspect of lawyering was covered in detail at a later point in the interview, and the results are discussed infra notes 451-86 and accompanying text.

Some of the lawyers who reported frequencies in the lower ranges, regardless of whether they were litigators or nonlitigators, volunteered that most of the corporate representatives with whom they had dealt were "sophisticated" or had previously been involved in litigation and therefore needed no reminder about the existence of the privilege.
TABLE 2. Frequency (During Five-Year Period Preceding Interviews) with Which Lawyers Have Raised Issue of Attorney-Client Privilege Regarding Prospective Communications with Corporate Representatives.

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Percent of lawyers in combined samples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>6.9</td>
</tr>
<tr>
<td>Once or Twice</td>
<td>7.8</td>
</tr>
<tr>
<td>2 - 6 Times</td>
<td>13.7</td>
</tr>
<tr>
<td>7 - 12 Times</td>
<td>12.7</td>
</tr>
<tr>
<td>13 - 24 Times</td>
<td>10.8</td>
</tr>
<tr>
<td>25 - 50 Times</td>
<td>12.7</td>
</tr>
<tr>
<td>51 - 100 Times</td>
<td>11.8</td>
</tr>
<tr>
<td>Over 100 Times</td>
<td>22.5</td>
</tr>
<tr>
<td>Does not know</td>
<td>1.0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>99.9%</strong></td>
</tr>
<tr>
<td>(N=102)</td>
<td></td>
</tr>
</tbody>
</table>

* Total percent does not add up to 100.0 due to rounding.

Litigators had initiated privilege discussions with the greatest frequency. Numerous nonlitigators offered comments to the effect that they give little thought to the privilege in their daily practice. "I don’t worry about the privilege until the potential for litigation arises; then I usually call in a litigator to explain the details,” was a typical observation. In contrast, one of the litigators declared, “Privilege pervades my thinking on a daily basis.”

That litigators tend to raise the privilege with corporate employees more often than nonlitigators is consistent with responses to a follow-up question. The lawyers were asked to describe the circumstances in which they had mentioned the privilege to corporate representatives. The most frequent context, cited by 78.9% of 95 respondents, was potential or actual litigation. The second most frequently mentioned situation (38.9% of 95 respondents) was in connection with “sensitive” matters or transactions. Several

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151 Nearly two-thirds of the litigators (34 of 53) had raised the privilege issue at least 25 times during the past five years, whereas 29% of the nonlitigators (14 of 49) had raised the issue with such frequency.

152 In connection with litigation, a number of respondents, most of whom were outside counsel, specifically noted that they had mentioned the privilege while preparing corporate representatives for pretrial depositions.
respondents in the house counsel sample, in particular, stressed that their mentioning of the privilege is restricted to “a few sensitive areas.” One observed that “because of the need to meet business objectives, it is not practical always to think or function in terms of the attorney-client privilege,” and another said that it is only when he “senses trouble” that he thinks about privilege. The examples offered most often by the attorneys to illustrate what they meant by “sensitive” included large commercial transactions, acquisitions and mergers, tax planning, and personnel matters. In descending order of frequency, the following additional contexts were identified: internal corporate investigations (24.0% of 95 respondents), the giving of written legal opinions (17.9%), government regulatory compliance or government investigations (14.7%), and the employee’s unfamiliarity with the lawyer or the law of privilege (9.5%).

For the lawyers in the survey, then, litigation and matters of a sensitive nature are the two principal areas in which they are most likely to mention the attorney-client privilege to corporate representatives. Since these are inevitable events in the existence of most large corporations it is reasonable to infer that the existence of the privilege is well-known at least to the corporate representatives who deal with such events.

The survey of executives also produced findings suggesting that lawyers discuss the privilege from time to time with the members of upper management. Almost 70% of the executives (thirty-six of fifty-two) reported that during the past five years, a lawyer for the corporation had explicitly raised with them an issue of attorney-client privilege regarding their communications. In addition, 50% of the executives responding to the question (twenty-five of fifty) said that at some point in their employment, the basic nature of the law of attorney-client privilege had been explained to them by the lawyer for the corporation.

\[153\] Obviously, many of these situations may overlap, and the number of attorneys mentioning a particular type of circumstance might have been larger had the question been presented in the form of a list of possible multiple responses rather than as an open-ended inquiry.

\[154\] Among those who said that the attorney-client privilege had never been defined for them by a lawyer for the corporation were seven executives with law degrees. Most of these executives surmised that the privilege had not been explained to them because they were known to be lawyers.

Regardless of the source of their knowledge, all but one of the executives in the survey indicated that they were aware of the existence of the privilege prior to receipt of my letter requesting their participation in the study. The one respondent who was unaware of the
3. What Lawyers Generally Tell Corporate Representatives About the Privilege

The ninety-five attorneys who said they had discussed the privilege with corporate representatives were asked to describe what they usually say about the rule of privilege, i.e., how they define it. Table 3 contains the descriptions of the privilege that the respondents said they give and the percentages of respondents who give each type of description.

<table>
<thead>
<tr>
<th>Description</th>
<th>Percent of lawyers in combined samples</th>
</tr>
</thead>
<tbody>
<tr>
<td>A brief statement to the effect that communications with counsel are privileged [hereinafter “the rule”], without elaboration.</td>
<td>26.3</td>
</tr>
<tr>
<td>A brief statement of the rule, with emphasis on the need to maintain confidentiality or the danger of waiver</td>
<td>43.2</td>
</tr>
<tr>
<td>A brief statement of the rule, with a warning that the privilege is narrowly applied</td>
<td>9.5</td>
</tr>
<tr>
<td>A brief statement of the rule, with an explanation that its purpose is to induce candor</td>
<td>4.2</td>
</tr>
<tr>
<td>A brief statement of the rule, with a warning that the individual is not protected</td>
<td>4.2</td>
</tr>
<tr>
<td>Depends on the situation</td>
<td>10.5</td>
</tr>
<tr>
<td>Other</td>
<td>2.1</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
</tr>
</tbody>
</table>

(R=95)

Roughly one in four makes only a “brief” statement that communications with counsel are privileged: “a one-sentence description” or “a general statement without technical details.” Well over a third (43.2%), however, said that they emphasize in various ways the need for confidentiality. For example, some of the attorneys in this group routinely caution corporate representatives against circulating attorney-client communications “too broadly” within the corporation or making disclosure to employees “without a need to privilege said he had assumed lawyers would maintain confidentiality, in general, but that anything said to counsel would become “public knowledge” in litigation.
know.” A few warn against disclosure “to others” or “to outsiders” without defining who such individuals might be. Other respondents give a general warning that “the privilege can be easily lost by waiver.” Another ten percent add a caveat to their brief statement to the effect that the privilege is “narrowly applied.” Some of these attorneys advise, for example, that only legal advice—not business advice—is covered.

A majority of the lawyers, therefore, apparently make an effort to stress some of the limitations of the privilege. In this regard, during other portions of the interview, five respondents indicated that whatever else they say about the privilege, they often give a warning that the privilege is “not absolute”: judges sometimes “breach” the privilege and “the other side may poke holes with exceptions.” Two of these lawyers tell corporate representatives “not to rely too much on the privilege.”

C. The Relationship Between Privilege and the Candor of Corporate Representatives

Whether the attorney-client privilege actually encourages corporate clients to be candid was a key question in the study. A methodological problem of the interview approach, however, was how best to maximize answers based on the experience of the respondents rather than purely on professional biases about the privilege. The interview questionnaire thus sought to elicit objective data about client conduct before asking the respondents the direct (and leading) question whether the privilege enhances candor.

1. Do Corporate Representatives Express Concern Over Privilege Protection?

Since one empirical index of the functional value of the privilege is whether clients explicitly show concern over confidentiality in the course of communications, the attorneys were asked whether corporate representatives had ever taken the initiative in raising the issue of privilege. One reasonable inference to be drawn from a representative’s mentioning of the issue is that he is concerned about secrecy and will be less likely to speak openly without an assurance that privilege applies. If this is so, then the findings tend to show that the privilege does play a role, at least in some circumstances, in encouraging candor in the corporate setting.

Seventy-two of the attorneys (70.6%) reported that in the five
years preceding the interviews, one or more corporate representatives had initiated a discussion of attorney-client privilege with them. As a follow-up, these attorneys were asked to describe the circumstances in which the issue had been raised. The response given by 65.3% of the lawyers (forty-seven of seventy-two) was that the representative was inquiring whether the privilege would apply to prospective communications. A typical description of the scenario was as follows: “In trouble situations, such as litigation, people will sometimes ask, ‘Is this privileged?’” One of the house counsel reported that senior executives in his company sometimes begin meetings with him seeking “an understanding that this is privileged.” More often, however, it was reported that executives, perhaps not wanting to appear overly concerned about a matter, will ask in an off-handed or “half-joking” manner whether their statements to the lawyer will be privileged.

Data obtained in the survey of executives also suggest that the privilege actually affects the behavior of corporate clients. The executives were asked to give a rough idea of how often, during the past five years, the protections provided by the corporate attorney-client privilege had been an important concern for them in their communications with lawyers for the corporation (either in-house or outside counsel). They were given five alternative responses from which to choose: “never,” “rarely,” “occasionally,” “frequently,” and “always.” Eleven of the fifty-two respondents (21.2%) said “never”; thirteen (25.0%) said “rarely”; twenty-one (40.4%) said “occasionally”; five (9.6%) said “frequently”; and two (3.8%) chose “always.” Although the frequency of concern for the largest number of executives was at the lower end of the scale, a total of forty-one executives (78.8%) indicated that they had been concerned about the applicability of privilege at least once in the past five years.

Thirty-one of the executives who had experienced concern over attorney-client confidentiality (three out of four) also reported that they had expressed their concern to counsel. As to the frequency with which they had explicitly raised the issue, sixteen of the thirty-one executives (51.5%) reported “once or twice,” seven (22.6%) said “three-to-six times,” two (6.5%) said “seven-to-twelve times,” and six (19.4%) indicated “over twelve times.” Litigation and sensitive transactions were mentioned most often by the executives as the two types of circumstances in which they had
experienced particular concern\textsuperscript{185} and in which they had expressly raised the privilege issue with counsel.\textsuperscript{186} It is noteworthy that these are the same two principal situations in which the attorneys in the survey said that they had discussed the privilege issue with their clients.\textsuperscript{187}

Thus, expressions of concern by corporate representatives over the applicability of privilege apparently occur on a fair number of occasions in matters that are either commercially sensitive or involve adversarial circumstances. This does not, of course, prove that the attorneys’ reassurances of privilege actually induced candor on the part of the corporate representatives with whom they were communicating. On the other hand, one reasonable inference is that the expressed desire for an assurance of confidentiality was a precondition to full and frank communications.

One additional form of objective information was sought from the lawyers prior to making a direct inquiry as to their beliefs about the candor-related effects of the privilege. The ninety-five lawyers who said they had specifically raised the privilege with corporate representatives\textsuperscript{188} were asked to state their reasons for doing so. Two-thirds (sixty-four of ninety-five) said that on at least one occasion they had raised the privilege for the specific purpose of encouraging candor on the part of the corporate representative with whom they were communicating. It is doubtful that so many would have raised the privilege for the purpose of inducing candor if they did not believe that a causal relationship existed. On the other hand, nearly 70\% of the lawyers (sixty-six of ninety-five) also said that they are often motivated by a tactical purpose when they raise the privilege: to help the client follow proper procedures to preserve the privilege so that communications will not be subject

\textsuperscript{185} The forty-one executives for whom the privilege had been an important concern were asked the following additional question: “Have you experienced any particular types of situations in which your concern over the attorney-client privilege was greater than others?” Thirty-four (82.9\%) said “yes.” In describing those situations, 64.7\% (22 of 34) mentioned matters relating to potential or actual litigation, and 47.1\% (16 of 34) spoke of “sensitive matters,” such as personnel decisions, major business transactions, mergers or corporate restructuring.

\textsuperscript{186} Of the thirty-one executives who had explicitly raised the privilege issue with counsel, thirty provided additional information about the circumstances: twenty (66.7\%) described situations involving potential or actual litigation and thirteen (43.3\%) spoke generally of “sensitive matters.”

\textsuperscript{187} See supra notes 151–53 and accompanying text.

\textsuperscript{188} See supra note 150 and accompanying text.
to discovery in litigation. In addition, three attorneys, without prompting, admitted to a practice that is thought by some commentators to be a particular problem in the corporate setting: filtering a communication from businessman A to businessman B through the attorney simply for the purpose of cloaking the communication with privilege.

2. Does the Corporate Attorney-Client Privilege Enhance Candor?

A solid majority of both the attorneys and the executives in the survey said they believed the privilege does, in fact, encourage candor. The lawyers were asked the following question: “Based on your experience, does the attorney-client privilege serve to increase the candor of corporate representatives, regardless of rank, who are aware that privilege applies?” Table 4 displays the responses of the house counsel and outside counsel separately because of a statistically significant difference in the replies. Although a majority of the house counsel felt that the privilege encourages candor, the percentage giving this response (62.0%) was significantly lower than that of outside counsel (88.5%). Possible reasons for this disparity and additional details about the respondents' comments relevant to this point will be explored in a later subsection.

Regardless of whether the privilege may be viewed with greater enthusiasm by one group of corporate lawyers than another, a clear majority in both samples said that in their experience, the privilege encouraged candor. Several anecdotes, such as the following, were proffered: “When an employee finds that something is disagreeable to talk about, the privilege encourages him to be candid about it.” Another recurring description of the effect of the privilege was that “it puts people at ease.” Some respondents

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169 Twenty-six (27.4%) of the 95 respondents indicated that their only purpose in mentioning the privilege to clients was to avoid possible discovery of communications in litigation. Several of these lawyers explained that they had found no need to remind corporate representatives of the privilege in order to induce candor because the representatives already spoke freely with them.

160 See, e.g., Brazil, supra note 127, at 230 n. 21; Nath, supra note 114, at 49, 57; see also In re LTV Sec. Litig., 89 F.R.D. 595, 602 (N.D. Tex. 1981) (opponents of broad corporate attorney-client privilege fear that “attorney can be used to shield information by routing data through him”).

161 See infra notes 277-97 and accompanying text.
took the opportunity to offer praise for the privilege as a means of

TABLE 4 Respondents’ Beliefs as to Whether the Corporate Attorney-Client Privilege Encourages Candor on the Part of Corporate Representatives Who Are Aware of the Privilege.

<table>
<thead>
<tr>
<th>Privilege encourages</th>
<th>Percent of house counsel, with respect to corporate representatives regardless of rank</th>
<th>Percent of outside counsel, with respect to corporate representatives regardless of rank</th>
<th>Percent of executives with respect to management’s communications with attorneys for the corporation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Candor</td>
<td>62.0</td>
<td>88.5</td>
<td>75.0</td>
</tr>
<tr>
<td>Does not encourage</td>
<td>26.0</td>
<td>5.8</td>
<td>23.1</td>
</tr>
<tr>
<td>Candor</td>
<td>12.0</td>
<td>5.8</td>
<td>1.9</td>
</tr>
<tr>
<td>Totals</td>
<td>100.0%</td>
<td>100.1%*</td>
<td>100.0%</td>
</tr>
<tr>
<td>(N=50)</td>
<td>(N=52)</td>
<td>(N=52)</td>
<td></td>
</tr>
</tbody>
</table>

* Total percent does not add up to 100.0 due to rounding.

encouraging law-abiding conduct. One typical evaluation of this nature was as follows: “The privilege encourages open and frank communications. Lawyers can thereby keep clients from doing foolish things, and this is in society’s interests in the long run.”

Most often, the lawyers described the benefits of the privilege by suggesting that corporate representatives would be less candid in its absence: “People operate in an atmosphere where they feel comfortable talking to lawyers, and the attorney-client privilege has helped to create this atmosphere; if it were taken away, the atmosphere would change”; “Although people don’t focus on privilege that much in practice, if it were no longer there communica-

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162 Some of the lawyers were even more rhetorical in their responses. For example, one house counsel described the privilege as a means of “keeping corporate America on a straight and ethical path for the benefit of shareholders, consumers, and the public at large.” Similarly, a respondent who had “assumed the privilege was just a cover-up for wrongdoing” while previously employed as a government attorney, was now convinced that the privilege “helps encourage good conduct more often than serving as a subterfuge. It’s a crucial part of the U.S. system.”
tions would be chilled”; “I’d have trouble getting people to talk without privilege”; “When I tell people that privilege does not apply to a particular discussion, they become more reticent.”

Not all of the spontaneous statements about the privilege, however, contained unqualified praise. A few of the attorneys who said that the privilege encourages candor nevertheless indicated that its effects are minimal in this regard and that it is often nothing more than an “after-the-fact device” used to prevent the disclosure of documents adverse to a corporation’s interests. A few others commented that the privilege is sometimes abused by litigants who assert the privilege for every communication in which a lawyer was somehow a participant: they “get away with it” because the adversary does not challenge the assertion. Most of these observers added, however, that occasional abuse does not justify abolition because “the good that the privilege does outweighs the bad.”

Turning to the views of corporate clients, the executives in the survey were asked: “Do you think the corporate attorney-client privilege serves to increase management’s candor with counsel?” As table 4 shows, 75% of the executives (thirty-nine of fifty-two) perceived a positive influence on candor. The same 75% also said that management would be less candid with counsel if there were no privilege. About a third of these executives, however, qualified their response by noting that the extent to which candor would be reduced would depend on the circumstances. Some specifically noted, for example, that written communications would be more circumspect but that oral discussions would be just as open. Others said there would be less candor in discussions relating to litigation or sensitive matters but not otherwise. A few executives suggested that their level of candor with house counsel would remain about the same but that they would be inhibited by the ab-

163 See also supra notes 159-60 and accompanying text.

164 In view of their more limited frame of reference, the executives were asked to consider the impact of privilege only with respect to the candor of management rather than that of corporate representatives in general.

165 The executives who answered the question in the negative offered explanations similar to those of the house counsel who said the privilege did not affect candor. See infra notes 277-87 and accompanying text. The executives stressed that in their particular companies, communications with counsel were candid either because executives “want to give counsel all the facts in order to get the best advice” or “the company already has a candid culture.”
sence of privilege in their communications with outside counsel.\footnote{166}

3. What Other Factors Influence Candor?

Despite the widely shared view among the lawyers and executives that the privilege encourages candor in corporate attorney-client relationships, the responses to additional questions showed that privilege is not always the key ingredient. All of the respondents were asked to identify factors other than privilege that affect the candor of corporate representatives either affirmatively or negatively. They were then asked to indicate the one that they believed had the greatest impact on candor. The first part of this open-ended question produced a list of nine additional factors that influence candor: (1) trust or confidence in the particular lawyer;\footnote{167} (2) the representative's perception of the lawyer as a practical problem-solver;\footnote{168} (3) faith in the lawyer's ethical responsibility to preserve the client's commercial secrets; (4) a recognition that the lawyer needs disclosure of all the facts in order to give good advice and to enable the client to achieve its business goals; (5) a corporate "culture" of candor;\footnote{169} (6) an "employment duty" to be candid;\footnote{170} (7) a fear of contradiction, or a realization that all of the facts will eventually emerge during litigation;\footnote{171} (8) the individual

\footnote{166} As one executive put it, "I'm not comfortable when dealing with outside counsel and would be even less so without privilege."

\footnote{167} This factor was articulated in various ways. One of the house counsel, for example, described it as follows: "The personal relationship with counsel: Do they have confidence in you? Have you represented them well? Do you understand their needs and concerns?" Another general counsel used the following language: "Confidence in the individual lawyer—his perceived loyalty, competence and judgment." A law firm partner referred to "trust and a good rapport—not necessarily friendship, but respect on a business level." One of the executives put it this way: "Trust in the professionalism and integrity of counsel."

\footnote{168} Lawyers and executives in the survey both used the term "naysayers" to describe counsel who fail to explore alternatives or who lack creativity in helping management to meet business goals within the law. Management was said to be more candid with "how-to" lawyers who act as "partners in making the business work."

\footnote{169} Some of the respondents used the term "good business ethics" as descriptive of this factor. One of the executives explained it as follows: "The tone of business ethics is set by management. Our General Counsel's concern for legal compliance is reinforced and supported by the CEO. This opens up discussions with the General Counsel that might not otherwise exist."

\footnote{170} As one of the house counsel phrased it, "Candor is enhanced when the employee knows that he will lose his job if he doesn't disclose all of the facts to counsel."

\footnote{171} This factor was mentioned by some of the litigators in the sample of outside counsel. The context described by most of them was that of preparing an employee-witness for a pretrial deposition. These lawyers observed that witnesses more willingly disclose facts to counsel when they are reminded that the opponent will eventually "drag out the truth
representative's predisposition for openness; and (9) as a negative influence on candor, the corporate representative's fear that full disclosure of the facts to counsel, if thought to be personally damaging, might jeopardize the representative's employment status.

The second part of the question asked them to specify the "most important" factor affecting candor. The largest number of respondents (44.0% of the lawyers and 46.0% of the executives) indicated that trust or confidence in the particular lawyer was the most important factor. Several of these respondents, however, qualified their answer by adding that the privilege helps to reinforce a trusting relationship. "Having a good relationship is the most important factor," said one of the lawyers, "but you wouldn't have the same relationship without the privilege." Similarly, one of the executives declared, "Without privilege, you'd destroy the basis of trust." Another 33% of the attorneys and 16% of the executives took this argument one step further and concluded that privilege is either the most important factor in encouraging candor or is "of equal weight with other factors." One attorney observed that no matter how good the rapport, in sensitive matters some corporate representatives would not talk openly without the privilege.

D. The Relationship Between Privilege and the Frequency of Legal Consultation

The effect of the privilege on the frequency with which corporate clients seek legal advice—a related but analytically distinct issue from their candor in communications—was also explored in the survey. Forty-five percent of the lawyers and 31% of the executives thought that the privilege increases the frequency of consultation. One of the lawyers who felt this way said that since the privilege "increases the comfort-level," it is bound to increase the frequency with which legal advice is sought. Some of the lawyers also suggested that the privilege helps bring clients to counsel sooner—"before they're in extremis." Most of the respondents, however, said that they perceived no connection between the fre-

172 Other qualifications of a similar nature were that clients "may tell you a little bit more because of privilege"; "privilege provides reassurance in a good relationship"; and "privilege makes a trusting relationship possible."

173 The remaining responses were widely scattered among the other factors.
quency of consultation and the privilege: "It is not a factor that
draws clients to counsel," was a typical comment. Several lawyers
observed that the privilege affects only the openness of communica-
tions—not whether the communications take place. In the words
of one of the executives, "The need for counsel would still exist
without the privilege."

When asked to identify the "most important factors" affecting
the frequency with which legal advice is sought, the largest number
in each sample (37.5% of house counsel, 57.7% of outside counsel,
65.4% of the executives) indicated "business necessity." The re-
sponse of one of the house counsel summarizes this finding: "Prud-
dent businessmen, dealing with complex laws, and fearful of mak-
ing mistakes, need lawyers to cope. The privilege is a secondary
consideration." Such factors as trust or confidence in the particular
lawyer, the practical value of the lawyer's services, counsel's "visi-
bility" (a factor mentioned only by house counsel), and manage-
ment policy were chosen by the remaining respondents as most im-
portant. Only one respondent—an executive—ranked privilege as
the primary factor motivating him to seek legal advice, and only
seven lawyers gave equal weight to the privilege and other factors.

E. The Absence of Personal Privilege

While the foregoing data tend to suggest that the attorney-
client privilege does, on occasion, encourage corporate representa-
tives to be candid, a paradox—or "sleight of hand" as one attorney
in the study put it—is that the privilege does not belong to them
personally. To what extent are corporate representatives aware
of the limitation on their ability to assert the privilege in their own
behalf? Slightly more than half of the 102 lawyers in the study
(52.9%) believed that virtually no one at any level of the corporate
hierarchy is aware of the limitation. Most of the remaining lawyers
thought knowledge of the limitation was either confined to a few in
top management (the opinion of 15.7%) or to a few individuals at
various levels of the corporate hierarchy (the opinion of 18.6%).175

Some of the lawyers volunteered that corporate representa-

174 See supra notes 117-25 and accompanying text.
175 Seven of the remaining 13 lawyers were all house counsel who thought knowledge
was widespread among the top management of their particular corporations. Three lawyers
indicated that employees have no knowledge of the privilege issue per se but have a general
awareness that the lawyer represents the corporation and may disclose the communications
to the employee's superiors. Another three were unable to say.
tives with knowledge of the privilege limitation probably acquired it during prior experience with conflicts of interest between the corporation and employees ("especially when a grand jury is investigating the company") or from a general understanding that the corporation's lawyer does not represent them personally. The lawyers who thought that at least a few in top management would be aware of the privilege limitation attributed such awareness to the "sophistication" of upper-level executives. To the contrary, a larger number of the lawyers thought that upper management, in particular, would not even be sensitive to the issue. The reason, according to the latter group, was upper management's predisposition to see an identity of interest between itself and the corporation. As a result, upper managers were thought likely to think of the privilege as belonging to them personally. One respondent summed up the apparent view of several of the lawyers when he said, "No one at any level of the corporation really gives the issue much thought in the absence of a conflict."

The lawyers' beliefs that the existence of the privilege limitation is mostly unknown even among the members of upper management is corroborated by the results of the following question that was put to the executives in the survey: "Prior to this interview were you aware of the limitation on the executive's personal ability to claim the privilege for his or her communications with the corporation's counsel?" Twenty-one executives (40.4%) answered "yes," and thirty-one (59.6%) answered "no." The twenty-one executives who said they knew about the limitation were asked to state the source of their knowledge. Only seven executives in the knowledgeable group recalled having been told by a lawyer. The others said either that they had assumed this was the rule based on their knowledge that a corporation's attorney represents only the entity (seven executives), or that they "intuitively" knew this was the rule (three executives). The remaining four had acquired knowledge during their prior careers as practicing attorneys.

The thirty-one executives who first became aware of the limitation during their interview were asked to describe their reactions as to what they had just learned. The responses ranged from "Sounds like a fair rule" to "It doesn't make a difference" to "Unfair!" Seven executives said that they were "surprised" this was the rule, but an equal number said that they were "not surprised." Examples of responses that might be characterized as expressing a positive or at least neutral attitude were: "The rule makes sense":
"If an executive has done something wrong, the corporation should be able to protect itself"; "Knowing this won’t make any difference because I’m not concerned over a conflict arising"; and "Because of my status, I would not expect the corporation to waive the privilege to my detriment." On the negative side were comments such as the following: "This is discomforting"; "I don’t like it"; "Executives should be told about this rule, especially if there’s a conflict"; "This is unfair to executives who act in good faith"; and "This will chill candor." Several of the executives who displayed a negative attitude toward the limitation nevertheless seemed reconciled to it "if the lawyer warns the executive in a conflict situation exactly whom he represents." The most interesting comment by any individual executive was one which covered nearly the entire range of possible responses:

My initial reaction as you began to describe the limitation was "Gee, I didn’t know." As you continued, I realized that intellectually, this should come as no surprise. The logic is that the executive works for the corporation and so does the lawyer. But I wouldn’t particularly like the rule if my personal liability were involved. What would the C.E.O. or the board think of this rule? I’m sure they view their communications with counsel as their own. But I doubt that the rule has any practical effect in this company because no illegal positions are being taken.

Apparently, the fact that the privilege belongs to the company alone generally does not influence an executive’s beliefs that the privilege enhances candor. Fifteen of the twenty-one executives who knew about the privilege limitation had said earlier in the interview that the privilege encourages candid communications between management and counsel. Regrettably, the thirty-one executives who did not know about the privilege limitation prior to the interview were not asked a direct follow-up question as to how their newly acquired knowledge would affect their views concerning the relationship between the corporate privilege and management’s candor. (Twenty-four of the thirty-one executives without prior knowledge had said earlier that the privilege encourages management to be candid). Since only three of the thirty-one executives without prior knowledge volunteered that the absence of personal privilege would chill candor, however, one reasonable inference is that few of them would change their earlier answers.

When, and under what circumstances, do lawyers explain to corporate employees that the corporation’s attorney-client privi-
lege is not theirs to assert? Only 43.1% of the attorneys in the survey (forty-four of 102) had ever told a corporate representative that the privilege belongs solely to the corporation, and about one in three of this group volunteered that the occasions had been rare. When the lawyers who had alerted corporate representatives to the privilege limitation were asked to describe the circumstances, the typical response of each respondent was: “Only when I perceived a conflict or potential conflict between the interests of the representative and the corporation.” Of the fifty-eight attorneys who had never alerted a corporate representative to the privilege limitation, two out of three explained that either they had never encountered a conflict situation or the personal liability of an employee had never been an issue. Additional proffered reasons for not raising the point, in order of frequency, were: (1) in conflict situations, employees had simply been advised, instead, to retain personal counsel; (2) employees had occasionally been reminded that the lawyer represents only the corporation; (3) employees had occasionally been reminded that their communications may be disclosed to their superiors; (4) in the absence of a conflict, the lawyer did not want to create anxiety or reduce candor; and (5) privilege issues, in general, were seldom discussed.

The reasons given by both the lawyers who had raised the privilege limitation issue and those who had not show clearly that the principal determining factor is whether the lawyer perceives a potential or actual conflict of interest between the individual and the corporation. “The lawyer walks a fine line” in such situations, according to one of the house counsel. “You want the employee to give you all of the facts so you can represent the corporation, but you also have to look out for the individual.” Unsolicited comments suggested that the circumstances in which the decision is made to give a *Miranda*-like warning are infrequent. One lawyer noted that most corporate litigation is civil in nature, rather than criminal; the corporation alone is the defendant; and “the real issue is purely economic—who has the deepest pocket to pay for a

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178 A few added that they had also raised the issue whenever an employee asked that the lawyer not disclose his communications to superiors within the corporation or whenever personal advice was requested on such matters as the terms of his contract of employment with the corporation.

The infrequency of conflicts of interest is suggested by the finding that very few attorneys routinely describe the entity theory of the privilege to their clients. *See supra* table 3, section III.B.3. at 240.
deal that went sour. The employees are in no personal trouble in such cases.” Another observed that “individual executives and employees, even if they made an error in judgment, are usually acting in the best interests of the company.” Similar examples were given by several other lawyers to make the point that the interests of the individual and the corporation usually coincide. This eliminates, in their view, the need to say anything about the corporation’s control over the privilege. “There’s only so much you can tell people about the privilege,” according to one of the house counsel. “In the absence of a conflict, there’s no reason for bringing it up.”

Interestingly, when a conflict does arise, the employee is not always told explicitly that his communications with counsel may be disclosed by the corporation to third parties. For example, in the group of fifty-eight lawyers who said they had never advised an employee that the privilege is not his to assert, thirteen respondents indicated that in conflict situations they had simply suggested the retention of personal counsel. The reasoning of the lawyers in this group is best illustrated by some of their comments: “The privilege limitation is implicit in telling them that the corporation is the client”; “The privilege issue is not meaningful to the employee. The practical question from the employee’s point of view is whom the general counsel represents”; “Employees don’t think of the conflict problem in terms of who can assert the privilege”; “It’s too complicated to explain the corporate entity concept. It’s enough that you tell them to get separate counsel.”

Even some of the lawyers who said they had advised an employee of the privilege limitation in fact may have only cautioned the employee about the existence of a conflict and the possible need for personal counsel. This inference is suggested by some of the comments that immediately followed the lawyers’ “yes” responses: “Sometimes I advise an employee to get separate counsel because our firm represents only the corporation. I’m not motivated by the privilege issue but by the conflict of interest”; “The conflict is explained, but not to the level of the privilege issue”; “If there’s a conflict of interest, I warn them I’m only representing the corporation.” The number of lawyers who said that they had actu-

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177 One lawyer said that he considered it his job to represent both the corporation and its top executives except when a conflict arises. The responses of most of the other lawyers, however, showed that the corporation was perceived to be the only client in the absence of an agreement to represent an employee during litigation, as, for example, when the employee was serving as a witness at a pretrial deposition.
ally told an employee about the privilege limitation, therefore, may be slightly inflated. It appears that in a conflict situation, some lawyers feel either that the individual is sufficiently protected by the advice to retain personal counsel or that this advice, by itself, is a warning of the absence of personal privilege.

F. Comparative International Experience

To obtain empirical evidence of what legal counseling would be like in the absence of privilege, the lawyers were asked to describe their experience, if any, in representing multinational corporate clients under foreign legal systems in which no attorney-client privilege is recognized. Only thirteen attorneys (four house counsel and nine law firm partners) had ever knowingly encountered such circumstances. In addition to the small size of the subgroup, the value of the findings may be further diminished because of cultural variables that distinguish the United States legal system from foreign systems, such as structure of the legal profession, nature of the attorney-client relationship and form of adjudicatory process. In some civil law countries, for example, the attorney-client privilege does not apply to a corporate client's communications with house counsel. The reason for this, however, lies in the fact that


Regardless of nationality, no privilege for house counsel applies in proceedings to enforce the anticompetition laws of the European Economic Community (EEC). A.M.& S. Europe Ltd., 1982 E. Comm. Ct. J. Rep. at 1611, 34 Common Mkt. L.R. at 323. The Court of Justice of the European Communities reasoned that lawyers employed by a single client will not pursue their client's interest with sufficient independence of judgment. Id. at 1611-12, [1982] 2 Comm. Mkt. L.R. at 324. The Court also suggested that because house counsel in several of the member-states of the EEC are not subject to professional discipline and rules of ethics, no adequate safeguards exist against abuse of the privilege. Id., [1982] 2 Comm. Mkt. L.R. at 324. Thus, only a client's communications with "independent lawyers"—those "who are not bound to the client by a relationship of employment "—are protected by the attorney-client privilege before the Commission. Id. at 1611, [1982] 2 Comm. Mkt. L.R. at 323.

While it is true that some of the individual EEC members do not accord full professional status to house counsel, see infra note 179, this is not the rule throughout the Common Market. English courts, for example, apply the legal professional privilege without distinguishing between "salaried legal advisers" (house counsel) and attorneys in private practice. See, e.g., Alfred Crompton Amusement Machines Ltd. v. Commissioners of Cus-
full-time legal employees of a continental corporation often do not have the same professional status as do lawyers in private practice. If candor in communications between corporate representatives and house counsel in Europe is less than in the United States, therefore, it may be attributable as much to the diluted nature of the attorney-client relationship as to the absence of privilege. In addition, the same wide-ranging pretrial discovery that is practiced in the United States is unknown in civil law countries, perhaps eliminating one of the perceived benefits of privilege in restricting the adversary's access to one's files. A reduced threat of discovery naturally reduces anxiety over the absence of privilege.

In any event, a total of eight of the thirteen lawyers with relevant international experience indicated that the absence of privilege had an inhibiting effect on communications. Five of these individuals perceived no major difference in the degree of candor in oral communications but observed that writings are "sanitized" or are much more "circumspect" than in the United States. Two of the house counsel with experience in tribunals of the European Economic Community, in which no privilege exists for house counsel, said that their clients relied almost exclusively on outside European counsel for legal services related to EEC matters.

Five attorneys perceived no adverse impact on candor in inter-

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178 In France, for example, the legal profession is divided into several categories of practice. See Herzog & Herzog, The Reform of the Legal Professions and of Legal Aid in France, 22 Int'l & Comp. L.Q. 462, 463-60 (1973). The avocat, the only French legal adviser who may appear in court as well as give general legal advice, holds the highest status, and his communications with a client are entitled to privilege. See P. Herzog, Civil Procedure in France 77 (1967). An avocat, however, cannot become house counsel (juriste d'entreprise) without forfeiting his title and full professional status. See Herzog & Herzog, supra, at 475.


180 Continental procedure, unlike that of common law systems, places the principal responsibility for fact-gathering on the judge rather than on the adversaries' lawyers. See Lowenfeld, Some Reflections on Transnational Discovery, 8 J. Comp. Bus. & Cap. Mkt. L. 419, 422-23 (1986). An observer of German civil procedure has stated that judicial control "works to confine the scope of fact-gathering to those avenues of inquiry deemed most likely to resolve the case." Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 846 (1985). See also P. Herzog, supra note 179, at 233, 318-19 (in France, party's ability to obtain documents in adversary's possession is very limited).

181 See supra note 178.
national attorney-client communications despite the absence of privilege. Two of these attorneys, both nonlitigators, said that they were unaware of any differences between the communications of their clients in foreign matters as to which no privilege applies and those of American clients in United States matters. The other three attorneys were litigators who said the absence of privilege had few if any adverse effects because pretrial discovery in the relevant foreign systems was far less probing than in the United States, thereby reducing the threat of disclosure in litigation.

Thus, the experience of a majority of the lawyers in a position to make a comparison between a system with privilege and one without lends support to the proposition that the existence of the privilege makes a difference in freedom of communication. The difference, however, appears to be more in the form and procedure of communication than in the content: clients may exhibit the same degree of candor but less is put into writing. Obviously, the small number of respondents with relevant experience prevents the drawing of any conclusions based solely on this data.

G. The Costs of the Privilege

The principal social cost of the corporate attorney-client privilege is the loss of potentially relevant evidence that occurs when a claim of privilege is upheld. This cost is tolerable in an adjudicatory system that values truth only if the competing benefits—candid communications and legal compliance—are deemed to have greater weight. The case for privilege, however, is bolstered if access to much of the same factual information contained in privileged communications can be obtained from nonprivileged sources. Another cost of the privilege is the time and effort that the judiciary must sometimes spend in adjudicating assertions of the privilege. Vigilant judicial screening, however, may help reduce the cost of lost evidence by ensuring that the privilege applies only in appropriate circumstances. Judicial experience with these costs was explored in the survey of the federal judges and magistrates.

All but one of the twenty-four judicial respondents with experience in deciding corporate privilege issues had used in camera procedures on at least one occasion in reviewing disputed documentary communications. This approach was said to have been used whenever the respondents were unable to resolve a dispute on the basis of the litigants' characterizations of the challenged com-
munications.\textsuperscript{182} Fifteen reported using in camera procedures in over 50\% of the privilege disputes they had adjudicated, and seven of these respondents said that they "always" look at contested documents in camera. No questions were directed to the burdens imposed by in camera review, but seven of the respondents volunteered that when corporate parties are involved, it can be a "time-consuming," "tedious" or "unpleasant" task "to be avoided whenever possible.\textsuperscript{183} They were quick to add, however, that sometimes there is no alternative.

Some of the respondents also commented that the problems associated with resolving corporate privilege disputes are eased by local rules requiring that litigants who object to pretrial discovery on the basis of privilege submit to both the court and the other parties detailed information concerning the surrounding circumstances of the challenged communications.\textsuperscript{184} According to eight respondents, these rules help reduce the judicial workload. When attention is focused on the details of particular communications, parties who initially are inclined to assert the privilege may withdraw their claims, and conversely, opponents sometimes concede the applicability of privilege.\textsuperscript{185} Even if a dispute remains thereafter, indexing of the communications in accordance with the rules was said to aid in sharpening the issues or even enabling the judi-

\textsuperscript{182} Seven of the respondents volunteered that distinguishing between communications relating to legal advice and those relating to business advice was a difficult task and one of the most frequent reasons requiring in camera review.

\textsuperscript{183} One magistrate said that before undertaking in camera review, he cautions counsel against making blanket assertions of privilege and "reminds" them of the court's power \textit{sua sponte} to impose sanctions for frivolous litigation under Rule 11 of the Federal Rules of Civil Procedure. He suggested that this had been an effective means of reducing the number of documents that he had been required to review in camera.

\textsuperscript{184} See, e.g., S.D.N.Y. Civ. R. 46(e)(2) (applicable to interrogatories and document requests); E.D.N.Y. Standing Order on Effective Discovery in Civil Cases No. 21 (applicable to depositions, interrogatories and document requests). The purpose of the rules is to produce background information that will assist the court and the party seeking discovery to determine whether a claim of privilege is well-founded. The information required by the rules is as follows: if a document, the type of document (letter, memorandum, etc.), date, author, addressee, other recipients, the relationship of the participants, and the general subject matter; if an oral communication, its date, the speaker, persons present, the relationship of the speaker to those present and the general subject matter. On an ad hoc basis, other courts have imposed requirements similar to those in force in the Southern and Eastern Districts. See, e.g., United States v. AT & T Co., 88 F.R.D. 603, 604-08, 651 (D.D.C. 1979); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1156-58 (D.S.C. 1975); International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 93-94 (D. Del. 1974).

\textsuperscript{185} The related experience of some of the judges and magistrates in resolving privilege disputes without formal adjudication is described \textit{supra} notes 60-61 and accompanying text.
cial officer to decide the question without the need for in camera review. One of the judges described the value of the procedure as "mak[ing] the lawyers, not the judges, do the work." Although the interview questionnaire did not directly address the effectiveness of these local indexing rules in facilitating the adjudication of corporate attorney-client privilege claims, the information that was obtained both here and in another survey on the rule as adopted in the Eastern District of New York suggests their beneficial value.

Nearly all of the judicial respondents had difficulty estimating the percentage of disputed corporate attorney-client communications that they had held to be nondiscoverable as a result of the privilege. Nineteen, however, were able to give a rough indication of whether they had upheld the privilege more often than not: Ten said they had sustained claims of privilege more than 50% of the time; five said under 50%; and four said that the ratio was "about fifty-fifty." The respondents therefore were about evenly divided between those who had upheld privilege more often than not and those who had done so only 50% or less of the time. Most of the respondents said the following grounds were fairly frequent reasons for rejecting claims of corporate privilege: waiver due to disclosure to outsiders; the communications were business in nature rather than legal; and lack of confidentiality within the corporation.

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188 For example, a magistrate said that he can sometimes base his determination as to whether a particular attorney-client memorandum was intended to be confidential on the quantity and status of the persons to whom the document was distributed.

187 For a published opinion illustrating how the listing requirement has been used as a means of reducing the need for in camera review, see Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc., 111 F.R.D. 76, 86-87 (S.D.N.Y. 1986).

189 The Eastern District privilege rule took effect in 1984 as part of an experimental package of rules intended to make discovery more effective and less costly. In a 1986 survey of lawyers who litigate in the Eastern District, 20 of 110 respondents (18%) felt that the rule had produced an increase in the information necessary to decide privilege claims, and 86 (78%) saw no change. Report of the Discovery Oversight Committee to the United States District Court for the Eastern District of New York 91 (July 10, 1986). The Committee that undertook the study concluded that the data, though limited, were sufficient to warrant retention of the rule. Id. at i. No similar study has been conducted in the Southern District of New York. Id. at 98.

189 These elements of the attorney-client privilege are explained infra notes 450-66 & 487-94 and accompanying text.

In contrast to the grounds cited in text, the future crime or fraud exception, see supra notes 73-74 and accompanying text, was said by most of the jurists to be a rare basis for rejecting claims of corporate privilege. The "good cause" exception in shareholder actions, see infra notes 536-54 and accompanying text, was not discussed with the respondents during this portion of the interview. Their responses to subsequent questions relating to this
To ascertain the extent to which upholding claims of corporate attorney-client privilege may have frustrated the fact-finding process, the judicial respondents were asked to give a rough idea of how often the information contained in the privileged communications would have been “necessary” in arriving at an accurate resolution of contested issues. As to communications that did not contain necessary information, the respondents were asked how often the information would have been at least “helpful” in deciding the case.\textsuperscript{190} They were then asked how often the necessary or helpful information, respectively, was available from nonprivileged sources through reasonable discovery efforts.\textsuperscript{191} The responses, although of limited value as quantifiable data, lend support to the argument that application of the privilege to corporations usually causes no severe damage to the search for truth. The majority of respondents reported that information protected by privilege was “never” or only “rarely” necessary to the adjudicatory process.\textsuperscript{192} In the occasional or rare instances when it was thought to be necessary, a majority also thought the information was frequently obtainable from other sources through reasonable discovery efforts.\textsuperscript{193} In contrast to necessary information, attorney-client communications containing merely “helpful” information were encountered by a majority of the judges on an “occasional” or “frequent” basis.\textsuperscript{194} Here, too, the aspect of the privilege, however, show that it, too, is an infrequent cause for rejection of corporate privilege claims. See infra note 560 and accompanying text.

The possible grounds for rejecting privilege that were specifically discussed with the judges and magistrates do not, of course, exhaust the universe of limitations and exceptions. For example, some of the lawyers in the survey expressed concern over what they perceived to be an increasingly frequent basis for denying application of the privilege: the notion that a lawyer’s legal advice to the client is not privileged unless it reveals, either directly or indirectly, the substance of a confidential communication from the client. See infra note 267.

\textsuperscript{190} The term “necessary” was not used in its literal sense. Rather, it was explained to the respondents as connoting “crucial” or “highly significant” evidence in proof of an element of a claim or defense. “Helpful” was defined as “relevant but less than significant.”

\textsuperscript{191} For both questions, the respondents were asked to select one of five possible response categories: “never,” “rarely,” “occasionally,” “frequently,” and “always.” The respondents found it impossible to provide estimates in the form of percentages.

\textsuperscript{192} The breakdown of responses among the 24 judges and magistrates was as follows: never 3—(12.5%); rarely 12—(50.0%); occasionally 5—(20.8%); frequently 1—(4.2%); always 0—(0.0%); couldn’t say 3—(12.5%).

\textsuperscript{193} The responses with respect to availability from other sources were as follows: never 1—(5.6%); rarely 3—(16.7%); occasionally 1—(5.6%); frequently 11—(61.1%); always 1—(5.6%); couldn’t say 1—(5.6%). The question applied to the 18 respondents who recalled having encountered necessary information on at least one occasion.

\textsuperscript{194} Six respondents (25.0%) indicated that privileged communications “rarely” contain
majority of judges and magistrates felt that the same information was frequently discoverable in some other form.\textsuperscript{195} One judge argued that "[i]f the other side’s lawyer cannot obtain the same information elsewhere, he’s not doing his job." Interestingly, the same opinion was voiced in almost identical language in a number of the interviews of lawyers in the survey.\textsuperscript{196}

The results of the questions put to the judges and magistrates provide only a partial indication of the nature and extent of the information that is lost as a result of being shielded by the corporate privilege because the questions elicited only information concerning communications that were litigated. Some claims of privilege go unchallenged. Even when privilege claims are litigated, a judge may not always be in a position to ascertain the value of the evidence in question. One of the magistrates in the study, for example, noted that it is especially difficult during the early stages of pretrial discovery to know whether particular facts are even relevant to the litigation. Nevertheless, the findings suggest that to the extent the corporate privilege does result in a loss of relevant information, it does so in only a limited number of cases.

IV. RATIONALE OF THE CORPORATE PRIVILEGE: ANALYSIS OF THE FINDINGS

A. Benefits and Costs of the Privilege

1. Conventional Instrumental Rationale

On their face, the survey findings reinforce the conventional instrumental rationale of the corporate attorney-client privilege. According to the lawyers and executives, corporate representatives are encouraged by the privilege to be candid in their communications with counsel,\textsuperscript{197} and the judicial participants indicated that the costs to the process of adjudication in terms of lost evidence are seldom significant because alternative sources of information

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\textsuperscript{195} Three judges (12.5\%) were unable to answer.

\textsuperscript{196} The responses with respect to alternative availability were: never 2—(9.5\%); rarely 2—(9.5\%); occasionally 3—(14.3\%); frequently 11—(52.4\%); always 2—(9.5\%); couldn’t say 1—(4.8\%). The question applied to 21 respondents who recalled having encountered helpful information on at least one occasion.

\textsuperscript{197} In addition, similar observations were made by the attorneys in Brazil’s study of the Chicago bar. See supra notes 143-45 and accompanying text.
are usually available.\textsuperscript{188} Although awareness of the privilege by corporate representatives does not necessarily mean that their communications will be candid as a consequence, knowledge surely enhances the possibility of a causal connection to candor. In this connection, three of the findings suggest that a foundation for such a causal relationship exists: (1) knowledge of the privilege is thought to be widespread among top-level corporate managers;\textsuperscript{189} (2) lawyers often initiate privilege discussions with respect to litigious matters and sensitive issues;\textsuperscript{200} and (3) corporate representatives themselves make occasional inquiries about the privilege.\textsuperscript{201}

In addition, the fact that corporate representatives sometimes express concern over whether their communications are privileged suggests that assurances by counsel of the applicability of the privilege lead to more candid discussions.\textsuperscript{202} Lawyers apparently act in reliance on the utility of the privilege because most of them said that they had raised the privilege issue with corporate representatives at least occasionally for the purpose of encouraging candor.\textsuperscript{203}

Setting to one side for the moment the disparity in the responses of house counsel and outside counsel,\textsuperscript{204} a solid majority of the lawyers said that “based on their experience” the privilege encourages candor on the part of corporate representatives regardless of their rank in the corporate hierarchy.\textsuperscript{205} Moreover, three out of every four executives thought that the privilege increases management’s candor with counsel.\textsuperscript{206} Although only thirteen attorneys had experienced the absence of privilege in an international setting, the majority of these respondents reported that communications were inhibited as a result.\textsuperscript{207} The latter empirical findings, despite their limited value, reinforce the views of the lawyers and executives whose experience has been solely in jurisdictions in which privilege is generally a given.

The fact that the corporate attorney-client privilege belongs solely to the corporation apparently does little to alter the views of

\textsuperscript{188} See supra notes 190-96 and accompanying text.
\textsuperscript{189} See supra table 1, section III.B.1. at 236.
\textsuperscript{200} See supra notes 150-54 and accompanying text.
\textsuperscript{201} See supra notes 155-60 and accompanying text.
\textsuperscript{202} See id.
\textsuperscript{203} See supra note 158 and accompanying text.
\textsuperscript{204} The analysis of this disparity appears infra notes 277-97 and accompanying text.
\textsuperscript{205} See supra table 4, section III.C.2. at 245.
\textsuperscript{206} See id.
\textsuperscript{207} See supra notes 178-81 and accompanying text.
upper-level executives concerning the effect of the privilege in encouraging management’s candor. This may be due, in part, to the fact that most of them are unaware that the corporation may waive the privilege over the individual’s objections—or at least they have given little if any thought to the issue.\(^{208}\) On the other hand, even the majority of executives who knew prior to the interview that the corporate privilege did not belong to them personally said that the privilege enhances management’s candor. In addition, very few of the executives who first learned of the rule during the interview indicated that it would chill candor. Surely communications would be inhibited in situations in which executives are told by counsel that a conflict exists and that they might wish to retain a personal attorney,\(^{209}\) but the lawyers’ responses suggest that such situations are rare.\(^{210}\) Most executives probably do not perceive the threat of waiver by the corporation to be a realistic threat. In most circumstances, they appear to assume, rightly or wrongly, that their interests and those of the corporation are the same. They may also feel that their relatively high rank in the corporate hierarchy will give them an influential voice on the waiver decision or that, as a result of their companies’ loyalty to them, the privilege will be invoked to protect both the company and themselves (or intentionally waived only when no harm will come to either party).

Until recently, there have been few reported cases in which waivers have occurred over the objections of individual employees.\(^{211}\) The trend may be changing,\(^{212}\) but very few of the executives in the survey showed any signs of serious concern over the issue, other than that they thought they had a right to know about it in cases of conflict. This raises a separate question about the ethical obligations of attorneys to warn corporate employees of the privilege limitation, a point that will be considered below.\(^{213}\) In sum, executives appear to be encouraged by the privilege to communicate with the corporation’s lawyers even though ultimate control over the privilege does not belong to them. Whether the same

\(^{208}\) See supra notes 174-77 and accompanying text.
\(^{209}\) See Lang, Investigations by Outside Counsel, LITIGATION, Fall 1988, at 31-35.
\(^{210}\) See supra note 176 and accompanying text.
\(^{212}\) See Arkin, supra note 120, at 3, col. 1 (increasing number of white-collar criminal prosecutions said to put pressure on corporations to “sacrifice” employees); see also supra notes 119-23 and accompanying text.
\(^{213}\) See infra notes 318-43 and accompanying text.
holds true for lower-level employees is an open question and an appropriate area for further research. Such employees, for example, might be more likely than top executives to have an intuitive sense of their personal inability to control the privilege based on the realization that anything they say to counsel may be revealed to their corporate superiors and used as a basis for employment sanctions.

Despite the survey's apparent confirmation of the utility of the corporate privilege—at least as to corporate management—it was emphasized at the outset of this Article that the bias of the participants must be taken into account in weighing the accuracy of the results.\textsuperscript{21}\textsuperscript{14} I have no doubt that the lawyers and executives honestly reported the frequency with which they discuss privilege issues. Whether "in their experience" the privilege has actually served to encourage candor, however, is a subjective evaluation. The findings on this point do not directly measure the effect of the corporate attorney-client privilege; they measure only the respondents' feelings about the matter. One may reasonably suspect, therefore, that the role of the privilege as an incentive to candor was exaggerated by the participants.

In addition, the findings themselves raise ambiguities that lend support to arguments against the corporate privilege. First, although two-thirds of the lawyers said that they had explicitly raised privilege issues with clients for the purpose of encouraging candor, seventy per cent of this group also indicated that often their purpose was solely to ensure nondiscovery in litigation.\textsuperscript{21}\textsuperscript{15} Advising clients on how to use the privilege to prevent discovery is not necessarily inconsistent with the goal of encouraging candor, but it shows that the privilege may also be used simply as a device for conducting corporate activities in secrecy without producing any positive effects on candor.

Second, the privilege is not the principal magnet that draws corporate clients to lawyers. Even without the privilege, business considerations would motivate corporate managers to seek legal advice.\textsuperscript{21}\textsuperscript{16} On the other hand, the competing findings with respect to candor suggest that although legal counseling would continue in the absence of privilege, the communications would not be as open,

\textsuperscript{21}\textsuperscript{14} See supra note 17 and accompanying text.
\textsuperscript{21}\textsuperscript{15} See supra notes 159-60 and accompanying text.
\textsuperscript{21}\textsuperscript{16} See supra section III.D.
at least as to litigious and sensitive matters. Corporate clients would still seek legal advice in such situations, but the respondents thought that the discourse would be less candid.  

Third, the results of additional probing into the importance of the privilege in relation to other factors that may influence candor show that a corporate representative’s rapport with the particular lawyer may alone suffice to engender open communications. “Trust and confidence in the lawyer” was the factor most often cited as being “most important” in influencing candor.  

Even if the corporate privilege were abolished, trust and confidence in the attorney might be sufficient to maintain candid communications. The relationship would continue to be reinforced by the attorney’s ethical duty to keep client secrets, thus preventing the attorney from disseminating sensitive information to competitors and other third parties. Moreover, the work product doctrine would still keep most litigation-related communications out of evidence.  

As a result of abolition, perhaps fewer attorney-client communications would be put into writing, but most oral discussions would probably be just as frank if the corporate representative had confidence in the attorney. This outcome is suggested both by the experience of some attorneys in the survey who had encountered

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217 The Supreme Court made the same point in Upjohn Co. v. United States, 449 U.S. 383, 393 n.2 (1981):

The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations to ensure compliance with the law would suffer, even were they undertaken.

Id.

218 See supra notes 167-73 and accompanying text. Interestingly, in a study of the Chicago bar on issues affecting legal education, lawyers ranked “instilling others’ confidence in you” as one of the most important skills for a practicing lawyer to develop. F. Zemans & V. Rosenblum, The Making of a Public Profession 125 (Table 6.1) (1981).

219 See supra note 65 and accompanying text; C. McCormick, supra note 97, § 87, at 208 (ethical rule “furnishes to most clients having a good faith claim or defense all the security (and hence encouragement to full disclosure) for which they would feel any need”).

220 See supra note 66-68 and accompanying text. In federal courts work product is not only prima facie immune during pretrial discovery but also apparently functions as an evidentiary privilege at trial. See United States v. Nobles, 422 U.S. 225, 239 (1975) (“Disclosure of an attorney’s efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case”).

Professor Richard Marcus has noted that work product contributes to the trusting relationship between client and attorney: “[W]ork product seems critical to building client trust; surely the client would lose confidence in his lawyer if the lawyer’s work were routinely available to assist the other side.” Marcus, supra note 124, at 1624.
the absence of privilege in international settings\textsuperscript{221} and by comments of some of the executives regarding the potential loss of privilege.\textsuperscript{222} The hypothesis is further reinforced by the results of a "what-if" question in a later portion of the survey in which the majority of respondents said that fewer attorney-client communications would be recorded if the privilege were qualified rather than absolute.\textsuperscript{223} Oral communications probably are not perceived as being threatened by a loss of privilege to the same extent as documentary communications because lawyers and corporate representatives may in good faith forget the details of what was said orally by the time the matter becomes relevant in litigation.\textsuperscript{224} Documents, in contrast, would provide a semi-permanent "paper trail" that would be more easily discoverable. Once the initial shock of abolition had subsided, however, attorneys and corporate clients might very well return to the recording of their communications.\textsuperscript{225} An empirical study of the practices of prosecutors and defense attorneys faced with potential mandatory disclosure of pretrial statements they have obtained from witnesses who testify at trial might be a useful source of analogous information on this point.\textsuperscript{226}

Without the privilege, however, some of the lawyers in the survey were quick to argue that even if trust in the lawyer is the principal incentive to candor, such trust, standing alone, might not be

\textsuperscript{221} See supra note 181 and accompanying text.
\textsuperscript{222} See supra note 166 and accompanying text.
\textsuperscript{223} See infra notes 612 & 616 and accompanying text.
\textsuperscript{224} This observation is buttressed by findings from other portions of the survey. See, e.g., infra notes 562-63 and accompanying text; see also infra note 470 (attorneys complain that clients put too much in writing). It is also easier to commit perjury in the absence of a documentary record, but I doubt that many corporate attorneys would lie for their clients.
\textsuperscript{225} See Easterbrook, Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information, 1981 Sup. Ct. Rev. 309, 362: "[I]t is easy to overstate the costs of accommodating one's conduct to disclosure rules. It is unlikely that Upjohn's general counsel would have abandoned note-taking in the future if Upjohn had lost its case. Certainly the government has not abandoned memo writing, despite the Freedom of Information Act." See also Waits, supra note 17, at 333-35 (arguing that abolition of work product immunity for witness statements would not reduce the recording of such statements because lawyers need to "pin witnesses down"; the large amount of data to be collected and shared with other lawyers in a firm or law department in large commercial litigation cannot reliably be remembered without a written record; and institutional clients may refuse to make decisions on "say-so of subordinates" in the absence of documentation).
\textsuperscript{226} Under Fed. R. Crim. P. 26.2(a), for example, a prosecutor must, upon demand, deliver to the defendant any relevant pretrial statements in his possession made by a witness for the prosecution following such witness's direct testimony. Defense counsel must do likewise with respect to any defense witnesses other than the defendant himself. Id.
enough to enable an attorney to get all of the facts in sensitive matters. Furthermore, even as to routine matters, the atmospheres of the privilege—its potential availability in crisis situations—may help to instill the sense of trust that induces candor. As one of the lawyers put it, “The privilege is another factor you can toss in to enhance their candor.”

Five other findings in this portion of the survey, while not necessarily supportive of arguments for abolition of the corporate privilege, nevertheless raise questions about its scope and operation: (1) concern among executives and lawyers about the applicability of privilege is limited for the most part to actual or potential litigation and other “sensitive” matters; privilege may not be as important to house counsel as to outside counsel; employees at lower levels of the corporate hierarchy generally know little about the corporate privilege; (4) in their discussions of the privilege with corporate representatives, most lawyers indicate that claims of privilege may not be upheld by courts for one reason or another; and (5) assertions of privilege claims often lack merit.

That the applicability of privilege is not a major concern either for lawyers or executives except in communications relating to litigation and sensitive matters implies, of course, that the privilege does not induce candor in equal measure in all types of legal counseling. Indeed, one of the most pro-privilege litigators in the survey admitted that the privilege affects candor only “to a minor degree in most circumstances” and is only “crucial in a few critical areas of concern.” His conclusion, of course, was that the privilege must apply in all circumstances in order to safeguard the role of privilege in the critical areas. But if the privilege has little impact in noncritical areas, does it not follow with equal if not greater force that the privilege should be confined to those areas of counseling where it makes a difference? To apply the privilege in an

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227 See supra notes 172-73 and accompanying text.
228 See supra notes 151-53, 155-57, & 166 and accompanying text. The increased concern over privilege that the respondents experience in litigation and sensitive matters reappears throughout the survey like a Wagnerian leitmotif. See, e.g., infra notes 396-97, 468, 470-71 & table 7, section VIII.A. and accompanying text.
229 See supra note 161 and accompanying text. See also supra table 4, section III.C.2. at 245.
230 See supra table 1, section III.B.1. at 236.
231 See supra table 3, section III.B.3. at 240.
232 See supra note 189 and accompanying text.
233 See Easterbrook, supra note 225, at 362-64 (questioning whether some types of legal
overinclusive manner is to conceal evidence without producing any compensatory benefits.

It would be easy enough from a definitional standpoint to limit the privilege to the same situations in which attorney work product immunity applies, i.e., communications made "in anticipation of litigation." This is a standard with which judges are familiar, even if their application of the standard is somewhat uneven. The attorney-client privilege would by no means be superfluous in such cases because it generally provides absolute protection, whereas work product protection is qualified. Interestingly, for several decades of its common law existence, the attorney-client privilege encompassed only communications relating to the litigation in which the lawyer's testimony was sought. It was not until the mid-1800s that the privilege was held to include com-

counseling for corporations may be more dependent on confidentiality than others); see also *In re* Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979) (with respect to counsel's interviews with lower-level employees, court noted "where there is no prospect of litigation, corporate counsel has little reason to be apprehensive about the unprivileged nature of his investigation"). As Wigmore and courts have frequently stated, the privilege "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 J. WIGMORE, supra note 2, § 2291, at 554. See supra note 18.

231 See supra note 66 and accompanying text.


Various formulations of the anticipation-of-litigation standard have been articulated. See, e.g., *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir.) ("litigation need not necessarily be imminent . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation"); cert. denied, 454 U.S. 862 (1981); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 948 (E.D. Pa. 1976) (threat of litigation must be "real and imminent"); *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974) ("while one might argue that almost all of the work attorneys do, or the advice they dispense, is in anticipation of litigation or its avoidance, the work product immunity requires a more immediate showing than the remote possibility of litigation"); see generally Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 Geo. L.J. 917, 925-29 (1983); Note, supra note 66, at 843-55.

233 See supra notes 68-69 and accompanying text.

234 See 8 J. WIGMORE, supra note 2, § 2294. This early limitation may have been attributable, in part, to the class distinction in England between barristers, who were courtroom advocates and therefore entitled to assert the privilege, and solicitors and other attorneys who essentially performed office counseling. The latter generally could not claim the privilege. See *Hazard*, supra note 6, at 1070-72.
munications relating to "legal advice of any kind." Wigmore supported this expansion of the privilege with the argument that legal advice is as valuable in avoiding litigation as in conducting it and that society is better served if more clients seek legal advice before litigation ensues. Wigmore is surely right that seeking legal advice to avoid disputes is a socially desirable goal. One of the most important services performed by the modern corporate lawyer, for example, is the practice of "preventive law"—providing advice on the legality of corporate action before it takes place. But the question still remains whether the privilege itself plays any significant role in encouraging candor during such nonlitigation counseling. The survey results suggest that it does not.

On the other hand, it is not just litigation-related communications that prompt concern by lawyers and executives over the applicability of privilege. Many of the respondents spoke also of "sensitive" matters and internal investigations into possible corporate illegality. What they may have meant by "sensitive" matters are corporate transactions that appear on their surface to be nonlitigious but which have the potential for producing major conflict or involve conduct that approaches the threshold of illegality. Since internal investigations may be made in anticipation of litigation, legal services in this connection might qualify as a hybrid of "sensitive" and "litigation-related" matters. Assuming the privilege is worth preserving for the reason that it encourages candor in all of these types of matters, there may be no practical choice but to continue to include legal counseling "of any kind" within its ambit. What workable definition could be devised to limit the corporate privilege to litigation and "sensitive" counseling? Additional empirical research into the specific types of circumstances in which the privilege does and does not affect candor would help in formu-

238 See 8 J. Wigmore, supra note 2, § 2294, at 554. The decision credited with expansion of the privilege beyond its litigation-based origins is Greenough v. Gaskell, 1 My. & K. 98, 39 Eng. Rep. 618 (Ch. 1833), in which Justice Brougham wrote: "If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous." Id. at 103, 39 Eng. Rep. at 621.

239 8 J. Wigmore, supra note 2, § 2295, at 565.


241 See supra notes 152-53 & 155-56 and accompanying text.

lating a definition. Without such a specific standard, courts would be left to determine on a case-by-case basis whether particular nonlitigation counseling involved a sufficiently sensitive topic to warrant privilege protection, thus diluting the traditional absolute nature of the privilege. The existing approach, although apparently overinclusive in protecting communications relating to legal counseling on any subject, is perhaps necessary in the interests of certainty. 243

Nevertheless, the survey data suggest that any damage to the instrumental effects of the privilege would be less likely to occur if privilege is occasionally lost—through waiver or otherwise—for communications relating to routine matters than for those that hover at the edge of litigation. Furthermore, if the corporate privilege were to be converted to a qualified privilege that could yield in cases of compelling need for evidence, an issue that is explored in a subsequent section, 244 the extent to which the communications in question concerned litigious or sensitive matters would be important factors for a court to consider in deciding whether discovery should be granted or denied.

Another significant finding in this portion of the survey is that house counsel were less enthusiastic about the candor-inducing effects of the privilege than were outside counsel. Because of the importance of the issue, this finding is given extended treatment below. 245 Also to be considered in a later section 246 is the fact that employees at lower levels of the corporate hierarchy, according to the lawyers, know little or nothing about the corporate privilege. Although presumably such employees could be quickly educated by counsel in specific situations, it is otherwise questionable whether their candor could be influenced by a privilege about which they are ignorant. 247 This finding is relevant to the question of whose communications within the corporation should qualify for coverage by the corporate privilege.

The fact that lawyers sometimes warn corporate representatives that the privilege does not provide ironclad protection also

243 See id. at 393 (if purpose of privilege is to be served, parties “must be able to predict with some degree of certainty whether particular discussions will be protected”).

244 See infra notes 623-759 and accompanying text.

245 See infra notes 277-317 and accompanying text.

246 See infra notes 409-14 and accompanying text.

247 But see Developments in the Law, supra note 79, at 1475 (“knowledge of a privilege may not so much encourage communications as knowledge of its absence would deter them”).
has implications for the operation of the privilege. If corporate clients already are aware that the privilege is not as absolute as they might wish, modification of the privilege to a qualified standard in certain narrow circumstances would do little to diminish whatever instrumental benefits currently are fostered by the privilege. This point, too, is treated in depth in a later section.\(^{248}\)

Finally, the data obtained from the judicial respondents concerning the near parity between valid and invalid claims of privilege\(^{249}\) calls into question the arguments made by some authorities that corporate attorney-client communications should be treated as presumptively privileged.\(^{250}\) On the contrary, the data reinforce judicial pronouncements imposing on the party invoking the attorney-client privilege the burden of demonstrating satisfaction of all its definitional elements.\(^{251}\) The findings also suggest that opponents of corporate litigants should not acquiesce in unsubstantiated claims of privilege. In the survey of lawyers, for example, some noteworthy but unquantifiable incidents were reported in which litigants had asserted blanket claims of privilege for all corporate documents that had passed through the hands of a lawyer and "got away with it" because the claims went unchallenged.\(^{252}\)

2. Alternative Instrumental Rationales

If the candor-inducing impact of the privilege on individual corporate representatives remains uncertain, a related but distinct

\(^{248}\) See infra notes 674-704 and accompanying text.

\(^{249}\) See supra note 189 and accompanying text.

\(^{250}\) See, e.g., Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1978) (en banc) (matter committed to lawyer was "prima facie" for legal advice and therefore privileged "absent a clear showing to the contrary"); Cal. Evid. Code § 917 (Deering 1986) (attorney-client communications are presumed to have been made in confidence); Davidson, Judicial Procedures for Resolving Claims of Privilege, Litigation, Summer 1982, at 36, 38 (proposing that presumption of privilege attach upon showing that communication was between lawyer and client).


\(^{252}\) See supra note 163 and accompanying text; see also supra note 160 and accompanying text. Some of the lawyers suggested that members of the bar should be better educated about the limited scope of the privilege and that claims of privilege should be challenged more often.
instrumental argument may help justify the corporate privilege. Perhaps the focus of the inquiry with respect to the incentives provided by the privilege should be on the corporation itself, not individual employees. In other words, regardless of whether the privilege has any direct effect in encouraging individual corporate employees to be candid, the privilege may provide a stimulus to the institution to encourage employees to communicate openly with the company's attorneys. While there may always be employees who will be reticent with counsel for one reason or another, there may be others who are simply not willing to discuss matters with counsel unless directed to do so pursuant to company policy. Availability of the privilege for the corporation might serve as the incentive for implementation of such a policy either on an ongoing basis or with respect to particular matters, such as internal investigations of possible wrongdoing. To the extent a few more employees speak candidly with counsel as a result of the policy, benefits may flow to the corporation through improved legal compliance and the avoidance of litigation. By extension, society at large benefits through law-abiding corporate conduct.

The notion that corporations should be given a special incentive to undertake voluntary action to comply with the law was suggested by the Supreme Court in *Upjohn*. The Court observed that legal compliance "is hardly an instinctive matter" in the regulatory milieu of the modern corporation, and it praised the "valua-

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253 See, e.g., 24 C. Wright & K. Graham, supra note 63, § 5476, at 147; Sexton, supra note 114, at 467.

254 *Upjohn Co. v. United States*, 449 U.S. 383 (1981); see also *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 610 (8th Cir. 1978) (en banc) (application of attorney-client privilege to internal investigations "will encourage corporations to seek out and correct wrongdoing in their own house and to do so with attorneys who are obligated . . . to conduct the inquiry in an independent and ethical manner").

Similar reasoning has also been proffered in support of yet another privilege in the corporate context: a privilege for "self-critical evaluation." See generally Allen & Hazelwood, supra note 108; Leonard, Codifying a Privilege for Self-Critical Analysis, 25 HARV. J. ON LEGIS. 113 (1988); Murphy, The Self-Evaluative Privilege, 5 J. CORP. L. 489 (1980). The self-evaluative privilege is broader than the attorney-client privilege because a lawyer need not be involved in the internal investigation; at the same time it is narrower in that it is a qualified rather than an absolute privilege. See, e.g., *Hardy v. New York News Inc.*, 114 F.R.D. 633, 641-42 (S.D.N.Y. 1987) (in employment discrimination case, plaintiff's interest in obtaining evidence of discriminatory intent held to outweigh employer's "interest in fostering candid self-analysis and voluntary compliance with equal employment laws, because the threat of disclosure would have an insignificant deterrent effect upon the preparation of the kind of documents that are being withheld in this case"). The self-evaluative privilege is also broader than work product because the company's internal investigation need not be prompted by the anticipation of litigation. See Leonard, supra at 121-22.
ble efforts of corporate counsel to ensure their clients' compliance with the law.\textsuperscript{225} Implicit in such language (and in the Court's rejection of a narrow approach to the corporate privilege) is a policy choice that the "carrot" of privilege as an inducement to corporate self-policing is preferable to the "stick" of post hoc regulatory enforcement.\textsuperscript{226} For example, government agencies responsible for regulating corporate conduct in antitrust and securities matters apparently rely to some extent on corporate lawyers in the private sector as adjuncts in the regulatory effort.\textsuperscript{227}

The Tentative Draft of the Restatement of the Law Governing Lawyers also relies upon the legal compliance rationale for the corporate privilege.\textsuperscript{228} In several places the comments refer to the value of the privilege as an inducement to the organization to "direct" its employees to communicate openly with the organization's lawyers.\textsuperscript{229} The privilege thus encourages corporations "to achieve voluntary compliance with the law."\textsuperscript{230}

But is privilege really helpful in ensuring legal compliance? This particular empirical question was not investigated in my survey; no inquiries were made, for example, into the record of legal compliance of the corporations employing the respondents in the study or the connection between the privilege and law-abiding conduct.\textsuperscript{231} The respondents' views that business necessity dictates

\textsuperscript{225} \textit{Upjohn}, 449 U.S. at 392.

\textsuperscript{226} See, e.g., Sexton, supra note 114, at 468-71 (\textit{Upjohn} Court's broad approach to privilege is based on "voluntary compliance model" of corporate behavior in contrast to "regulatory model" that would require narrow privilege in order to make more information discoverable by litigants and public); 24 C. Wright \& K. Graham, supra note 63, § 5476, at 189-90 ("any limitation on the power of courts and agencies to compel revelation of corporate activities is a pro tanto loosening of the regulatory apparatus"; \textit{Upjohn} "made a subtle but not insignificant change in the balance of power").

\textsuperscript{227} See, e.g, Brodsky, The "Zone of Darkness": Special Counsel Investigations and the Attorney-Client Privilege, 8 SEC. REG. L.J. 123, 123 (1980); Coffee, Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response, 63 Va. L. Rev. 1099, 1248-49 (1977); Shenefield, Compliance Programs as Viewed from the Antitrust Division, 48 ANTITRUST L.J. 73, 73 (1979).

\textsuperscript{228} \textit{RESTATEMENT OF THE LAW GOVERNING LAWYERS} § 123 (Tent. Draft No. 2, 1989).

\textsuperscript{229} Id. § 123 comments b, c & d.

\textsuperscript{230} Id. § 123 comment b.

\textsuperscript{231} A few respondents, however, volunteered positive opinions on this point. See, e.g., supra note 162 and accompanying text.

It would be possible, of course, to ascertain from records of courts and administrative agencies the number of instances in which a corporation's alleged noncompliance with the law had been litigated. See, e.g., M. Clinard \& P. Yeager, \textit{CORPORATE CRIME} 113-24 (1980) (study of charges and sanctions against Fortune 500 corporations). Such information is inadequate, however, because it does not account for undetected instances of corporate
consultation with lawyers, however, casts some doubt on the voluntary legal compliance rationale. The very existence of the numerous laws and regulations with which corporations must contend and the omnipresence of lawyers in corporate affairs suggests that corporations will encourage open communications with counsel in order to comply with the law regardless of the privilege. They have little choice, since noncompliance will expose the corporation to liability to the government, shareholders and private parties as well as to adverse publicity that may injure its business. Furthermore, management owes a fiduciary duty to the corporation and its shareholders to comply with the law. Voluntary compliance is an obvious social good and should be encouraged, to be sure, but it is doubtful that the attorney-client privilege plays a major role in accomplishing this goal because legal advice will be sought in any event. If the lawyer's advice is not followed, or if the advice proves erroneous because it was based on an incomplete and misleading presentation of facts, there is little social good to be found in veiling the communications in secrecy. As Professor Edmund Morgan observed several years ago, the client who suppresses the facts when consulting with a lawyer has no one to blame but himself if complications arise as a result of inadequate legal advice based on incomplete data.

Yet another instrumental rationale suggested by some commentators—and hinted at by the Supreme Court in Upjohn—is that the corporate privilege is necessary to ensure misconduct.

Some commentators have questioned whether attorneys have been very successful in recent years in achieving legal compliance by their corporate clients. See, e.g., Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 615 (1985); Sexton, supra note 114, at 469-70 n.107.

See, e.g., Lane v. Chowning, 610 F.2d 1385, 1389 (8th Cir. 1979) (bank officers and directors have duty to investigate and remove wrongdoers from corporation); Garner v. Wolfinbarger, 430 F.2d 1093, 1103 (5th Cir. 1970) ("management has an obligation to the corporation, to the stockholders and to the public to do what is lawful"), cert. denied, 401 U.S. 974 (1971); Block & Barton, Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel, 35 Bus. Law. 5, 7 (1979); Kaplan, Fiduciary Responsibility in the Management of the Corporation, 31 Bus. Law. 883, 897-88 (1976).

See Garner, 430 F.2d at 1102 ("to grant to corporate management plenary assurance of secrecy for opinions received is to encourage it to disregard with impunity the advice sought").

Morgan, supra note 6, at 26.

See, e.g., Miller, supra note 146, at 268-70.

that the lawyer's advice will be candid. The Court noted, for example, that the absence of privilege for communications with lower-level corporate employees would make it "difficult to convey full and frank legal advice" to such employees. Focusing on the motivations of the attorney is a clear departure from conventional teaching that the purpose of the privilege is to motivate clients—not attorneys—to be candid. In effect, the argument conflates the attorney-client privilege and the work product doctrine. The implication of the argument is that without the privilege, the attorney's advice may be "hedged." Some suggestion of this potential effect was made by a few of the attorneys in the survey with an international practice who said that their written advice is sometimes "sanitized" in matters as to which privilege is absent. The danger of such "sanitized" advice—assuming it is not augmented by oral explanations—appears to be that instead of condemning proposed illegal conduct in no uncertain terms, the lawyer's legal opinion might be framed in an ambiguous manner, perhaps leading the client to take action that would violate the law or result in litigation. Legal advice might take this form if the law-

267 Id. at 392. In another portion of the opinion, the Court states that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." Id. at 390. The sentence structure is intriguing because it implies that the applicability of the privilege to an attorney's legal advice is a foregone conclusion. Among the lower courts, however, there continues to be a division of opinion concerning the extent to which the attorney's advice is protected by the privilege. Some courts hold that since the purpose of the privilege is to induce clients, not attorneys, to be candid, the lawyer's advice is protected only if it would reveal, directly or indirectly, the substance of the client's confidential communications. See, e.g., American Standard Inc. v. Pfizer Inc., 828 F.2d 734, 745-46 (Fed. Cir. 1987); In re Sealed case, 737 F.2d 94, 99-100 (D.C. Cir. 1984); Clute v. Davenport Co., 118 F.R.D. 312, 314 (D. Conn. 1988); Potts v. Allis-Chalmers Corp., 118 F.R.D. 597, 601-05 (N.D. Ind. 1987).

Others hold that the privilege should apply to the lawyer's advice in all circumstances, regardless of whether it would reveal a client's confidential communication. See, e.g., In re LTV Sec. Litig., 89 F.R.D. 595, 602 (N.D. Tex. 1981); State ex rel. Great American Ins. Co. v. Smith, 574 S.W.2d 379, 383-85 (Mo. 1979); see also CAL. EVID. CODE § 952 (Deering 1986). The all-inclusive approach has been described as "simpler and preferable" to case-by-case determination as to which parts of counsel's advice might reveal a client's communication. C. McCormick supra note 97, § 89 at 212. Contra, Rice, Judicial Management of Complex Litigation: Further Comments on the Use of Informal Management Techniques and on Procedures for the Resolution of Privilege Claims, in MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS 293, 299-302, & 302 n.24 (1983) (all-inclusive approach would represent "drastic" expansion of existing rule).

268 See Marcus, supra note 124, at 1621, 1623-24 (Upjohn Court "blends" attorney-client and work product privileges).

269 See supra note 181 and accompanying text.
yer feared that in possible litigation relating to the conduct in question, the communication would be relevant and admissible as evidence of the client's state of mind.

The short answer to this argument is that the lawyer has an ethical duty to provide candid and thorough legal opinions.\textsuperscript{270} As one court stated, "[T]he guarantee of a veil of secrecy [n]either establishes [n]or narrows the attorney's obligation in the giving of advice."\textsuperscript{271} On the other hand, human nature being what it is, perhaps it is inevitable that the quality of lawyers' advice would be affected by the absence of secrecy. It was this realization, in part, that prompted the creation of the work product immunity in litigation lest "[i]nefficiency, unfairness and sharp practices" develop in the lawyer's preparation for trial.\textsuperscript{272} The attorney-client privilege serves a dubious social policy, however, if, in assuring candid legal advice, it also assures the client of the ability to disregard such advice without fear of impeachment.

On the whole, the survey data neither prove nor disprove the merits of instrumental rationales for the corporate attorney-client privilege.\textsuperscript{273} I hesitate to suggest that it be abolished both because the suggestion would be heresy\textsuperscript{274} and also because the findings fall

\textsuperscript{270} See Model Rules of Professional Conduct Rule 2.1 comment ¶ 1 (1983):
A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

\textsuperscript{271} Garner v. Wolfinbarger, 430 F.2d 1093, 1102 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971).

\textsuperscript{272} Hickman v. Taylor, 329 U.S. 495, 511 (1947).

\textsuperscript{273} Possible noninstrumental rationales, as suggested previously, see supra notes 106-12 and accompanying text, do not provide a sufficient basis for recognition of the privilege for large corporations. The human traits and values that the right of privacy is intended to protect simply are not present. While corporate representatives are entitled to respect as individuals, their roles in the corporate context are as agents of the entity: The attorney's client ordinarily is the corporation, and the privilege belongs to the corporation, not to its individual agents. See C. Wolfram, supra note 111, § 6.5.3, at 284; supra notes 117-25 and accompanying text.

\textsuperscript{274} See Waits, supra note 17, at 309 (author states that her proposal to abolish work product immunity for witness statements "may be heresy"). Aside from the district court in Radiant Burners, see supra notes 95-98 and accompanying text, only a handful of writers
short of supporting abolition on empirical grounds. Some of the findings, however, do raise doubts that the privilege is either an essential incentive for corporate employees to confide in attorneys or a principal encouragement for voluntary corporate compliance with the law. The corporate privilege is perhaps justified if for no other reason than that it has the potential for achieving such benefits and that it may on occasion produce the effects that are attributed to it. Continued recognition of the privilege for corporate clients, however, does not necessarily require acceptance of all the terms that define the privilege for individuals. Although it may not happen often, the potential still remains that the privilege will effectively suppress a great deal more evidence in the corporate setting than it does in the case of individuals. A corporate attorney-client privilege that is flexible enough to yield to the needs of the fact-finding process in appropriate cases may be what is needed in the future.

B. House Counsel versus Outside Counsel

One of the most significant findings of the survey was that fewer house counsel (62.0%) than outside counsel (88.5%) thought that the corporate privilege encouraged candor. Of the fifty respondents in the house counsel sample, a total of nineteen were skeptical that any relationship existed between the privilege and candor: thirteen (26.0%) said that the privilege has no effect on candor and six (12.0%) said they were not sure.

One of the recurring comments made by the nineteen respondents with doubts about the instrumental value of the privilege was to the effect that "in this corporation" employees would be candid even without the privilege. Five of the house counsel commented that their companies were seldom involved in litigation, which is the only time, in their view, that the privilege would have any impact. Noting that their companies were highly regulated,
two others posited that employees were generally candid because “we operate in a fishbowl environment.” Another felt that the major concern in his company was trade secrecy—not the attorney-client privilege. One rejected the connection between privilege and candor for the reason that the employees in his company were aware that counsel represents only the corporation, not the individuals personally: “business ethics” was said to be the incentive to candor. Another said that employees know “they’ll be fired” if they are not candid with counsel. “Communications must go on, with or without the privilege,” was the conclusion of another.

The fact that the house counsel were answering with respect to a single client while the outside counsel were drawing upon experience with numerous corporate clients may partially explain the difference in responses between the samples. That some house counsel thought that communications would flow even without the privilege may be a function of the culture of the particular corporation in which they worked—its size, litigation history, and policy set by top management. The responses of outside counsel were based on experience with more than one corporate client; the freedom with which communications flow to outside counsel may have varied significantly among these clients. The views of outside counsel, therefore, may represent a generalization of the overall impact of the privilege, while the responses of house counsel represent a client-by-client breakdown.

Assuming, however, that the results for both samples can be generalized, i.e., the privilege is more important for outside counsel than for house counsel as an incentive to candid communications, a possible explanation is that most outside counsel do not participate in daily corporate affairs to the same extent as house counsel. The more frequent contact between house counsel and corporate representatives may produce a rapport that is alone sufficient in most instances to ensure candor. Nearly all of the executives in the survey, for example, said that they communicate more often with house counsel than outside counsel. Additionally, in most of the 102 corporations represented in the combined samples of executives and house counsel, middle management and lower-level employees are free to consult with house counsel about legal problems of the corporation without a specific direction from their superi-

\[276\] See supra notes 54-57 and accompanying text.
These findings are consistent with those of another study showing that the members of in-house legal departments have routine contact with middle management and employees at the operational levels. As previously discussed, a sense of trust and confidence in the lawyer is the most important factor influencing candor according to the largest number of respondents in the survey (both lawyers and executives). This element of the attorney-client relationship may therefore develop more quickly in the case of house counsel, who interact with corporate representatives on a daily basis and are always "on call" for legal consultation.

Besides the frequency of contact between corporate representatives and house counsel, another reason that trust and confidence may develop more readily in the client's relationship with house counsel than with outside counsel is that most house counsel—at least chief legal officers with the title of General Counsel or its equivalent—are on the company's "management team." For example, thirty of the thirty-seven house counsel in the survey who held the title of General Counsel were also officers of their corporations at the rank of Vice President, Executive Vice President or Senior Vice President. Furthermore, thirty-six of the fifty house counsel (regardless of title) indicated that they perform some amount of nonlegal work for their employers. The median percentage of time devoted by these thirty-six respondents to nonlegal duties was twenty per cent. Data obtained at a later point in the interview also suggest that a great many business communications flow through house counsel's office, and only some of them involve re-

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279 See id.
280 See Chayes & Chayes, supra note 8, at 288 (study of compliance and preventative law programs of legal departments of thirteen large corporations).
281 See supra note 218 and accompanying text.
282 See supra note 46. Five additional respondents with the title of Associate or Assistant General Counsel were also Vice Presidents or higher.
283 The performance of nonlegal duties was more prevalent among the chief legal officers than among the lower-ranking in-house attorneys with titles such as Assistant General Counsel: 33 of the 37 respondents with the title of General Counsel devoted a portion of their time to nonlegal activities, whereas only three of the thirteen lower-ranking attorneys did so. The types of nonlegal activities performed by these lawyers are described infra notes 495-503 and accompanying text.
284 Of the nineteen house counsel in the survey who said either that the privilege does not encourage candor or that they were not sure of the effect, fifteen were chief legal officers of the corporations employing them, and twelve of these individuals also held the title of Vice President, Executive Vice President or Senior Vice President. The median percentage of time devoted by the nineteen skeptics (regardless of title) to nonlegal business duties for their corporations was ten per cent.
quests for legal advice.\(^{288}\) For a sizeable number of house counsel, therefore, a blending of the roles of lawyer and businessperson is occurring. A few of the house counsel noted, however, that having the title of Vice President did not necessarily imply that they also performed business functions. The purpose for the title, they said, was simply to increase their clout as a lawyer within the organization.

Considering their visibility, ease of access to and by corporate employees, role in the corporate hierarchy and participation by many in nonlegal work for their employers, house counsel are quite differently situated from outside counsel with respect to the opportunities for development of a candid relationship with corporate representatives. The implication, of course, is that house counsel may not need the corporate privilege as a stimulus for candid communications to the same extent as outside counsel, if at all.

Comments volunteered by various respondents are consistent with this hypothesis. Some of the members of both samples of lawyers said that the privilege is “more important” for outside counsel, who are usually not as well known by corporate employees. Respondents in both samples also reported instances in which corporate executives had shown wariness about speaking to outside counsel until assured that privilege would apply.\(^{289}\) According to one house counsel, “The privilege especially helps to put people at ease with outside counsel.” In a similar vein, one of the law firm partners said: “To tell people who don’t know you that there is a privilege opens them up.” The following quotation from the interview of another partner was the most articulate exposition given of the privilege’s value to outside counsel:

When I started practicing thirty years ago, most of my contacts were with managers directly. Now they have dozens of lawyers on their staff... We’re strangers today because of the growth of in-house counsel. Management tends to be tight-lipped with outside counsel and things would be even worse without the assurance of confidentiality. Outside lawyers need the privilege to help foster trust on the part of management. At least the litigators—the “hired guns” who are called in on an ad hoc basis—need it. Maybe it’s not so important for the corporate department people who deal with management on a more regular basis.

\(^{288}\) See supra notes 502-05 and accompanying text.

\(^{289}\) See supra note 166 and accompanying text.
This lawyer's observation also echoes the results of other field research suggesting that outside counsel "tend more to be 'hired guns,' chosen for a particular job, and less and less members of an ongoing relationship with responsibility for the client's overall well-being." 287

Subliminal reasons, however, may also account for the greater enthusiasm shown by outside counsel for the corporate privilege. Perhaps it is not so much that some in-house attorneys undervalue the privilege as that outside counsel exaggerate its value due to economic motives. Because so many corporations have increased the size of their in-house legal staffs in the past few years, private law firms have had to find ways to continue making their services attractive to and desired by corporations. 288 To this end, large law firms have increasingly relied upon their capacity to handle large litigation and specialized legal services in such areas as tax, major acquisitions, and international transactions, as opposed to the sort of "general corporate counseling" that is now performed more and more by in-house legal departments. 289 This trend is borne out by data in the survey showing that the 102 corporations in the combined samples of executive and house counsel principally retain outside counsel for litigation and specialty matters. 290

In connection with their marketing efforts to obtain the legal business of corporate clients, outside counsel may be able to offer greater assurance that the attorney-client privilege will apply to

287 Chayes & Chayes, supra note 8, at 294. In their study of thirteen corporate law departments, the Chayeses conclude that "today with respect to outside law firms, the general counsel is the client, rather than the CEO or some other representative of the firm." Id. at 290 (emphasis in original).

288 See supra note 8.


290 See Chayes & Chayes, supra note 8, at 293-95 (reporting results of studies showing that major role for outside counsel is in litigation, major transactions and "exotic specialties"); Fried, supra note 289, at 61 (law firms may "carve out a distinct niche for themselves" through the advantages they offer in specialty fields and litigation); Nelson, supra note 289, at 137-38 (law firms will continue to attract corporate clients for legal business in areas of large litigation and newly developing areas of the law).

Regardless of the type of legal problem involved, outside counsel also are thought to be of continuing value to corporations when time is of the essence and a hasty deployment of manpower is required. See Chayes & Chayes, supra note 8, at 295. Some of the house counsel and executives in my own survey made mention of this as a reason for retaining outside counsel.

291 See supra note 54.
their communications than to those of house counsel. Writers have often suggested that, despite paying lip service to the rule that the privilege applies equally to house counsel and outside counsel, courts are predisposed to reject claims of privilege for communications with house counsel on the ground that the matter involves business rather than legal advice. House counsel are more likely to be seen as giving business advice, it is said, because they "start out looking like businessmen." Outside counsel who specialize in performing internal investigations of possible corporate wrongdoing, for example, can point to case law in which privilege has been denied for communications with house counsel whose investigatory work was characterized by the court as a nonlegal managerial function. Despite the apparent rejection in *Upjohn* of the idea that house counsel is not acting as a lawyer when conducting an internal investigation, the retention of outside counsel is still more likely to remove uncertainty on this point.

No explicit statements of an economic motive were made by

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292 See *supra* note 8. The Supreme Court in *Upjohn* also implicitly endorsed the prevailing assumption that the privilege applies to house counsel in the same manner as to other lawyers who provide legal services for a corporation. See *Upjohn* Co. v. United States, 449 U.S. 383, 394 (1981). Almost all of the attorney-client communications at issue in *Upjohn* were with the company's general counsel. Id. at 386-87.


The legal/business advice dichotomy is discussed *infra* notes 487-94 and accompanying text.

294 Burnham, *supra* note 293, at 543. One treatise suggests that "intraprofessional rivalry" may lie behind the arguments of practitioners who oppose house counsel's entitlement to privilege on the ground that they are more like businessmen than lawyers. 24 C. WRIGHT & K. GRAHAM, *supra* note 63, § 5478, at 222.

295 See, e.g., *In re* Grand Jury Subpoena, 599 F.2d 504, 511 (2d Cir. 1979) ("Participation of the general counsel does not automatically cloak the investigation with legal garb.")

At a continuing legal education seminar on the corporate attorney-client privilege held in New York City, July 12, 1984, prominent law-firm litigator Judah Best urged corporations to retain outside counsel to conduct internal investigations in order to ensure the applicability of privilege. See Best, *How to Conduct an Internal Corporate Investigation*, in *CORPORATE DISCLOSURE AND ATTORNEY-CLIENT PRIVILEGE* 163, 167 (Practising Law Institute, Corporate Law and Practice Course Handbook Series, No. 450, 1984).

296 See *Upjohn* Co. v. United States, 449 U.S. 383, 394 (1981) (communications to general counsel during internal investigation were characterized by Court as having been made "to counsel for *Upjohn* acting as such... in order to secure legal advice from counsel"). But see Easterbrook, *supra* note 225, at 355 n.174 (questioning why privilege was applicable in *Upjohn* since "[t]here was no need for an attorney to do the interviewing... If the attorney is a supernumerary, the privilege is inapplicable").
any of the outside counsel in the survey, but one tax partner in a law firm did stress that the attorney-client privilege gives him a competitive edge over accountants when it comes to advice on tax matters because a client’s communications with an accountant usually are not privileged. Thus, there may exist subconscious reasons for the relatively stronger enthusiasm displayed by outside counsel for the privilege that have little to do with its actual effects on candor.

Assuming, however, that the difference in responses between house counsel and outside counsel is empirically accurate and that the privilege is not as important to house counsel as it is to outside counsel in encouraging candor, should the corporate privilege be withdrawn from house counsel’s communications? What would be the impact? Since most house counsel—at least chief legal officers—are members of their employers’ management teams, it seems reasonable to suppose that most communications would continue to flow unabated. Even lower-ranking members of the in-house legal department who lack management status are nevertheless part of the “corporate team” because of their continuous on-site presence; they, too, would probably have the trust of the non-legal employees and would still receive candid communications. As co-employees within the same enterprise, nonlegal personnel and house counsel share institutional incentives to be candid with each other in order to achieve company objectives.

In limited circumstances, communications with an accountant may fall within the attorney-client privilege when the accountant is acting as an agent of the attorney or client in facilitating the lawyer’s giving of legal advice. See, e.g., United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961).

Elimination of the privilege for house counsel is advocated in Gardner, supra note 107, at 364-62, and Sedler & Simeone, supra note 114, at 23-25.

See supra notes 167-70 and accompanying text; cf. Developments in the Law, supra note 79, at 1612 (privileges designed to promote open communication within certain organizations, such as the government and academic institutions, are of questionable empirical validity because “[t]he parties to these internal communications are involved in ongoing relationships and are working together to achieve institutional objectives”).
the law, and consultation with in-house lawyers may be the most
cost-effective way of doing so.\textsuperscript{300}

Since house counsel are actively engaged in the daily affairs of
the corporations employing them, removal of the privilege from
their communications would undoubtedly produce an increase in
the amount of relevant evidence in corporate litigation. At mini-
mum, it would eliminate costly disputes over the question whether
a particular communication between employees that was routed
through the legal department was for the purpose of seeking legal
advice or was merely an attempt to cloak the communication with
privilege.\textsuperscript{301}

There may be some force, however, in preserving the privilege
for communications with house counsel that are made in connec-
tion with pending or anticipated litigation. As noted above, litiga-
tion is one of the areas in which concern over the applicability of
privilege is at its highest.\textsuperscript{302} Preserving the privilege for such mat-
ters would allow the corporation to continue to maintain a litiga-
tion staff within its legal department, secure in the knowledge that
privilege would apply to most communications with the litigation
lawyers.\textsuperscript{303} This would eliminate the felt need to refer all litigation
work to outside counsel, which apparently is the practice of corpo-
rations in Europe with respect to matters involving the tribunals of
the EEC.\textsuperscript{304}

On the other hand, American corporations already refer a
great deal of litigation to outside counsel.\textsuperscript{305} Even companies with
an in-house staff of litigators tend to refer complex cases, such as
antitrust, securities, mass torts and large commercial disputes to
law firms either for exclusive case management or for a sharing of
responsibility with house counsel.\textsuperscript{306} Privilege would attach to the

\textsuperscript{300} See Fried, \textit{supra} note 289, at 60-61 (house counsel can often perform corporate legal
services more cheaply, more quickly and more effectively because “they know the personnel
and needs of the company intimately”).

\textsuperscript{301} See \textit{supra} notes 145, 160, 182-83 and accompanying text.

\textsuperscript{302} See \textit{supra} note 228 and accompanying text.

\textsuperscript{303} There should be no requirement, of course, that the particular in-house attorney be
a litigator in order for the privilege to attach. The test should focus on whether the commu-
nication was made in connection with actual or anticipated litigation regardless of the attor-
ney’s specific role in the matter. Conversely, the mere fact that the attorney is denominated
a “litigator” or a member of the litigation department should not automatically throw the
mantle of privilege over communications with him.

\textsuperscript{304} See \textit{supra} note 181 and accompanying text.

\textsuperscript{305} See \textit{supra} notes 290-91 and accompanying text.

\textsuperscript{306} See Chayes & Chayes, \textit{supra} note 8, at 291; Fried, \textit{supra} note 289, at 61.
communications between the in-house lawyers and the outside lawyers in such matters because the in-house lawyers would become, in effect, the "client." Furthermore, house counsel's records of communications with corporate employees in connection with potential or actual litigation would receive qualified protection as attorney work product. Thus, there may be little need even in the litigation context to preserve the attorney-client privilege for in-house lawyers.

A loss of privilege for house counsel would probably be most noticeable, if at all, in the area of legal counseling in connection with prospective business transactions. As to such matters, there is already an element of uncertainty that privilege will attach because of the risk, noted above, that courts will characterize house counsel's role in such matters as that of a business adviser rather than a legal adviser. Yet such communications go on. The loss of privilege would, of course, increase the frequency with which house counsel are compelled to give testimony, thus implicating Wigmore's concern over the sense of "treachery" that lawyers would experience if routinely called upon to testify against their clients. Courts, however, could require, as some already do, that house counsel be subpoenaed or deposed only as a last resort, thus enabling them to perform their primary role as counselors, not witnesses. In those instances where house counsel are compelled to give adverse testimony, the complications caused by disqualification of the advocate-witness are not likely to be a frequent problem because litigation is often handled by outside counsel.

In sum, there is reason to doubt that abrogating the attorney-client privilege in the case of house counsel would do much to alter the nature of their clients' communications or otherwise disrupt existing practices. House counsel are integral members of the legal systems.

308 See supra notes 66-68 and accompanying text.
309 See supra notes 222-94 and accompanying text; see also infra notes 487-94 and accompanying text (discussing privilege and business communications).
310 See supra notes 84-86 and accompanying text.
311 See, e.g., Shelton v. American Motors Corp., 805 F.2d 1323, 1327, 1330 (8th Cir. 1986) (taking deposition of opposing house counsel "should be employed only in limited circumstances" in which no other source for information is available; evidence is relevant and nonprivileged, and information is crucial to case); N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85-86 (M.D.N.C. 1987) (party seeking deposition of adversary's attorney must demonstrate lack of alternative sources and methods of discovery).
312 See supra note 64 and accompanying text.
profession in every sense of the word, but it does not necessarily follow that the privilege is needed to facilitate counseling in their particular type of practice.\footnote{313}{See Sedler & Simeone, supra note 114, at 25 ("Granted, [house counsel] are lawyers in the full sense, there is no need to extend confidentiality to communications made to them because the same communications would be made even in the absence of confidentiality ").}

Having come to the brink of advocating abolition of the attorney-client privilege for house counsel, I nevertheless back away from it for several reasons. First, although some of the house counsel in the survey were less enthusiastic about the instrumental effects of the privilege than the outside counsel, a 62% majority of the house counsel said that the privilege helps encourage candor. Since too much uncertainty would prevail if the applicability of privilege for house counsel were determined on a corporation-by-corporation basis, overinclusiveness may be necessary in order to ensure the benefits of the privilege for those corporate legal departments for whom the privilege makes a difference. Second, the samples were relatively small. Further research confirming the discrepancy between the effects of the privilege in counseling by house counsel and outside counsel would provide greater assurance that abolition is warranted. Third, even if the privilege in fact is less efficacious in producing candor in communications with house counsel, abolition might resurrect an unhealthy class distinction in the legal profession. Until recently, house counsel have commanded less prestige and respect in the legal profession than have the partners of large corporate law firms.\footnote{314}{See C. Wolfram, supra note 111, at 736-37; Kritzer, The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study, 1984 Am. B. Found. Res. J. 409, 418 n.30; Slovak, Giving and Getting Respect: Prestige and Stratification in a Legal Elite, 1980 Am. B. Found. Res. J. 31; Fried, supra note 289, at 60.} This difference in status is unjustified and should not be magnified by suggesting that house counsel are “second-class citizens” due to the inapplicability of privilege, as is the case, for example, with house counsel in France.\footnote{315}{See supra notes 178-79 and accompanying text.} In addition, the communications of house counsel may often be discoverable in any event if they involve predominantly business advice,\footnote{316}{See supra notes 293-94 and accompanying text; infra notes 487-94 and accompanying text.} which tends to lessen the overall cost of applying the privilege to house counsel. To take advantage of this prospect, of course, opposing litigants must be willing to challenge blanket assertions of privilege for communications with house
counsel, and courts must rigorously police the existing limitations of the privilege. Finally, if the corporate privilege were converted to a qualified standard, the fact that certain communications were with house counsel rather than outside counsel could still be a factor for the court to consider in determining the extent to which the instrumental effects of the privilege would be harmed by lifting the privilege in the particular case.\textsuperscript{317}

C. Implications for Attorneys’ Ethical Responsibilities

The data obtained in the survey provide strong evidence that most corporate officers and employees are unaware of the limitation on their ability to assert the corporation’s privilege on their own behalf.\textsuperscript{318} This finding, when coupled with the increasing number of reported decisions in which corporate representatives have discovered, too late, that their communications with the corporation’s counsel are not protected by a personal privilege,\textsuperscript{319} suggests that lawyers should be extremely sensitive to issues of fairness in their dealings with corporate representatives. The problem is particularly acute when counsel is conducting an internal investigation into possible wrongdoing that could expose the corporation or employee, or both, to criminal or civil liability.\textsuperscript{320} In such investigations, employees will be under pressure to cooperate lest they lose their jobs. Many of the attorneys in the survey use the criterion of potentially conflicting interests as the primary trigger for a warning regarding the privilege limitation.\textsuperscript{321} Are they thereby fulfilling their ethical obligations to the parties involved?

Until recently, the regulatory codes of ethics for lawyers did not directly address the issue.\textsuperscript{322} In 1983, however, the American Bar Association adopted the Model Rules of Professional Conduct

\textsuperscript{317} See infra notes 729-31 and accompanying text.
\textsuperscript{318} See supra notes 174-78 and accompanying text.
\textsuperscript{319} See supra notes 119-25 and accompanying text.
\textsuperscript{320} See supra notes 176-77 and accompanying text. Such occasions apparently are rare, as suggested by the finding that very few of the lawyers routinely include the entity theory of the privilege in their descriptions to corporate representatives. See supra table 3, section III.B.3. at 240.
\textsuperscript{321} The only relevant provisions in the Model Code of Professional Responsibility are EC 5-18, which simply reminds corporation lawyers that their allegiance is owed “to the entity,” not to individual employees, and DR 7-104(A)(2), which disallows the giving of advice to persons whose interests conflict, or potentially conflict, with those of a client other than the advice to secure counsel. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18, DR 7-104(A)(2) (1981).
as a proposed national standard of legal ethics, and rule 1.13(d) thereof contains a guideline on point. The rule states that in dealing with the "constituents" of an organization, "a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."\textsuperscript{323} The language of the rule itself does not include "potential" conflicts nor does it impose a requirement that privilege implications be explained, but the accompanying nonmandatory comment refers to potential conflicts and also states: "Care must be taken to assure that the individual understands that, when there is such adversity of interest, . . . discussions between the lawyer for the organization and the individual may not be privileged."\textsuperscript{324} To the extent that they advise corporate representatives about the rule of privilege or give warnings in situations involving only potential conflicts, many of the lawyers in the sample appear to be following, commendably, the standard suggested in the comment to rule 1.13(d) rather than the rule itself.\textsuperscript{325}

The consequences of a corporation's decision to make third-party disclosure of a corporate representative's communications with counsel, over the individual's objections, may be severe: at minimum, waiver of the privilege could cause embarrassment and at worst expose the individual to criminal liability.\textsuperscript{326} Is it fair to assume, as suggested by Model Rule 1.13(d), that employees have no need to know about the privilege limitation except when a conflict becomes "apparent" to the lawyer? One of the executives in the survey observed, for example, "You never know when a matter may turn out to involve a conflict." In allowing the lawyer to remain silent until an actual conflict is perceived, the standard of rule 1.13(d) may provide inadequate protection for employees. By

\textsuperscript{323} \textbf{Model Rules of Professional Conduct} Rule 1.13(d) (1983).

\textsuperscript{324} Id. Rule 1.13(d) comment ¶ 8. The Model Rules state at the outset, "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." Id. Scope ¶ 1.

\textsuperscript{325} Interestingly, New York, the jurisdiction in which the lawyers in the survey practice, rejected the Model Rules of Professional Conduct in 1985. See Gillers, \textit{Amending the Ethics Code—Solicitation, Prepaid Plans, Fees}, N.Y.L.J., Nov. 10, 1985, at 1, col. 3, and at 3, col. 1. At the time of the survey, the official code of ethics for New York lawyers was the Code of Professional Responsibility, in which EC 5-18 and DR 7-104(A)(2) provided the only relevant guidance. See supra note 322.

\textsuperscript{326} One court has suggested that when an internal investigation is being conducted by "special counsel" pursuant to a consent decree between the corporation and a government agency, due process may require that employees be warned of their right to silence and individual counsel. Handler \textit{v.} SEC, 610 F.2d 656, 660 n.1 (1979).
the time the conflict is apparent to the lawyer, the employee may have made several personally damaging statements. Furthermore, telling corporate representatives only that the lawyer is "counsel to the entity" may not be sufficient to instill an appreciation that communications with counsel are, in effect, "the property" of the corporation. Three-fifths of the executives in the survey, all of them well-educated members of top management, were unaware of this point, or at least had not given the matter any thought.

In addition to considerations of fairness to the individual, a pragmatic reason for the lawyer to clarify his role as counsel to the entity is to help protect against disqualification in the event of any subsequent litigation between the corporation and the individual involving the subject matter of the communications that were exchanged. For example, if the corporation and an employee are named as co-defendants in a civil action for damages based on the employee's misconduct, the company may wish to assert a cross-claim against the employee for indemnity. The corporation might also want to bring an independent action for damages against the employee (or, more likely, former employee) if the employee's conduct has caused injury to the corporation.327

In adherence to the entity theory of corporate representation, courts generally have held that the corporation's lawyer may continue to represent the corporation in such litigation even though the former employee had conveyed personally damaging information to the lawyer.328 Some cases suggest, however, that even in the

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327 Conversely, the employee might bring an action against the corporation in connection with the matter, alleging, for example, breach of contract or wrongful discharge. See generally Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404 (1967).

328 See, e.g., W.T. Grant Co. v. Haines, 531 F.2d 671, 675-77 (2d Cir. 1976) (corporation's law firm permitted to continue representation of company in action against former officer despite existence of "close question" whether lawyers violated DR 7-104(A)(2) (prohibition on giving advice to unrepresented person with adverse interests) by suggesting to officer that candid answers to inquiry, taking of lie detector test and providing access to personal records would clear his name); Bobbitt v. Victorian House, Inc., 545 F. Supp. 1124, 1126-28 (N.D. Ill. 1982) (in dissolution proceeding by 50% shareholder and director of closely held corporation, motion to disqualify corporation's lawyer denied because plaintiff failed to show information given to counsel was to be concealed from corporation); Wayland v. Shore Lobster & Shrimp Corp., 537 F. Supp. 1220, 1223 (S.D.N.Y. 1982) (counsel to closely held corporation not disqualified from defending action by officer because officer could not have reasonably believed information he gave to counsel would be kept confidential from corporation). The court in Meehan v. Hopps, 144 Cal. App. 2d 284, 301 P.2d 10 (1956) stated:

To hold that the [officer's] giving of such information in that more or less intimate
absence of an actual attorney-client relationship with the employee, a lawyer who has spoken with the employee about sensitive matters relating to his employment may not represent the corporation against the employee where those matters are the subject matter of the litigation. The rationale for disqualification in these cases appears to be the existence of a de facto attorney-client relationship between the individual and the employer's attorney. Disqualification has also been based on the notion that an employee, even though fully aware that counsel represented the entity alone, was lulled into thinking that his cooperation and forthright-

relationship which necessarily must exist between an officer of the corporation and its attorneys would prevent the corporation attorneys from thereafter using it in favor of the corporation in litigation against the officer, [and] would be unfair to the corporation and its stockholders . . . .

\[Id. at 292-93, 301 P.2d at 15-16.\]

See, e.g., Perillo v. Advisory Comm. on Professional Ethics, 83 N.J. 366, 370, 416 A.2d 801, 803 (1980) (municipal attorney may not represent municipality against municipal employee where attorney's contacts with employee in course of handling municipal business were regular and frequent); DeCherro v. Civil Serv. Employees Ass'n, Inc., 94 Misc. 2d 72, 76-77, 404 N.Y.S.2d 255, 257-58 (Sup. Ct. Albany County 1978) (union attorney disqualified from defending union in action by union member for breach of duty of fair representation where member had discussed the facts underlying action with union's attorney; attorney-client relationship had been "sufficiently established" in part because member was not legally sophisticated enough to understand distinction between personal and organizational representation); In re Banks, 283 Or. 459, 471-78, 584 P.2d 284, 290-94, (1978) (counsel to closely held family corporation could not ethically represent corporation in contract dispute with former chief executive officer who dominated corporation because counsel had drawn contract and officer had no basis for believing counsel had other than officer's individual interest at heart).

See Nichols v. Village Voice, Inc., 99 Misc. 2d 822, 824, 417 N.Y.S.2d 415, 418 (Sup. Ct. N.Y. County 1979) ("fiduciary obligation" or "implied professional relation" may exist in absence of formal attorney-client relationship such affected person has right to believe attorney will respect person's confidences); Margulies v. Upchurch, 696 P.2d 1195, 1200 (Utah 1985) ("Even in the absence of an express attorney-client relationship, circumstances may give rise to an implied professional relationship or a fiduciary duty toward the client, thereby invoking the ethical mandates governing the practice of law").

If actual joint representation of two clients is undertaken by an attorney, it is clear that disqualification of the attorney is required in any subsequent litigation between the two clients if the subject matter is substantially related to the prior joint representation. See Model Rules of Professional Conduct Rule 1.9(a) (1983). Disqualification may be compelled even if the former client did not intend to keep information confidential from the other client. See, e.g., E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 385-95 (S.D. Tex. 1969) (law firms retained by corporation conferred with corporate officer and represented him during SEC and bankruptcy hearings; firms were estopped from representing corporation in its later action against officer based on transactions at issue in prior hearings despite fact officer was told information given to lawyers would be reported to corporation's management).
ness would result in clearing his name with the company.\textsuperscript{331} At the outset of any interview in a matter in which the interests of the employee potentially conflict with those of the employer, a warning by counsel that he represents only the entity and that any information provided by the employee may be disclosed to the employer and possibly to outsiders should be sufficient to dispel any such false sense of security on the part of the employee.\textsuperscript{332}

\textsuperscript{331} For example, in Chase Manhattan Bank, N.A. v. Higgeston, No. 17864/84 (Sup. Ct. N.Y. County, Oct. 11, 1984) (LEXIS, States library, N.Y. file), the law firm retained as special counsel to Chase Manhattan's board of directors was disqualified from representing the bank in an action for damages against six former officers based upon their alleged negligence in the handling of certain loan participations. The lawyers had engaged in in-depth interviews of the officers concerning the transactions at issue. All of the officers had been represented by personal counsel at the time of the interviews and had been made aware in a letter from Chase's chairman that the law firm had been retained by Chase for the purpose of determining whether Chase had legal claims against present or former officers and, if so, whether it was in Chase's interest to pursue them. Apparently no additional warnings were given by the law firm during the interviews. The court reasoned that "[d]efendants' legitimate expectation [was] that candor and cooperation [during the interviews] would buffer them against any further legal action" and that the law firm had "obtained a potentially unfair advantage."

The purpose of disqualification in such cases is not entirely clear since the corporation presumably is still entitled to use the information that was obtained from the employee. Disqualification, of course, does provide a form of judicial "punishment" to the lawyers, but it also delays the litigation and separates the client from knowledgeable and well-prepared counsel. See W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976) (in absence of tainted trial, appropriate forum for any punitive measures against counsel is bar grievance committee). On the other hand, if the lawyer is to testify on behalf of the corporation to admissions made by an employee, disqualification may be justified by the advocate-witness rule. See \textit{Model Code of Professional Responsibility} DR 5-101(B), DR 5-102 (1981) (withdrawal by attorney required if he "ought" to be called as witness for his client); Mac Arthur v. Bank of New York, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981) (disqualification required if attorney's testimony would be significantly useful to client). The Higgeston court relied upon the advocate-witness rule as an alternative ground for disqualification, and this may be a sounder basis for the result that was reached. Chase Manhattan Bank, N.A. v. Higgeston, No. 17864/84(Sup. Ct N.Y. County, Oct. 11, 1984) (LEXIS, States library, N.Y. file).

\textsuperscript{332} Some of the attorneys in the survey indicated that they suggest to corporate representatives the need for separate counsel. Such advice is also recommended in the comment to rule 1.13(d) of the Model Rules of Professional Conduct: "[T]he lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation." \textit{Model Rules of Professional Conduct} Rule 1.13(d) comment \# 8 (1983); \textit{see also Model Code of Professional Responsibility} DR 7-104(A)(2) (1981) (no advice may be given to person whose interests conflict with those of client except advice to obtain counsel).

In cases of potential conflict, some lawyers may give a preliminary warning about their limited role but delay recommending the retention of separate counsel until the conflict becomes "real and imminent": "[W]hen a firm is already counsel to a corporation, it would in many cases—such as a typical corporate payments investigation—be wholly impracticable
As an alternative to the existing rule that generally gives the corporation the exclusive power to waive its attorney-client privilege for the employee's communications to its counsel, some commentators have urged that the employee be given the right to assert the corporation's privilege in his own behalf even when he has not become the individual client of the corporation's attorney.\(^{333}\) The corporation thus could not voluntarily disclose the employee's communications with counsel to the government or other third party without the consent of the employee.\(^{334}\) The argument is made that broadening the right of the employee in this fashion is necessary to further the purpose of the corporate attorney-client privilege to encourage employees to be candid.\(^{335}\) Analogy is drawn to the "joint defense" or "pooled information" doctrine, which allows two clients with separate counsel, who share a common interest in pending or potential litigation, to participate in joint attorney-client consultations and to share their separate attorney-client communications with one another without either client relinquishing the right to assert the privilege against third parties with respect to his own communications.\(^{336}\)

\(^{333}\) See Sexton, supra note 114, at 505-14; Note, supra note 64, at 838-43; see also Note, supra note 211, at 420-21 (proposing independent privilege for corporate executives).

\(^{334}\) The proposed extension of privilege would not create an attorney-client relationship between the corporation's attorney and the employee. The attorney's duty of loyalty would continue to be owed solely to the corporation. See Note, supra note 64, at 842. If the attorney has actually undertaken joint representation of the corporation and the employee, the individual may, of course, assert his personal privilege to prevent access by third parties. See supra note 123 and accompanying text.

\(^{335}\) Another possible solution that would not involve any change in existing doctrine is for the officer or employee to negotiate a contract with the corporation, either at the time of employment or as a precondition to the lawyer's investigatory interview, giving the employee the right to determine whether his communications with counsel could be disclosed to outsiders. See Arkin, supra note 120, at 4, col. 5. Even if the employee had foresight and sufficient bargaining power to demand such an agreement, public policy might preclude its enforcement, since it would run counter to the corporation's interest in self-protection. See id.; see also Sexton, supra note 114, at 510 n.213 (contract giving veto power to employee would be ineffective because of inadequate remedy in event of breach).

\(^{336}\) See Sexton, supra note 114, at 508-10.

\(^{337}\) See id. at 510-12; Note, supra note 64, at 838-42.

The joint defense doctrine, if applicable, overcomes the objection that the confidentiality essential to the attorney-client privilege has been lost by making or sharing communications in the presence of "strangers." See In re LTV Sec. Litig., 89 F.R.D. 595, 604 (N.D. Tex. 1981); Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572, 579 (S.D.N.Y. 1960). Only communications that advance common interests may be pooled without loss of
This approach, however, should be rejected. The corporation, as a collective enterprise with a duty to shareholders, should have the right to protect itself against the acts of individuals within the corporation who have caused it injury. The corporation therefore should be free to enter into negotiations with the government or other party that may involve a waiver of its attorney-client privilege if it is in the company's best interests to do so. In addition, it is doubtful that giving the employee the right personally to assert the corporation's privilege would do much to increase the employee's candor. In trouble situations, the employee would reasonably suspect that what he told the company's lawyer would be disclosed to superior authorities in the corporation even if disclosure could not be made to third parties. Thus, his disclosures to counsel would still expose him to discipline or loss of employment. In all likelihood, therefore, the employee would give counsel an incomplete or inaccurate account of his conduct. Furthermore, even if the individual could personally assert the corporation's privilege against third parties, he should not be able to assert it against the corporation itself in any civil litigation between him and the company. It is a well-settled principle both in the case of clients with the same attorney and clients with separate attorneys who share

The Supreme Court's decision in Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985), which allowed a trustee in bankruptcy to waive the debtor corporation's privilege with respect to management's prebankruptcy communications with counsel, implicitly recognizes the importance of the corporate entity's right to expose internal wrongdoing by its officers and employees. See id. at 348-58; see also infra notes 572-76 and accompanying text.

See, e.g., Wallace v. Wallace, 216 N.Y. 28, 35-36, 109 N.E. 872, 873 (1915) (confidential communications between lawyer and two joint clients concerning representation are pro-

See G. Wolfram, supra note 111, § 6.5.4, at 287 ("[T]he benefits of the privilege are solely for the advantage of the corporation. Its decision to forego those benefits . . . should not be subject to veto by an employee whose perspective might be quite personal"); Kaplan, Some Ruminations on the Role of Counsel for a Corporation, 56 Notre Dame L. Rev. 873, 884 (1980) (interpreting Model Rules of Professional Conduct as advocating corporation's lawyer has duty to protect corporation against injury from its agents); Saltzburg, supra note 124, at 305 n.128 (internal corporate investigations will be ineffective in exposing and eradicating wrongdoing, "if the employees and officials responsible for a corporation's problems never suffer as a result of an investigation").
their communications under the joint defense doctrine\textsuperscript{340} that the privilege protects only against disclosure to third parties; the two clients may not invoke the privilege against each other. Even if the attorney undertook joint representation, therefore, the potential for a falling out between the employee and the corporation with the consequent loss of privilege should be explained to the employee, regardless of whatever effect there may be on candor.\textsuperscript{341}

A more satisfactory solution than giving employees the right to claim for themselves the corporation's privilege against outsiders is to broaden the circumstances in which lawyers explain to corporate representatives the law regarding the nature of the corporate privilege. Rule 1.13(d) of the Model Rules of Professional Conduct should be modified in two respects: a lawyer's reminder to corporate representatives that he represents only the corporation should be accompanied by a clarification concerning the privilege, and both disclosures ought to be made not only when conflicts become "apparent" but also whenever the interests of the employee and the corporation "may differ."\textsuperscript{342} Similarly, the Code of Profes-


\textsuperscript{341} See, e.g., \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} EC 5-16 (1981) (when lawyer undertakes joint representation, "he should explain fully to each client the implications of the common representation"); \textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 2.2 comment \textsuperscript{36} 6 (1983) (where lawyer represents two clients with potentially conflicting interests, "it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised").

\textsuperscript{342} Proposed amendments to the Code of Professional Responsibility in New York, for example, incorporate the disclosure requirement of Model Rule 1.13(d) but expand the language to include situations in which the interests of employees "may differ" from those of the organization. \textit{See DRAFT OF THE NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY} DR 5-109 (Oct. 5, 1987). Rule 1.13(d) of the Michigan Rules of Professional Conduct (1988) also broadens Model Rule 1.13(d) by omitting any reference to the lawyer's perception of adverse interests as the determinant for a warning. The lawyer is directed to "explain the identity of the client [to corporate representatives] when the lawyer believes that such explanation is necessary to avoid misunderstandings on their part." \textit{MICHIGAN RULES OF PROFESSIONAL CONDUCT} Rule 1.13(d) (1988); \textit{see also} C. WOLFRAM, \textit{supra} note 111, at 736 (recommending that lawyer explain nature of representation to all employees "whose interests might in the future come into conflict with those of the organization"). The more liberal standards of the proposed New York rule and the Michigan rule as to the appropriate circumstances for a warning are preferable to Model Rule 1.13(d), but they still fail to require
sional Responsibility, which currently is silent on the entire issue, should be amended to make the corporate lawyer's duties clear. Whenever a conflict is possible, as, for example, during an internal investigation of potential corporate wrongdoing, communications with the employee should be prefaced with the reminder that the lawyer represents the corporation, not the individual, and that statements of the employee may be disclosed to higher authorities within the company and eventually to outside parties at the discretion of the corporation, even if no current intent to do so exists. It is doubtful that candor would be chilled in the overwhelming majority of corporate attorney-client communications: As one of the executives in the survey put it, "It won't make any difference in my communications, but it's good to know the rule."

V. WHOSE COMMUNICATIONS SHOULD FALL WITHIN THE CORPORATE PRIVILEGE?

A. The Road to Upjohn: The Control Group and Subject Matter Tests

The issue of whose communications within the corporate hierarchy should fall within the corporation's attorney-client privilege has consumed a great deal of judicial energy in the past few years, and still no consensus exists for its resolution. One possible approach is suggested by Wigmore's general proposition that "[a] communication . . . by any form of agency employed or set in motion by the client is within the privilege." In the early 1950s, two federal district courts seemed to agree that a broad agency approach is indeed proper by stating simply that the corporate privilege encompasses "information furnished by an officer or employee of the [corporation]" and that communications from the corporate "client" are those of its "employees, officers, [and] directors." The Tentative Draft of the Restatement of the Law Governing Lawyers adopts essentially the same broad approach by extending the corporate attorney-client privilege to any person who is in "an agency relationship with the organization" if "the

notice of the privilege limitation.

See supra note 322. Bar authorities in New York, for example, are contemplating revision of the Code to address the issue. See supra note 342.

See supra note 2, § 2317, at 618 (emphasis in original).


communication concerns a legal matter of interest to the organization.\footnote{347}

If all employees of a corporation are to be treated as its spokespersons for purposes of the attorney-client privilege, however, the corporation will have a tactical advantage that is unavailable to a similarly situated individual. The scenario of an automobile accident between a privately-owned car and a corporate vehicle being used in the business of the corporation provides an example. If the lawyer for the owner-driver of the private vehicle interviewed a friend of the owner who was a passenger in the car at the time of the accident, the interview would not fall within the attorney-client privilege since the lawyer obviously would not be talking to his client.\footnote{348 At most, the attorney's record of the interview would be conditionally privileged as work product.\footnote{349 In contrast, if the corporation's attorney interviewed an employee of the corporation who happened to be a passenger in the company car en route to a worksite at the time of the accident, the interview would receive the absolute protection of the attorney-client privilege under a literal application of general agency principles. But as one court queried: "Does the fact that a corporation may speak only through a natural person grant to it privileges which a natural person would not possess?"\footnote{350} On the foregoing facts, a court might be inclined to hold that the co-employee was speaking as a "mere witness" and not as the corporate client.\footnote{351 How it would arrive at this conclusion, however,}

\footnote{348 The privilege does not apply to communications with third parties, even though the lawyer may have been directed by the client to speak to such parties. 8 J. Wigmore, \textit{supra} note 2, § 2317(2).
\footnote{349 See \textit{supra} notes 66-69 and accompanying text.
\footnote{351 See, e.g., \textit{id.} (statement to attorney by corporate employee who had performed work at scene of accident held not privileged); Atlantic C.L.R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (statements of railroad crew members to railroad's investigator following accident not privileged even though subsequently given to railroad's attorney); Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 432 N.E.2d 250 (1982) (corporate engineer's metallurgical report concerning machine that caused accident held not privileged); Leer v. Chicago, M., St. P. & P. Ry., 308 N.W.2d 305 (Minn. 1981), (statements taken by railroad investigator of members of switching crew who witnessed accident that killed fellow crew member held not privileged), \textit{cert. denied}, 455 U.S. 939 (1982).
\footnote{Earlier decisions holding to the contrary with respect to employee-prepared accident reports may have been influenced by the English doctrine of "legal professional privilege,"}
is far from clear. The notion that corporate employees who are mere witnesses fall outside the zone of eligibility for the corporate privilege has its origins in the Supreme Court’s opinion in *Hickman v. Taylor*\(^3\). Shortly after a tugboat accident in which five seamen drowned, the partners who owned the tugboat retained a lawyer who obtained statements from the surviving crew members. When the partners were later sued in a wrongful death action, the plaintiff sought access to these statements. Although discovery was denied on the basis of work product immunity,\(^3\) the Court observed that the statements fell outside the scope of the attorney-client privilege.\(^3\) Without elaborating upon the exact scope of the attorney-client privilege, the Court simply noted that the privilege “does not extend to information which an attorney secures from a witness.”\(^3\)

Despite the fact that *Hickman* involved employees of a partnership, not a corporation,\(^3\) it has been read by some observers as which gives absolute protection to all communications between the solicitor and any of the client’s agents or third parties for the purpose of assisting in litigation. See *Gergacz*, supra note 93, at 130-31. Growth of the English doctrine in the United States was stunted by *Hickman v. Taylor*, 329 U.S. 495 (1947), in which such documents were classified as “work product,” entitling them only to a qualified immunity, unless they involved communications with the client. See *infra* notes 352-55 and accompanying text.

\(^3\) 329 U.S. 495 (1947).

\(^3\) The *Hickman* Court held that even though the attorney-client privilege may not apply, a party is not entitled to discovery of “written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties” absent a showing of undue prejudice. *Id.* at 510. Such discovery would “[contravene] the public policy underlying the orderly prosecution and defense of legal claims.” *Id.* See also supra notes 66-69 and accompanying text.

\(^3\) Hickman, 329 U.S. at 508.

\(^3\) *Id.*

\(^3\) Since *Hickman* involved a partnership—an aggregate of individuals—the clients were natural persons, thus eliminating the problem of identifying someone who personified the client. On the other hand, employees of a partnership arguably could qualify as agents for the purpose of communicating on behalf of the partners. See supra note 344 and accompanying text. The proposed Restatement position is that the attorney-client privilege should include not only the communications of employees of corporations but also those of any “organization,” including sole proprietorships. *RESTATEMENT OF THE LAW GOVERNING LAWYERS § 123 comment c* (Tent. Draft No. 2, 1989). Admittedly, it seems unfair to give corporations an advantage over unincorporated businesses with respect to extension of the privilege to employees’ communications merely because the artificiality of corporate existence creates the need to bestow “client” status on corporate agents who can speak for the corporation. By the same token, however, extending the privilege to counsel’s communications with any employee of any organization, including a sole proprietorship, as does the proposed Restatement, *see id.*, gives organizational parties, in general, an unfair advantage over individuals. For example, if a sole proprietor’s employees, while on the job, fortuitously witness an accident that implicates their employer, the communications of the employer’s counsel
suggesting the boundaries for the corporate privilege: If the employee is speaking as a mere witness, the corporate attorney-client privilege does not attach.\(^3\) In seeking to exclude “mere witnesses” from the scope of the corporate privilege, lower federal courts developed essentially two approaches to the question of whose communications within the corporate hierarchy should qualify for the privilege: the control group and subject matter tests.

Rejecting a broad agency approach as conflicting with Hickman, the court in City of Philadelphia v. Westinghouse Electric Corp.\(^3\) fashioned what has come to be known as the control group test as a means of distinguishing between qualified corporate spokespersons and employees who are mere witnesses:

\[\text{[I]f 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.}\(^3\)

The control group test thus extends the privilege to those individuals who “personify” the corporation by their ability to control whatever corporate action is taken in response to counsel’s advice. As a practical matter, the control group consists of most members

with the employees about the accident would be privileged. An individual who was also involved in the accident and whose friends were witnesses could not claim the privilege for his attorney's communications with his friends. See supra note 348 and accompanying text.

\(^3\) See, e.g., 24 C. Wright & K. Graham, supra note 63, § 5483, at 287 (Hickman expressed an “attitude... at odds with the notion that communications from any corporate employee could qualify as privileged communications from the corporate client to its attorney”).


\(^3\) 210 F. Supp. at 485. City of Philadelphia was decided shortly after the district court in Radiant Burners, Inc. v. American Gas Ass’n, 207 F. Supp. 771 (N.D. Ill.), supplemented, 209 F. Supp. 321 (1963), rev’d, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929 (1963), had totally rejected the applicability of the attorney-client privilege to corporations. See supra notes 95-102 and accompanying text. The City of Philadelphia court found a good deal of “sound logic” in the view that corporations do not fall within the common law attorney-client privilege, but it felt compelled by tradition to recognize the corporate privilege. City of Philadelphia, 210 F. Supp. at 494. Some of the problems implied by the district court in Radiant Burners, such as the danger of overbreadth if too many corporate communications are immunized, see Radiant Burners, 207 F. Supp. at 774-75, seemed to awaken courts to the need for more carefully “tailoring the ordinary rules to the peculiar cloth of this legal entity.” American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 88 n.12 (D. Del. 1962).
of top management and those lower-level managers who are closely involved in the decision-making process with respect to which the particular legal advice is being sought.

Until the Supreme Court's decision in *Upjohn*, the control group test was followed by an apparent majority of federal courts and has remained the governing standard in roughly one-fifth of the states. Aside from the conceptualism that members of a control group personify a corporation because, like an individual client, they are the corporate actors who will make discretionary decisions on the basis of the attorney's legal advice, other arguments have been advanced in support of the control group test. Principal among them is the limitation that the test imposes on the number of communications that are eligible for privileged treatment, thus aiding in pretrial discovery. Proponents of the

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361 Most of the states that have explicitly endorsed the control group test have done so through codification. See *Alaska R. Evid. 503(a)(2); Ark. R. Evid. 502(a)(2); Me. R. Evid. 502; Nev. Rev. Stat. § 49.075 (1979); N.D. R. Evid. 502(a)(2); Okla. R. Evid. 502; S.D. R. Evid. 502(a)(2); Tex. R. Evid.—Civil & Crim. 503(a)(2). In Illinois, the control group test has been adopted by judicial decision. See *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 432 N.E.2d 250 (1982); *Archer Daniels Midland Co. v. Koppers Co.*, 138 Ill. App. 3d 276, 485 N.E.2d 1301 (1985).

The codified versions of the control group standard appear to have been influenced by the pre-1971 proposals of the Advisory Committee's draft of the Federal Rules of Evidence in which the attorney-client privilege for corporations was defined in terms of the control group test because of its seemingly widespread acceptance. See *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, Proposed Rule 5-03(a)(3), 46 F.R.D. 161, 249-51 (1969) ("representative of the client" defined as one "having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client"). Following the Supreme Court's divided affirmation of the decision in *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), aff'd per curiam, 400 U.S. 348, 401 U.S. 950 (1971), however, the Committee eliminated its definition of "representative of the client" because of the apparent lack of a consensus on the subject among the Justices of the Supreme Court. See 56 F.R.D. 183, 235-40 (1971); 2 J. Weinstein & M. Berger, *supra* note 17, ¶ 503(d)[04], at 503-47. Ultimately, none of the advisory committee's proposed rules of privilege were adopted. See *infra* note 392.

362 See, e.g., Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 65 F.R.D. 397, 400 (E.D. Va. 1975) (control group test coexists well with need for discovery); Consoli-
control group test also argue that coverage of other employees is unnecessary to fulfill the goals of the privilege. It is contended that under the test, corporate managers will continue to employ attorneys to conduct internal investigations because of their business duty to be vigilant and to comply with the law; attorneys will be thorough in interviewing employees because of their professional obligation to do so; and lower-level employees will be no less inhibited in their communications with attorneys than they would under a broader privilege because the corporation’s privilege is not theirs to invoke. Thus, a narrow attorney-client privilege, together with the work product immunity in situations where litigation is likely, arguably provides sufficient protection to encourage corporate self-policing.

The predominance of the control group test was challenged, however, in the 1970 decision in *Harper & Row Publishers, Inc. v. Decker*. The plaintiffs in a massive antitrust suit sought discov-


363 Nath, supra note 114, at 44-47.

364 In re Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979).

365 Id. at 1236. See supra notes 117-25 and accompanying text. Because of the limitation on the individual employee’s control over corporate attorney-client communications, Professor Stephen Saltzburg proposes a somewhat different type of control group test. See Saltzburg, supra note 124. He contends that the corporate privilege should encompass only those employees who, in the particular corporation, have the actual power to control the subsequent use of their communications, i.e., to assert the corporation’s privilege against outsiders. Id. at 306-13. In his view, such individuals are the only persons for whom the rationale of the privilege—the assurance of secrecy as an inducement to candor—truly applies. Professor Saltzburg’s argument would be virtually unassailable but for the fact that no individual within a corporation ultimately can control the company’s use of his communications with counsel. See supra notes 117-25 and accompanying text. Even the chief executive officer would be at the mercy of the board of directors or successor management. See supra notes 121-22 and accompanying text. As the Supreme Court has noted, “individual officers and directors always run the risk that successor management might waive the corporation’s attorney-client privilege with respect to prior management’s communications with counsel.” Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 357 (1985). The survey findings show that Professor Saltzburg is correct, however, to the extent that upper managers usually assume they have some degree of control over the corporation’s exercise of the privilege or at least would seldom expect a waiver to their detriment. See supra notes 208-13 and accompanying text.

366 In re Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979); see generally Nath, supra note 114, at 37-54; The Supreme Court, 1980 Term, supra note 114, at 270-80.

367 423 F.2d 487 (7th Cir. 1970), aff’d per curiam by an equally divided court, 400 U.S. 348, reh’g denied, 401 U.S. 950 (1971). Without explicitly addressing the shortcomings of the control group test, the Supreme Court of California had previously adopted a more flexible approach to the issues in D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964). Seeking to adopt the same reasoning that supports the
ery of interview memoranda prepared by defendants’ lawyers in connection with the “debriefing” of several lower-echelon corporate officers following their testimony before a grand jury that was investigating possible antitrust activities. The court held that the control group test gave inadequate protection to some corporate agents whose communications should be privileged. Apparently taking its cue from Hickman, the court stressed that the corporate employees in the instant case were not speaking to the attorney about matters or events as to which they were little more than “bystander witnesses.” Rather, they had been directed by their corporate superiors to communicate with counsel, and the subject matter of the communication was “the performance by the employee of the duties of his employment.” This, said the court, was sufficient to bring their communications within the privilege.

A shortcoming of the subject matter test as articulated in Harper & Row is that it presents the potential for immunizing from discovery a multitude of corporate documents without providing the offsetting benefits that the corporate attorney-client privilege is intended to foster, i.e., increased candor by the client to enable counsel to provide informed advice. For example, if the board of directors or top management adopted a policy that all internally prepared documents concerning the activities of the corporation were to be routed to corporate counsel on a regular basis, literal application of the test arguably would insulate the documents from disclosure despite their true character as routine busi-

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388 The plaintiffs were local governments, public schools and libraries suing on the basis of an alleged price-fixing conspiracy in the publication industry. Harper & Row, 423 F.2d at 489.

389 Id. at 491.

370 Id. at 491-92.
ness records. In such cases, employees technically would be "communicating" with counsel pursuant to a directive of their superiors and the subject matter of the communication would concern the employees' performance of their duties. It is doubtful, however, that the Harper & Row court intended to dispense with the other traditional requirements of the privilege: a showing that legal advice was sought from a lawyer acting as such; that the communications related to the seeking of legal advice; and that confidentiality was intended and maintained.

A few years later, the court in Diversified Industries, Inc. v. Meredith synthesized these concerns by adopting a modified version of the subject matter test. While stressing the merits of the subject matter test in encouraging the "free flow of information" in those cases in which it is most needed, the court also noted the potential for abuse that the standard presents. To resolve the problem, the court set forth the following criteria: (1) the employee must be communicating with counsel for the purpose of obtaining legal advice at the direction of his corporate superior so that the corporation can secure the advice; (2) the subject matter of the communication must fall within the scope of the employee's duties; and (3) access to the communication must be restricted to those

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See Weissenberger, Toward Precision in the Application of the Attorney-Client Privilege for Corporations, 65 Iowa L. Rev. 899, 912 (1980); Note, Privileged Communications — Inroads on the "Control Group" Test in the Corporate Area, 22 Syracuse L. Rev. 759, 766 (1971).

See supra note 2. A "business" communication to counsel should contain, at the very least, an implied request for legal advice based thereon. See infra notes 492-94 and accompanying text.

672 F.2d 596, 606-11 (8th Cir. 1978) (en banc). The case grew out of disclosures in a proxy contest that employees of Diversified Industries, Inc. may have used a secret "slush fund" to bribe purchasing agents of other companies. Id. at 607. A law firm was retained and authorized by Diversified's board of directors to investigate the facts, report the results and set forth its recommendations for a course of action. Id. The firm thereupon interviewed several employees at all levels of the corporation and embodied the interview summaries together with its analysis and recommendations in a report to the board. Id. at 607-08. Subsequently, one of the companies whose purchasing agents allegedly had been bribed sued Diversified for damages and sought production of the law firm's report and board minutes referring to critical portions thereof. The original panel that heard the case denied applicability of the privilege on the ground that the law firm had been hired to provide only investigatory services that could have been performed by nonlawyers; work product immunity was also denied because no litigation was anticipated at the time of the investigation. Id. at 698-90. In the en banc decision, the majority agreed that work product immunity was unavailable, id. at 611 n.4, but found that the attorney-client privilege could apply because the law firm had been providing legal services. Id. at 610.

Id. at 609.
within the corporation who have a need to know of its contents due to their own role within the corporate structure. The court stressed that these modifications would prevent the privilege from attaching to routine business reports merely because they pass through the hands of counsel, would preserve the requirement of confidentiality in the corporate context, and would avoid violating the bystander witness concept by limiting qualified communications to those concerning the employee's corporate duties.

The stage was thus set for the Supreme Court's 1981 decision in *Upjohn Co. v. United States* to resolve the controversy over whose communications within a corporate hierarchy should receive the benefit of the attorney-client privilege. The General Counsel for Upjohn Company had undertaken an investigation into the nature and scope of questionable overseas payments by various employees. He sent confidential questionnaires (accompanied by a letter from the Chairman urging cooperation and the maintenance of confidentiality) to foreign managers requesting detailed information about their knowledge of any questionable payments and, together with outside counsel, conducted follow-up interviews of eighty-six individuals.

When the results were in, Upjohn voluntarily disclosed the existence of its questionable payments in filings with the Securities and Exchange Commission and the Internal Revenue Service ("IRS"). The IRS began an investigation into the tax consequences

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375 *Id.* The court drew upon the analysis in 2 J. WEINSTEIN & M. BERGER, supra note 17, ¶ 503(b)[04], at 503-47 to -50.

376 *Diversified*, 572 F.2d at 609. A few courts have accepted *Diversified*'s gloss on the subject matter test. *See*, e.g., Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 507, 277 S.E.2d 785, 791-92 (1981); Leer v. Chicago, M., St. P.& P. Ry., 308 N.W.2d 305, 308-09 (Minn. 1981), *cert. denied*, 455 U.S. 939 (1982). Others have tried their hand at formulating alternative standards. A notable decision in this regard is *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377 (D.D.C. 1978), in which the court's criteria differed in only one major respect from those of *Diversified*. Instead of imposing the requirement that the employee be shown to have consulted with counsel at the direction of a superior, the *Ampicillin* court said that the employee "must have made a communication of information which was reasonably believed to be necessary to the decision-making process concerning a problem on which legal advice was sought." *Id.* at 385 (emphasis in original). In *Duplan Corp. v. Deering Milliken Research Corp.*, 397 F. Supp. 1146 (D.S.C. 1974), the court attempted to synthesize the control group and subject matter tests by holding that a communication: (1) must be made by a member of the control group or (2) an agent, employee or representative acting pursuant to the direction of a control group member, and (3) must be incident to a request for legal advice. *Id.* at 1163-65.


378 *See id.* at 386-87, 394 n.3.
of the transactions and, after receiving a list from Upjohn of all employees who had provided information to the General Counsel, issued an investigatory summons demanding discovery of the questionnaires and counsel’s interview notes. The lower courts applied the control group test to determine the validity of Upjohn’s claim of attorney-client privilege, but the Supreme Court reversed, holding that the scope of a corporation’s privilege is not to be gauged by the limitations of the control group test.

Justice Rehnquist’s opinion for the majority rejected the concept that only those within the corporation empowered to direct the company’s actions in response to legal advice personify the corporation for purposes of the privilege. This approach, said the Court, ignores the function of the privilege in protecting the “giving of information to the lawyer to enable him to give sound and informed advice.” Whereas an individual client is both the source of information and the person who will make decisions on the basis of the attorney’s advice, in a corporation these roles may

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379 Id. at 387.
380 A federal magistrate, whose recommendation was adopted by the district court, held that Upjohn’s disclosure of the payments to the SEC constituted a waiver of any privilege that might attach to the questionnaires and interview notes. United States v. Upjohn Co., 78-1 U.S. Tax Cas. (CCH) ¶ 9277, at 83, 603 (W.D. Mich. 1978), adopted by district court at 78-1 U.S. Tax Cas. (CCH) ¶ 9437 (W.D. Mich. 1978), remanded, 600 F.2d 1223 (6th Cir. 1979), rev’d and remanded, 449 U.S. 383 (1981). The Sixth Circuit Court of Appeals reversed and remanded, holding that no waiver had occurred, but agreeing with the district court’s application of the control group standard. Upjohn, 600 F.2d at 1227-28.

The court of appeals rejected Upjohn’s contention that the subject matter test should govern the scope of the corporate attorney-client privilege. The court reasoned that the test encourages senior management to insulate itself from unpleasant facts by directing counsel to obtain the information about possibly illegal transactions from lower-echelon employees. “Such purposeful ignorance,” said the court, is detrimental to corporate interests. Id. at 1227. The court’s reasoning on this point is obscure. There is no reason to believe that counsel would not disclose the fruits of its investigation to management; the privilege, after all, does not shield the employee’s information from the employer. See supra note 118 and accompanying text. The court went on, however, to its principal argument that under a broad privilege, corporate counsel becomes an undiscernable repository of all the details of questionable transactions. To force the adversary to obtain the details from individual corporate agents was said to severely burden the discovery process. The court, therefore, rejected the subject matter test “because of the broad ‘zone of silence’ it would tend to create.” Id. at 1227.

381 Upjohn, 449 U.S. at 397.
382 The Court’s rejection of the control group test was unanimous, but Chief Justice Burger wrote a concurring opinion in which he criticized the majority for not providing a set of alternative guidelines. Id. at 402-04; see infra note 393.
383 Upjohn, 449 U.S. at 399.
be divided among many persons.\textsuperscript{384} The Court observed that the actions of employees in the middle and lower levels of a corporation can “embroil the corporation in serious legal difficulties” and that these are the persons who will have the information most helpful to counsel in providing advice with respect to such difficulties.\textsuperscript{385} Since the control group test discourages communications with lower-echelon employees, it frustrates the lawyer’s task of becoming fully informed of the facts.\textsuperscript{386} Stressing that modern corporations rely on their lawyers to cope with regulatory legislation, the Court also observed that the test “threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”\textsuperscript{387} Further, the control group standard was said to be unpredictable because of the inherent uncertainty in determining whether a corporate officer will be deemed to have played a “substantial role” in acting on counsel’s advice.\textsuperscript{388}

\textsuperscript{384} Id. at 391.


As a matter of agency law, a corporation can be held liable for acts committed by its agents within the scope of their employment. \textit{Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions}, 92 Harv. L. Rev. 1227, 1249-50 (1979). The scope-of-employment test is generally interpreted with flexibility so as to encompass virtually any act occurring while an employee is engaged in a job-related activity. Otherwise, a general corporate directive prohibiting illegal acts by employees would exempt the corporation from liability because any such act would be outside the scope of an employee’s authority. \textit{Id.}; see also \textit{Restatement (Second) of Agency §§ 228-232 (1958); Brickey, Corporate Criminal Liability: A Primer for Corporate Counsel}, 40 Bus. Law. 129, 132-33 (1984).

\textsuperscript{386} \textit{Upjohn}, 449 U.S. at 391-92. The Court agreed with the view that the control group test presents the corporate attorney 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 employees with the 'very highest authority,' he may find it extremely difficult, if not impossible, to determine what [actually transpired]." Weinschel, \textit{Corporate Employee Interviews and the Attorney-Client Privilege}, 12 B.C. Indus. & Com. L. Rev., 873, 876 (1971).

It has also been argued that the control group test discourages thorough factual investigations by corporate lawyers because of the fear that they will be creating evidence to be used against their client by third parties. Burnham, \textit{supra} note 293, at 548.

\textsuperscript{387} \textit{Upjohn}, 449 U.S. at 392.

\textsuperscript{388} Id. at 393. To illustrate its point, the Court compared two cases in which the out-
Having rejected the control group test, the Court simply reiterated the circumstances surrounding Upjohn's internal investigation and concluded that the privilege should apply to the communications at issue in order to be "[c]onsistent with the underlying purposes of the attorney-client privilege." Although the facts were tailor-made for application of the subject matter test as refined in Diversified, the Court surprisingly declined to adopt it or any other specific approach. The Court emphasized that it was deciding only the case before it and that "draft[ing] a set of rules which should govern challenges to investigatory subpoenas" would violate the spirit of Federal Rule of Evidence 501. The most it would make clear was that the control group test was unacceptable as a basis for "govern[ing] the development of the law in this area."
B. Empirical Findings

Upjohn does not end the debate over which spokespersons should be covered by the corporate attorney-client privilege. The states are free to follow their own course, and the exact scope of Upjohn is unclear even in the federal courts. Do the competing tests really make a difference in the conduct of lawyers and corporate managers? Have predictability, frequency of lower-level communications and the ability to gather facts been improved by Upjohn? From the federal judiciary’s perspective, are there any indications, to date, that the inclusion of lower-level communications within the privilege causes undue discovery problems for the adversaries of corporations? To gain insight on these issues, the lawyers and judges in the survey were asked to describe their experience, both before and after Upjohn, and the executives were asked how the scope of the corporate privilege might affect their conduct.

1. The Lawyers’ Views

The effect of the control group standard prior to Upjohn was elicited by the following question put to the lawyers: “Was the control group standard ever a factor that you took into consideration when communicating with representatives of your corporate client?” About one-third of the lawyers in the combined samples of house and outside counsel (32 of 102) recall having taken the standard into account prior to Upjohn. Of these thirty-two lawyers, twenty-six (81.3%) indicated further that their conduct had been affected by it. More specifically, on at least one occasion they had sought to limit their communications to the control group. In

ject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee’s conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.

Id. at 402-03 (Burger, C.J., concurring).

See supra note 361.

See infra notes 430-49 and accompanying text.

Six of the 32 lawyers (18.8%) said that even though they had taken the control group standard into consideration, they had never sought to limit their lower-level communications. Their volunteered comments indicated that they had found it necessary to ignore the control group standard in order to obtain information. One of them noted, “I was worried by the control group test but did nothing about it; the benefit of legal help for the business outweighed the loss of privilege.”
order of frequency, litigation (actual or potential), sensitive matters, internal investigations of possible corporate wrongdoing, and major transactions were mentioned as the circumstances in which the twenty-six respondents had attempted, when possible, to avoid speaking with persons outside the control group. Nevertheless, six litigators in this group indicated that “when necessary” they had spoken to lower-level employees. “In litigation, you have to get the facts, regardless of the source,” was a typical comment. Including the remaining six lawyers who had taken account of the control group test but had never sought to limit their lower-level communications, a total of twelve out of thirty-two respondents volunteered that they had spoken with lower-echelon employees despite the absence of privilege because of the need for information.

A substantially larger number of lawyers—sixty-eight (66.7%)—answered “no” when asked whether they had been influenced by the control group standard before the decision in *Upjohn*. Unsolicited explanations were offered by forty-five of these respondents. The three most common reasons, with an indication of how many respondents gave the particular explanation, were: (1) the lawyer had dealt mostly with top management and therefore was not concerned over the absence of privilege at the lower levels (nineteen); (2) the lawyer had felt compelled to communicate with lower-level employees regardless of privilege rules (seventeen); and (3) prior to 1981 the lawyer had not been in a position to communicate with corporate employees because he was employed by the government or was only an entry-level associate at a law firm (seven). The seventeen lawyers who said that they had felt compelled to communicate with lower-level employees regardless of privilege rules stressed that the facts needed to give proper legal advice were often in the possession of such employees. They therefore considered it necessary to speak to noncontrol group employees “in order to do their job.” In addition nine of these individuals said that they had considered the control group standard to be “bad law.” Either they assumed that ultimately it would be rejected in favor of a broader approach, or they were determined “to fight the privilege issue in court,” as, for example, by arguing that particular employees were within the control group.

The Supreme Court’s rejection of the control group test substantially reduces the need of corporate lawyers to concern them-

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397 See supra note 396.
selves over the question of whose communications are protected by the privilege. Since some states have refused to follow the federal rule, however, there remain enclaves in which the control group standard could still exert an influence. State court litigation is not infrequent for some corporations, and if such litigation were to arise in a state such as Illinois, which adheres to the control group standard, Upjohn would provide cold comfort. Furthermore, even if the case were litigated in federal court in such a state pursuant to diversity jurisdiction, the local law of privilege would still apply to the substantive matter in dispute.

The lawyers in the combined samples were therefore asked to indicate whether the control group standard had ever been a factor they had taken into consideration after the decision in Upjohn. Twenty-one of the lawyers (20.6%) felt they were under the continuing influence of the control group standard. As a result, all

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389 See supra note 361. The law of New York, the state in which the lawyers in the study were practicing, is uncertain as to the status of the control group standard. Compare Cornell Mfg. Co. v. Mushlin, 85 App. Div. 2d 592, 592, 444 N.Y.S.2d 709, 710 (2d Dep't 1981) (citing Upjohn to preclude pretrial discovery of counsel's interviews with corporate employees) with In re Civil Serv. Employees Ass'n, 103 App. Div. 2d 1000, 1001, 478 N.Y.S.2d 380, 382 (4th Dep't 1984) (County Attorney's investigatory interviews of county employees held subject to disclosure during trial to facilitate adversary's cross-examination of employees as witnesses).

In a case involving the separate issue of whether a lawyer ethically may communicate on an ex parte basis with employees of a corporate adversary, see supra notes 128-29 and accompanying text, the Appellate Division, Second Department, relied on Upjohn for the following dictum: "The general rule is that the attorney-client privilege may apply to communications made by all corporate employees to corporate counsel in connection with a particular litigation, and that the privilege is not limited to only those communications made by the corporation's 'control group.'" Niesig v. Team I, N.Y.L.J., Aug. 14, 1989, at 21, col. 3, 29, col. 1. The only significant opinion of the Court of Appeals on the corporate attorney-client privilege, however, does not pass on the issue of how deep within the corporate hierarchy the privilege extends. See Rossi v. Blue Cross & Blue Shield of Greater New York, Inc., 73 N.Y.2d 588, 590, 540 N.E.2d 703, 703-04, 542 N.Y.S.2d 508, 508-09 (1989) (upholding applicability of privilege to house counsel's memorandum to management).

The median percentage of time devoted by the litigators in the survey to matters in state court was 35%. See supra notes 51-52 and accompanying text.


401 Federal courts are bound by Upjohn with respect to federal claims, but they must apply state privilege law in diversity actions and other matters as to which state law supplies the rule of decision. See Fed. R. Evid. 501; see generally Note, The Attorney-Client Privilege in the Corporate Context: The Intersection of Federal and Illinois Law, 1984 U. Ill. L. Rev. 175, 183-88.

402 Altogether, 34 attorneys (one-third of the combined samples) had taken the control group standard into account at some point either before or after the Upjohn decision. Of the 32 lawyers who had been concerned about the control group issue prior to
but one of these respondents had occasionally restricted their lower-level communications.\footnote{The one respondent who said that he had never limited his communications gave the following explanation: “In states like Illinois, you still have to deal with lower-level people to get facts. We'll fight the privilege issue later in court. For example, it may be possible to argue that as to the specific matter the employee was in the control group.”} Interestingly, only three of them cited the potential applicability of state evidence law as their reason for continued deference to control group principles. A more frequent explanation was uncertainty as to the scope of \textit{Upjohn} in federal courts, as illustrated by the following comments: “After \textit{Upjohn}, you know the group is bigger, but by how much?”; “We try to limit ourselves to the control group. \textit{Upjohn} seems to say only that we're not bound by it if necessary to go to the lower levels”; “We're not confident that privilege applies at all levels”; “I don't trust \textit{Upjohn}.” Habit was another volunteered reason for conforming one's practice to the control group test: “I grew up under the control group standard and still think that way. Besides, the more you keep things in the control group, the better it looks to a judge.” Others simply said they considered it prudent to limit communications to the control group in “sensitive” matters. Six of the respondents, however, indicated that in spite of the potential applicability of the control group standard, when necessary they had spoken with lower-level employees either to give them advice or to obtain factual information.

In order to further discern the practical effect of the control group/subject matter dichotomy, the lawyers were asked to assess the impact of \textit{Upjohn} on three aspects of their practice: predictability that privilege will attach, frequency of communication with lower-level employees and overall ability to gather facts. The responses to each question are shown in table 5.

A substantial majority of the lawyers (85.3\%) thought that predictability was improved by \textit{Upjohn}. Several complained that under the control group standard, they do not know at the time of communication with a middle-level member of management whether a court will subsequently characterize the individual as a member of the corporation's control group. Typical comments were
that the *Upjohn* approach provides "greater comfort" or "peace of

TABLE 5. Lawyers' Views of the Effect of *Upjohn* on Three Aspects of Corporate Representation.

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Does not know</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Did <em>Upjohn</em> improve your ability to predict that privilege will attach?</td>
<td>85.3</td>
<td>10.8</td>
<td>3.9</td>
<td>100.0%</td>
</tr>
<tr>
<td>2. Did <em>Upjohn</em> affect the frequency of your lower-level communications?</td>
<td>9.8</td>
<td>90.2</td>
<td></td>
<td>100.0%</td>
</tr>
<tr>
<td>3. Did <em>Upjohn</em> affect your overall ability to gather facts?</td>
<td>26.5</td>
<td>71.6</td>
<td>2.0</td>
<td>100.1%*</td>
</tr>
</tbody>
</table>

* Total percent does not add up to 100.0 due to rounding.

mind" and that the control group test "doesn't make sense," is "too fuzzy" or "causes too much uncertainty." The respondents, however, were not all equally enthusiastic about the improvement in predictability afforded by *Upjohn*. Of those who perceived an improvement, about a third of the house counsel and half of the outside counsel characterized the impact as only "slight."*4* Several of the 87 respondents who said that the *Upjohn* approach improves predictability were asked whether the improvement was "large" or "slight." Fourteen of 44 (31.8%) of the house counsel and 23 of 43 (53.5%) of the outside counsel said that the improvement in predictability was "slight." It is noteworthy that a greater percentage of house counsel (68.2%) than outside counsel (46.5%) characterized the improvement in predictability as "large." One reason that may account for the variation in response between the two groups of lawyers is that *Upjohn* made clear that house counsel's communications can qualify for privilege. *See supra* note
eral of the respondents in this category explained that they seldom communicate with lower-level employees, making *Upjohn* almost irrelevant for them. Similarly, a few indicated that since the control group issue had not been a factor for them, the *Upjohn* approach made only a "theoretical" or "abstract" improvement in predictability that has had little practical significance. Several others said that they still consider the law tenuous, even in federal courts, as to the scope of the privilege at the lower levels. Ironically, one respondent felt that *Upjohn* introduced less certainty: "Before *Upjohn* at least you knew who was not covered; you had a 'safe harbor' in the control group. Now it's unclear as to who is covered."

As shown in table 5, *Upjohn* was said to have had a relatively insignificant impact on the frequency of the respondents' communications with lower-level employees. Only about 10% of the lawyers said that the *Upjohn* decision had increased the frequency of such communications. Even though they were not asked to explain their answers, thirty-six lawyers, slightly more than one-third of the combined samples, volunteered that they would communicate with lower-level employees if necessary to get the facts, regardless of the rule of privilege. The following comments are typical of those who said that necessity dictates their communications: "You must investigate the facts as needed, and then worry about privilege later if you have to"; "Even without privilege at the lower levels, I have to get the facts"; "You must get the facts—the good, the bad and the ugly, no matter what."

With respect to the overall ability to gather facts, table 5 shows that slightly more than a quarter viewed *Upjohn* as having had a positive influence. A few of the respondents who gave an affirmative answer volunteered that fact-gathering is improved be-

292. Lawyers serving as house counsel therefore may be more likely than outside counsel to perceive *Upjohn* as making a large improvement in predictability. One of the house counsel, for example, volunteered that *Upjohn* confirms the applicability of privilege for in-house lawyers and therefore gives him "peace of mind." A law firm partner's comment is also suggestive of this explanation for the disparity in response: "For me there is not much improvement in predictability. I view *Upjohn* as helping in-house counsel have greater freedom."

A second reason why house counsel may be more inclined to view the *Upjohn* approach as making a large improvement in predictability is that house counsel's continuous presence in the corporation may bring him or her into more frequent contact with lower-level employees, thus enhancing the perceived value of *Upjohn*. See supra notes 280-81 and accompanying text.
cause lower-echelon employees communicate more freely or candidly when told that the corporate privilege applies to their communications. Others attributed the improvement to a greater willingness on the part of corporate management to encourage lower-level communications.

2. The Corporate Executives' Views

During the pretest segment of the study, it was determined that questioning the executives about their pre-Upjohn experience would be unproductive. Instead, the executives in the final sample were asked simply to state their current belief as to the scope of the privilege: "Prior to this interview, was it your belief that privilege could attach to a lawyer's communications with any corporate employee, regardless of rank?" Thirty-nine executives (75.0%) answered yes, five (9.6%) said no, and eight (15.4%) did not know. That so many executives gave a positive answer was not surprising because several attorney-respondents had stated during their interviews that most corporate managers assume coverage at all levels. One of the lawyers, for example, had asserted that "[t]he control group test runs counter to people's expectations."

To investigate the executives' potential conduct under the control group standard, a hypothetical was posed as a follow-up question. They were asked to assume that the corporate privilege does not apply to counsel's communications with lower-level employees and that outside parties may therefore obtain access to those communications in litigation. The executives were then asked whether management would be less likely to encourage lawyers to obtain information from lower-level employees or whether such a rule would in all likelihood have no effect. Twenty-eight (53.8%) said they would be less likely to encourage lower-level communications, twelve (23.1%) said the control group standard would have no effect, eight (15.4%) said its effect would depend on the circumstances, and four (7.7%) were unable to say. Combining the first and third response categories, the total percentage of executives who thought the control group approach would more than likely have a negative impact, at least in some circumstances, was nearly 70%. Although this finding sheds no direct light on the question whether lower-level communications with counsel would be less candid in the absence of privilege, the data do suggest that some lower-level communications would not take place at all.

Very few comments were volunteered by the executives, but a
portion of those with a negative view of the consequences of the control group standard used such terms as "chilling" and "crippling" to describe its effect. An equal number, however, said the control group approach would impose only a "slight constraint." Six executives said they would "leave it up to the lawyers" as to how communications with lower-level employees should be handled. One executive whose company does business in Illinois answered on the basis of experience that "special precautions" are taken in control group jurisdictions. In contrast, one of the executives who had formerly served as counsel in a variety of companies reported: "In my experience, businessmen talk to the lawyer when they feel that they have to. They wouldn’t stop lawyers from speaking to lower-level employees just because of the absence of privilege."

3. Views from the Bench

To obtain a sense of the potential cost of the *Upjohn* approach in terms of lost evidence, the respondents from the judiciary were asked the following question: "With respect to all of the contested communications that you have held were protected by the corporate attorney-client privilege, approximately what percentage involved communications with corporate employees whom you would consider to be outside the control group?" Fourteen of the twenty-four jurists with relevant experience said that such communications had involved noncontrol group employees less than 25% of the time; four said noncontrol group communications accounted for 26-50% of the privileged communications; two said that 60-70% of the communications had involved noncontrol group employees; and four were unable to answer.

In the experience of the judicial respondents, therefore, most corporate attorney-client communications that are upheld as privileged involve members of the control group. *Upjohn*’s extension of the privilege to communications with lower-level employees apparently makes little difference in the majority of their cases.

The judges and magistrates were also asked to indicate how often, in their experience, the *Upjohn* approach had "significantly increased the difficulty litigants have encountered in obtaining information that would be helpful in resolving the case." Six respondents said that the *Upjohn* approach had "never" caused any diffi-

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405 See supra notes 371-401 and accompanying text.
culties for a corporation's adversary, seven said that they had "rarely" seen difficulties, one said "occasionally" and three said "frequently." Some of the judicial respondents who said that Upjohn has seldom or never been a stumbling block to the acquisi-
tion of evidence volunteered two principal reasons. First, since most corporate attorney-client communications are with upper management, the control group/Upjohn dichotomy is usually irrel-
vant. Second, even if lower-level communications are involved, the adversary usually can discover the facts directly from the em-
ployees or from other nonprivileged sources.

C. Discussion

1. Analysis of the Findings

The information provided by the lawyers in the survey regard-
ing the effect of the control group/Upjohn dichotomy is difficult to assess. Only thirty-four (one-third) of the attorneys in the study had ever taken the control group test into consideration at some point in their practice. A substantial majority of these lawyers, however, indicated that the test had caused some limitation in their communications with lower-level employees. On the other hand, over a third of the lawyers in the study made unsolicited statements that the need to ascertain the facts would cause them to speak to lower-level employees regardless of whether the corpo-
rate privilege applied. For these lawyers, application of the control group standard would do little to decrease the frequency of their lower-level communications. A good number of lawyers apparently feel, in contradiction to some of the literature, that they must investigate facts in the possession of lower-level employees in order to properly advise management even if the information might fall into the hands of an adversary. As a few of the litigators in the

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406 Eighty-one per cent of those who had been affected by the control group test prior to Upjohn and 95% of those affected after Upjohn had, on occasion, attempted to restrict their lower-level communications. See supra notes 396-97 and 402-03 and accompanying text.

407 See supra note 386.

408 Subsequent to Upjohn, two members of a panel of the ABA Antitrust Section agreed that communications with lower-level employees would be essential in order to pro-
vide proper representation regardless of whether privilege applied. See Barnette, Leary & De Lone, supra note 120, at 133 & 137-38. Mr. De Lone put the matter as follows: "Surely, failure to investigate for fear that the fruits of the investigation might someday fall into hostile hands, either the government or treble-damage plaintiffs, would be a folly." Id. at 138.
survey noted, the risk of discovery is minimal if the investigation is conducted in anticipation of litigation because the work product immunity would shield much of the information.

Would the communications of lower-level employees be candid without the corporate privilege? In this portion of the interview, the lawyers were not asked to focus specifically on the question of candor by lower-level employees. Other segments of the interview, however, produced data relevant to the issue. As reported above in table 4, a substantial majority of the attorneys indicated that the corporate privilege encourages candor on the part of employees who are aware of it, regardless of their rank. As to such awareness, however, most lower-level employees were thought to lack knowledge. It is questionable whether the corporate privilege could have very much of an influence on persons who are not cognizant of it. Even if the corporate privilege were brought to the attention of a lower-level employee, he might very well be told that counsel represents only the company or that the privilege is that of the corporation, not the employee personally, when the interests of the employee and the corporation are potentially adverse. In such cases, to the extent the employee is candid, it is more likely to be as a result of the orders of upper management, not a promise of confidentiality.

Moreover, in a later section of the interview, the attorneys were asked to assess the impact of a hypothetical change in the law which would make the corporate attorney-client privilege a qualified privilege that could give way upon a showing by an adversary of compelling need for the evidence. Nearly two-thirds of the lawyers felt that such a change in the law would do nothing to affect the candor of lower-level employees. Although qualifying the privilege is not the same thing as eliminating it, this finding nevertheless suggests that the control group standard has little adverse influence on the candor of lower-level employees.

Some of the lawyers in the survey would probably dispute the foregoing conclusion. A few lawyers, for example, volunteered that the corporate privilege was of "particular help" in getting lower-

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409 See supra notes 161-63 and accompanying text.
410 See supra table 1, section III.B.1. at 236.
411 See supra notes 176-77 and accompanying text.
412 See supra notes 51-53 and accompanying text.
413 See supra notes 176-77 and accompanying text.
414 See supra notes 176-77 and accompanying text.
level employees to be candid. Perhaps this is because the lawyers do not tell employees that the privilege belongs solely to the corporation, or because the assumption is that the company will not waive the privilege to their detriment. In any event, an equal number of lawyers singled out lower-level employees as examples of corporate representatives who are not influenced by the corporate privilege; rather, their candor was said to be a product of the directions of their superiors. Thus, to the extent the Upjohn Court brought lower-level employees within the corporate privilege in order to encourage lawyers to investigate and to encourage lower-level employees to be candid, the effort may have been wasted.

According to the lawyers in the survey, the only significant impact of the Upjohn decision itself was to increase their ability to predict that privilege will apply to particular communications. The answers to the remaining questions about Upjohn suggest that it has had little influence in the practices of most corporate attorneys. Nine out of ten respondents thought that Upjohn had no effect on the frequency of their lower-level communications, and nearly three out of four reported no impact on their fact-gathering abilities. The apparently minimal effect of Upjohn is reflected even in the responses of the subgroup of thirty-four lawyers who indicated that the control group standard had been an inhibiting factor at some point in their practice. Within this subgroup, only six house counsel and one outside counsel reported that Upjohn had increased the frequency of their lower-level communications. Although fourteen members of the subgroup said that the broader approach to privilege had improved their ability to gather facts, this is still less than half of those who might be expected to be especially enthusiastic about Upjohn.

415 See supra table 5, section V.B.1 at 310.
416 See id.
417 See supra note 402. The 34 relevant attorneys were comprised of seventeen house counsel and seventeen outside counsel.
418 The six house counsel constitute 35.3% of the relevant 17 house counsel, and the one law firm partner constitutes 5.9% of the 17 outside counsel. Although the numbers are small, use of the Fisher Exact Test showed the differences to be significant. More house counsel than outside counsel may have been affected by Upjohn for reasons previously suggested. See supra note 404.
419 See also Barnette, Leary & De Lone, supra note 120, at 133 (remarks of Mr. Leary): On balance, I doubt that the Upjohn case will have much impact on the way corporate investigations are actually conducted. Even lawyers in jurisdictions which followed the severely limited "control group" test had to pretty well ignore it because they could not otherwise serve their clients. It has never made sense to
Despite the apparent inconsequentiality of *Upjohn* to lawyers, the findings do not necessarily prove that the Supreme Court was wrong or that widespread adoption of the control group standard would not make any difference in lawyers' conduct. The before-and-after questions that were used in the interviews are inherently imprecise because the pre-*Upjohn* and post-*Upjohn* time periods do not provide a tidy division between two applicable rules of law. Prior to *Upjohn*, federal courts were split over the control group issue, and some of the lawyers in the survey indicated that they had always assumed a broader approach would prevail. For such lawyers, potential application of the control group standard by lower federal courts may have posed little or no risk, and *Upjohn* therefore signalled no dramatic change in the law. One respondent, for example, argued that "the Supreme Court was really only following the law, not leading it." According to another, "If the *Upjohn* decision had gone the other way, it would have caused a general chilling effect."

Another important factor that may skew the findings regarding *Upjohn*’s apparent failure to affect lawyers’ conduct is that many corporate lawyers seldom communicate with lower-level employees. Nearly a third of the respondents (thirty-one) volunteered at some point during the interview that they rarely, if ever, personally come into contact with lower-echelon employees. If the need to do so should ever arise, their evaluation of the effects of one test or the other might be quite different. Otherwise, for these lawyers the inclusion of lower-level employees within the privilege makes no practical difference.

The answers given by the executives in the survey lend somewhat stronger support for a broad approach to the privilege. Their responses suggest that if the control group standard had been endorsed in *Upjohn*, the management of a majority of corporations might have sought thereafter to insulate lower-echelon employees from counsel, at least in certain circumstances. Thus, even attorneys who were still willing to speak to lower-level employees might

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remain deliberately ignorant of the facts because of a fear of adverse discovery.

*Id.*

See supra notes 358-76 and accompanying text.

Several attorneys, for example, volunteered comments to the effect that prior to *Upjohn* they had considered the control group test a minority approach that ultimately would be rejected by the Supreme Court.

See supra notes 404-05 and accompanying text.
be interdicted by management’s decision to narrow the scope of their representation. The views of the executives are therefore consistent with the apparent hypothesis of the Upjohn Court that a broad privilege is more helpful than the control group standard in encouraging corporate clients to undertake corrective internal investigations.423 On the other hand, the question was presented to the executives in an unavoidably leading manner, once again introducing the problem of subjectivity and bias.424 Furthermore, they were not asked to take account of how the availability of the work product immunity might affect their answers in cases of potential litigation.

As to the costs imposed by the Upjohn approach, the data obtained from the judges and magistrates in the survey suggest that the overall loss of evidence is small. Most of the communications as to which the respondents had upheld claims of privilege had involved members of the control group.425 Most of the judicial respondents also indicated that Upjohn rarely increases the difficulty that adversaries encounter in obtaining evidence.426 Judicial experience must be viewed cautiously, however, because it does not account for claims of attorney-client privilege that go unopposed. Indeed, a few of the attorneys in the survey observed that one of the intangible effects of Upjohn had been a reduction in challenges to their corporate clients’ assertions of privilege. A survey of government attorneys or practitioners who represent individual plaintiffs against corporations might produce quite different results with respect to the question of cost. From the vantage point of the jurists in the sample, however, adversaries are infrequently hindered by Upjohn.

In sum, the results of the survey fail to offer convincing evidence one way or the other as to the relative superiority of the control group test or subject matter test in furthering the goals of the corporate attorney-client privilege. At minimum, they create some misgivings about the value of Upjohn in affecting the investigative efforts of lawyers and the candor of lower-level employees. To this extent the findings support the decision of state courts and legislatures that continue to follow the control group standard.

As previously discussed, however, the corporate privilege may
be justified because it provides an incentive for corporate management to undertake corrective self-policing with the assistance of lawyers.\footnote{See supra notes 253-60 and accompanying text.}\footnote{The proposed Restatement justifies a broad standard for the corporate attorney-client privilege precisely for this reason: "Defining the organizational privilege as stated in [Section 123] fully accords with the policy objective of the privilege . . . by encouraging an organizational client to employ its power as principal to direct agents to communicate in order to provide legal services for the organization." \textit{Restatement of the Law Governing Lawyers} § 123 comment d (Tent. Draft No. 2, 1989); see also id. comment c (privilege is necessary to induce organizational clients "to direct employees and other agents to be forthcoming in communicating with the organization's lawyer").} If assured that the corporation can assert the privilege for communications at all levels of the corporate hierarchy, upper management may: (1) authorize counsel to obtain the facts directly from lower-level employees; and (2) order such employees to be candid with counsel.\footnote{See infra notes 623-799 and accompanying text.}

Giving full credit to the views of the executives in the survey, most corporate managers will otherwise discourage counsel from seeking out important sources of information. Without thorough knowledge of facts that are obtainable, perhaps, only from lower-level employees, the lawyer might not be able to provide the type of legal advice that is needed to keep the corporation within the bounds of the law or to correct past misdeeds.

It seems accurate to say that expansion of the corporate attorney-client privilege beyond the control group at least has the potential for encouraging management to authorize open channels of communication between all employees and the corporation's attorneys in an effort to comply with the law. Society, of course, is the ultimate beneficiary of corporate legal compliance. To enhance the prospects of this beneficial result, it makes sense as a general matter to take a broad approach to resolution of the question of whose communications with counsel should be covered by the corporate privilege. If the cost of a broad approach—concealment of important facts in adjudicative proceedings—is seldom a problem or can be mitigated when the cost becomes too high in particular cases by lifting the privilege for some lower-level communications,\footnote{See infra notes 623-799 and accompanying text.} then rejection of the control group test is a logical choice.

2. Suggestions for Determining Appropriate Corporate Spokespersons

Assuming that the corporate privilege should not be restricted
to the communications of upper management, exactly which other communications should qualify? *Upjohn* leaves this issue unsettled, and the survey questionnaire did not pursue the point beyond asking the respondents to compare the control group standard with the "broad approach" taken in *Upjohn*. No precise formula is provided by the *Upjohn* opinion itself. In concluding that the corporate privilege should apply, the Court stressed seven characteristics of the communications between *Upjohn*'s employees and its counsel, but it is doubtful that all of the factors would have to be satisfied in all cases. Courts must either opt for the unlimited agency approach suggested by early federal precedents or adhere somewhat closer to *Upjohn* by using some version of the subject matter test.

My own view is that the goal of encouraging corporate managers to authorize open channels of communication between lawyers and employees throughout the organization can be adequately met without a rule that would permit any agent of the corporation to speak for the entity. An agent who is outside the control group should be considered a spokesperson for the corporation only when the subject matter of his communication with counsel concerns his personal responsibilities as a member of the corporate organization. Thus, the most appropriate standard is one which extends

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429 See supra note 389.
431 See supra notes 345-46 and accompanying text.
432 See supra notes 367-76 and accompanying text.

An inappropriate interpretation of the subject matter test was made in Baxter Travenol Laboratories, Inc. v. Lemay, 89 F.R.D. 410 (S.D. Ohio), supplemented, 514 F. Supp. 1156 (S.D. Ohio 1981). In that case, the employee in question had worked for the plaintiff corporation prior to 1978, at which time he became associated with other former employees of the plaintiff in a competing enterprise. When he left the competitors in 1980, he was retained by the plaintiff corporation as a litigation consultant. In that capacity, he provided information to plaintiff's counsel about the activities of plaintiff's competitors during his association with them. Id. at 412. The court recognized that the content of the communications did not concern the employee's job-related duties for the plaintiff corporation, but it held that the communications nevertheless fell within the privilege because the employee's current duty...
the corporate privilege to confidential communications between the corporation's attorney and any member of the control group or any other officer or employee, provided that as to such other individual, the subject matter of the communication concerns his corporate duties and the purpose of the communication relates to legal advice for the corporation.

Limiting eligible communications to those that deal closely with the employee's particular corporate duties maintains the integrity of the principle that the privilege encompasses only communications with the client, not with bystander witnesses, and thus preserves a degree of symmetry with the scope of the privilege as it applies to individuals. An employee who becomes aware of the activities of others within the corporation simply because he is on the job or in proximity to them when he acquires such knowledge is a fortuitous witness to the event. Of course, if it is a regular part of the employee's corporate responsibility to observe and supervise the acts of other employees, his statements to counsel about such matters could qualify for privileged treatment.

was to communicate with counsel for the purpose of securing legal advice for the corporation. Id. at 414. Such a bootstrap approach would enable corporations to convert mere witnesses into sources of privileged information simply by designating them litigation consultants.

See supra note 359 and accompanying text. Corporate rank and title should not be determinative of whether an individual is in the control group, since titles can mean different things in different corporations. See City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa.). What is required is a factually specific inquiry in individual cases to ascertain whether the person communicating with counsel was a true participant in the decision-making process with respect to which legal advice was solicited. In Consolidation Coal Co. v. Bucyrus-Erie Co., 39 Ill. App. 2d 103, 432 N.E.2d 250 (1982), the Illinois Supreme Court defined the standard along these lines by bringing within the control group any "employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority." Id. at 112, 432 N.E.2d at 258.

See supra notes 348-51 and accompanying text.

Some codifications take a broader view that apparently would allow the privilege to apply whenever an employee in one department of the corporation reports to counsel about activities in another department. See, e.g., Ore. R. Evid. 503(1)(d)(A) (any information acquired by employee "during the course of employment"); Restatement of the Law Governing Lawyers § 123(3) (Tent. Draft No. 2, 1989) ("communication concerns a legal matter of interest to the organization"); Unif. R. Evid. 502(a)(2) (1988) (employee makes a communication "while acting in the scope of employment") (emphasis added).

See United States v. AT & T Co., 86 F.R.D. 603, 618 (D.D.C. 1979) (subject matter is within scope of employment if it is directly related to employee's own corporate activities or those of employee's subordinates); Ellenberg v. Tuffy's Div. of Starkist Foods, Inc., 18 Fed. R. Evid. Serv. (Callaghan) 442, 448 (D.Minn. 1985) (in job discrimination lawsuit, co-
An indispensable requirement, of course, is that legal rather than business advice was being sought or offered on behalf of the corporation. This is fundamental to the attorney-client privilege and must be a part of any subject matter test. A showing that the employee was aware of potential legal issues, or that his superior was aware of such issues if the employee is communicating at the superior's direction, should satisfy this component. In addition, confidentiality must have been intended and must be maintained. This element can be adequately met by a showing that the communications were disseminated within the corporation only among those whose corporate function gives them a need to know their content. Both the legal advice and confidentiality issues are pursued in greater depth in the next section of the Article.

Beyond the foregoing essentials, it seems unduly restrictive to require, as some courts have, that the employee's particular communication was directed by his superiors. Such a showing may,
of course, support a finding that the purpose of the communication was to seek legal advice for the corporation. But if an employee voluntarily approaches the corporation's attorney and discloses facts relating to his corporate responsibilities in order to seek resolution of a legal problem of the corporation, the goal of the privilege to increase legal compliance would be well served. Nor should it be indispensable that the exchange of information was actually "necessary" for the particular legal advice being sought; it should be enough that the lawyer or employee reasonably believed that the information would be relevant in resolving the problem for which legal advice was sought. As is well-known to lawyers, only some of the facts related by a client ultimately may be necessary in analyzing the legal issues involved. In sum, it should be sufficient that the purpose of a communication was to obtain or convey legal advice for the corporation, its content was closely related to the employee's corporate duties and dissemination of the communication among other employees was appropriately restricted.

Another issue left unresolved by Upjohn is whether counsel's communications with a former employee, regardless of his prior status in the corporate hierarchy, should fall within the corporate privilege. I submit that they should not. Once the agency relationship has come to an end, there no longer is any conceptual ba-

Privilege was denied for the additional reasons that the communication was a "routine" report and confidentiality was not intended. Id.


See In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 385 n.10 (D.D.C. 1978) (court rejected requirement that a communication, in fact, contain information necessary for legal analysis, "because such an ex post facto approach would discourage full disclosure by an employee who may not know what information is necessary").


See Upjohn Co. v. United States, 449 U.S. 383, 394 n.3 (1981) (Court declined to consider applicability of privilege to interviews with former Upjohn employees because issue had not been addressed by courts below).
sis for treating the former agent as a spokesperson for the principal. From an instrumental standpoint, the current management of the corporation no longer has any influence over whether the individual will speak candidly with counsel. This eliminates one of the principal justifications for extending the privilege to corporations.\(^4\)

Moreover, the corporate privilege is not likely to have any direct influence on the former employee's candor. Current employees might at least be somewhat motivated to be forthcoming by the corporate privilege, even if they know it is not theirs, because they may feel confident that the company, perhaps out of loyalty, will not waive it.\(^4\) A former employee could not possibly have the same expectations; an employer's loyalty is a slender reed upon which to rely once the employment ties are severed. Although a few courts have held that the corporate privilege extends to former employees,\(^4\) the proposition is unsound and is by no means re-

\(^4\) See supra note 428 and accompanying text. The first draft of the proposed Restatement of the Law Governing Lawyers § 123 comment e (Tent. Draft No. 1, 1988) took the unqualified position that the corporate privilege should be available only if the speaker is "in an agency relationship with the organization at the time that the agent communicates." \(^4\) The reasoning was that only during the agency relationship does the principal have the necessary leverage to obtain an agent's cooperation in attorney-client communications. See id. comment d. In the second draft, however, this position was modified so as to extend the corporate privilege to communications by former agents to the extent that they are under a continuing legal obligation to furnish information to the principal. See Restatement of the Law Governing Lawyers § 123 comment e (Tent. Draft No. 2, 1989). The drafters cite section 381, comment f, of Restatement (Second) of Agency (1957), as authority for the proposition that such a legal obligation on the part of former agents may exist. It is doubtful, however, that any such legal obligation would give current management much influence, as a practical matter, over the candor with which the former employee communicates with the corporation's attorney.

\(^4\) See supra notes 208-11 and accompanying text.


Applying California law, however, the court in Connolly Data Sys., Inc. v. Victor Technologies, Inc., 114 F.R.D. 89 (S.D. Cal. 1987), denied application of the corporate privilege to an attorney's communication with a former employee. The court stressed that former employees are not persons "who would ordinarily be utilized" as spokespersons for the corporation and the employee in question was "not the only one" with relevant knowledge about the transaction in question. \(^4\) at 94. The fact that the former employee may have had better recollection than current employees was insufficient, said the court, because an indi-
required by the logic of *Upjohn*. In cases of potential litigation, which is the most likely circumstance in which former employees will be contacted by counsel, the work product doctrine should provide sufficient inducement for diligent investigation by counsel.

VI. PRESERVING THE PRIVILEGE: CONFIDENTIALITY AND THE SEEKING OF LEGAL ASSISTANCE

Lawyers and corporate clients who wish to preserve privilege for their communications should be particularly sensitive to the definitional requirements that the communications (1) originate and remain “in confidence” and (2) relate to the attorney’s providing of “legal” services not “business” advice. According to the judicial respondents in the survey, the absence of confidentiality (due either to waiver or lack of secrecy within the corporation) and the predominantly business nature of the communications are two common grounds for denying claims of privilege in the corporate context. This section of the article presents the findings of the survey and analysis with respect to the maintenance of documentary communications and the mixing of legal and business communications in the corporate attorney-client relationship.

A. The Internal Confidentiality of Documentary Communications

One of the house counsel in the study asserted that “the worst enemy of the attorney-client privilege is the photocopy machine.” He was alluding to the problem of reconciling the notion of confidentiality with the fact that written attorney-client communications are often broadly circulated throughout the corporation. The danger of losing the privilege due to inadequate confidentiality is the most common warning that the lawyers in the study give to corporate clients.

To what extent should clients be required to restrict the intracorporate dissemination of attorney-client communications in order to preserve privilege? In general, secrecy must have existed

vidual client “cannot ask a witness who better remembers the events involved to speak to his or her attorney and then claim the conversation is protected from disclosure.” *Id.*


*See supra* note 189 and accompanying text.

*See supra* table 3, section III.B.3. 240.
when the communication originally took place and must have been maintained thereafter.\textsuperscript{452} Analytically, secrecy in connection with the original attorney-client exchange affects the determination of whether privilege attached at the outset.\textsuperscript{453} This is a straightforward question of confidentiality. Post-communication disclosure to outsiders is more appropriately treated under the rubric of "waiver" of the privilege.\textsuperscript{454} The circumstances in which waiver may occur due to subsequent third-party disclosure are not unique to corporate clients and have become fairly well crystalized in numerous judicial decisions.\textsuperscript{455} On the other hand, determining whether the distribution and maintenance of documentary attorney-client communications within the corporation is itself consis-

\textsuperscript{452} See In re Horowitz, 482 F.2d 72, 81-82 (2d Cir.), cert. denied, 414 U.S. 867 (1973).

\textsuperscript{453} In general, communications made in the known presence of third parties are not privileged. United States v. Landof, 591 F.2d 36, 39 (9th Cir. 1978); Liggett Group Inc. v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 211 (M.D.N.C. 1986). It has long been the rule, however, that the presence of or transmittal through ministerial employees such as secretaries and clerks will not destroy the privilege. See United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

Some courts have extended the charmed circle to include other agents of either the client or the attorney who are deemed "necessary" or "highly useful" in the communications process. See, e.g., id. at 922 (assistance of accountant necessary for lawyer to render legal advice); McCaffrey v. Estate of Brennan, 533 S.W.2d 264, 268 (Mo. App. 1976) (close business associate of client); San Francisco v. Superior Court, 37 Cal. 2d 227, 230-31 P.2d 26, 27 (1951) (physician employed to aid in attorney's preparation of defense).

\textsuperscript{454} Waiver of the attorney-client privilege generally occurs upon "any voluntary disclosure by the client to a third party." In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982); see generally C. McCormick, supra note 97, § 93.

\textsuperscript{455} See, e.g., In re Subpoenas Duces Tecum (Fulbright & Jaworski), 738 F.2d 1367, 1369-70 (D.C. Cir. 1984) (disclosure to SEC as part of its "voluntary compliance program" results in waiver as to other government agencies and private parties); In re John Doe Corp., 675 F.2d 482, 488 (2d Cir. 1982) (waiver occurs if privileged documents are disclosed to accountant for business reasons distinct from assisting lawyer in providing legal services); Derderian v. Polaroid Corp., 121 F.R.D. 13, 15-16 (D. Mass. 1988) (deponent's reliance upon privileged documents to refresh recollection prior to or during deposition may waive privilege depending on circumstances); In re Consolidated Litig. Concerning International Harvester's Disposition of Wisconsin Steel, 666 F. Supp. 1148, 1154-55 (N.D. Ill. 1987) (giving adversary free access to files during discovery constitutes waiver as to privileged documents); Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 329 (N.D. Cal. 1985) ("inadvertent" disclosure of documents to adversary during discovery may constitute waiver depending on circumstances); Panter v. Marshall Field & Co., 80 F.R.D. 718, 720 (N.D. Ill. 1978) (assertion of "advice of counsel" as affirmative defense waives privilege for communications with counsel concerning matter as to which legal advice was sought); ITT v. United Tel. Co., 60 F.R.D. 177, 185-86 (M.D. Fla. 1973) (waiver occurs if client or his attorney testifies to confidential communication or introduces privileged document during trial).

No consensus exists as to the proper standard or scope for waiver. See generally Davidson & Voth, Waiver of the Attorney-Client Privilege, 64 Ore. L. Rev. 637 (1986); Marcus, supra note 124.
tent with secrecy presents a hybrid of the confidentiality and waiver problems and is a matter that has received much less attention in judicial opinions. One commentator aptly defined the issue as follows: "[A]re there persons within the organization who should be prevented from seeing or hearing confidential communications to counsel, or is privacy from the ‘outside’ world sufficient?" It is principally the question of internal confidentiality, rather than third-party disclosure, that is addressed in this study.

Among the few courts that have touched upon the issue, no consensus exists as to what special precautions, if any, a corporation must have taken in order to justify a finding of confidentiality. Under the control group approach for identifying the corporate representatives whose communications with counsel qualify for privilege, the confidentiality issue is fairly simple: distribution to employees outside the control group is tantamount to third-party disclosure and thus destroys the applicability of privilege. Some control group adherents have held that the mere accessibility of attorney-client documents to noncontrol group employees destroys confidentiality.

With the diminished status of the control group standard in the wake of Upjohn, the number of employees who may plausibly be in the chain of distribution of attorney-client communications is unclear. In Upjohn itself no confidentiality issue was presented because apparently no one other than the company’s lawyers reviewed counsel’s interview questionnaires. The test for internal confidentiality adopted by a few courts is a “need-to-know” standard. Does this standard also require the segregation

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467 See supra notes 358-66 and accompanying text.


469 See, e.g., Natta v. Hogan, 392 F.2d 686, 693 (10th Cir. 1968); Jarvis, Inc. v. AT&T, 84 F.R.D. 286, 292 (D. Colo. 1979).

470 See supra notes 377-93 and accompanying text.

461 See Upjohn Co. v. United States, 449 U.S. 383, 395 n.5 (1981). The Court observed: "Pursuant to explicit instructions from the Chairman of the Board, the communications were considered ‘highly confidential’ when made ... and have been kept confidential by the company." Id. at 395.

462 Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 609 (8th Cir. 1978) (en banc);
of attorney-client documents in the corporate files so as to prevent access by nonessential personnel? Although not necessarily the determinative factor, some courts have cited the failure to label documents "confidential" or to implement specialized filing systems for the segregation of documents as indicative of a lack of confidentiality. The federal district court in James Julian Inc. v. Raytheon Co., however, rejected the notion that the potential reading of a privileged document by unauthorized personnel renders the document nonconfidential. Requiring corporations to maintain two sets of files with screening committees to ascertain "the need of each employee to know the contents of any requested document[s]" was said to be impractical and unnecessary under the case law.

1. Findings

How do the views expressed in the case law square with existing corporate practices? To explore this issue, a series of interview questions asked the respondents in the samples of house counsel and corporate executives to describe the procedures followed by the corporations employing them. The data from the two samples were pooled, thus providing information about 102 large

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466 Id. at 142.
corporations headquartered in New York City.\textsuperscript{467}

The first question sought to ascertain the extent to which non-legal personnel within corporations maintain attorney-client communications in files physically separated from general business files. As shown in table 6, only nine of the 102 corporations represented in the survey (8.8\%) maintain segregated files of this nature on a routine basis. Among the majority of respondents whose employers do not routinely segregate their files, several indicated that all memoranda and correspondence, including communications to or from counsel, are intermingled in “topical” or “subject matter” files or folders. Some of the house counsel noted that a policy of routine segregation would not be feasible. “Business would come to a halt,” according to one, and another felt that “the business people just wouldn’t do it.” Forty-six respondents in the combined samples of house counsel and executives, however, said that although segregation is not a routine practice, attorney-client documentary communications are kept separate from general business files “in particular matters.” Potential litigation and sensitive matters, such as mergers and acquisitions or special investigations, in that order, were the two most frequently mentioned circumstances in which segregation was said to occur. Several house counsel and executives reported that as to these matters, documentary attorney-client communications are kept either in the files of the internal legal department or “the desk drawer” of the executive.\textsuperscript{468}

The second question relating to confidentiality was whether the corporate employers of the house counsel and executives had a specific policy or practice that routinely limited the personnel within the company who could have access to documentary com-

\textsuperscript{467} See supra note 43.

Because the outside counsel in the study represented so many different corporate clients, see supra note 47, no attempt was made to learn from them the practices followed by their clients. Instead, the law firm partners were asked whether they had ever advised their corporate clients to follow certain procedures and how often they themselves followed the practice of labelling their written communications. The results of these questions are reported in footnotes 468, 470 and 471.

\textsuperscript{468} Similar results, not displayed in table 6, were obtained in a question put to the outside counsel. When asked whether they had ever advised any of their corporate clients to maintain, on a routine basis, separate files for documentary attorney-client communications, only two of the 52 respondents answered affirmatively. 21 partners (40.4\% of the sample), however, said that they had advised segregation in matters relating to litigation or sensitive circumstances.
munications with counsel. As indicated in table 6, only one in four

TABLE 6. Corporations in Which Special Procedures Regarding Documentary Attorney-Client Communications Are Followed.
(Combined Samples, N=102)

<table>
<thead>
<tr>
<th>Procedure</th>
<th>Number of Corporations</th>
<th>Percent of Corporations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Separate files are maintained:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. on routine basis,</td>
<td>9</td>
<td>8.8</td>
</tr>
<tr>
<td>b. in particular matters.</td>
<td>46</td>
<td>45.1</td>
</tr>
<tr>
<td>Totals</td>
<td>55</td>
<td>53.9%</td>
</tr>
<tr>
<td>2. Access of corporate personnel is limited:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. on routine basis,</td>
<td>25</td>
<td>24.5</td>
</tr>
<tr>
<td>b. in particular matters.</td>
<td>51</td>
<td>50.0</td>
</tr>
<tr>
<td>Totals</td>
<td>76</td>
<td>74.5%</td>
</tr>
<tr>
<td>3. Labels or legends are placed on documents or special language is used:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. on routine basis,</td>
<td>13</td>
<td>12.7</td>
</tr>
<tr>
<td>b. in particular matters.</td>
<td>67</td>
<td>65.7</td>
</tr>
<tr>
<td>Totals</td>
<td>80</td>
<td>78.4%</td>
</tr>
</tbody>
</table>

of the corporations had such a routine practice. When asked to whom access was restricted, all but two of the twenty-five respondents employed by these corporations replied that the standard was based on the employee's "need to know." Many of them noted that this is the same standard they use for "all confidential business matters." A number of house counsel and executives pointed out that although their companies had no routine policies for restricting access to attorney-client communications per se, executives have exclusive access to their own files, which is where such communications are most likely to be stored. "An executive's correspondence files are not accessible to other employees," was a typical description of routine corporate policy. Similarly, some respondents noted that access to certain documents dealing with confidential matters, many of which would include communica-

469 Two other respondents said that attorney-client communications were routinely restricted to top management.
tions with counsel, is restricted for reasons of trade secrecy.

An additional 50% of the corporations in the study limit employee access to documentary communications with counsel in particular circumstances. As in the case of segregation, the circumstances that were said by most of the respondents to trigger restricted access were litigation and sensitive matters. In such cases, the most commonly used standard, according to twenty-eight of the fifty-one respondents (54.9%) whose employers limit access in particular matters, was that of the employee's need to know. Others said that in their companies access was limited, in order of frequency, either to specifically named individuals, counsel, or top management.470

The final area of investigation relating to the handling of attorney-client communications was the practice of using stamps, labels or legends on documents at the time of their preparation, indicating that they embody a privileged communication. Table 6 shows that although not a routine practice in most organizations, use is frequently made of labels and legends in particular circumstances. As with the practices of segregating documents and restricting access, labelling was most often done in connection with litigation and sensitive matters.471

470 In connection with the issue of restricted access, the outside counsel were asked whether they had ever advised corporate clients to limit the business personnel who could have access to documentary communications with counsel. The results parallel those obtained from the house counsel and corporate executives. Only two partners had advised routine limitations on access, but thirty-two (61.5% of the sample) had advised limitations in litigation and sensitive matters. The outside counsel said that they used the following criteria for limiting access, in descending order of frequency: need to know; specifically named individuals; top management; counsel only. A few of the law firm partners who had never given advice regarding restricted access said that they leave such matters to house counsel. Also, like some of the executives and house counsel, a few partners said that restricting access to those with a need to know is not motivated by the attorney-client privilege but by concern over trade secrecy.

The survey questions relating to the accessibility of written communications provoked spontaneous grumblings from one of every four attorneys in the combined samples of house counsel and outside counsel to the effect that corporations "put too much in writing." According to these lawyers, writings leave "smoking guns," are "misinterpreted by adversaries," and are "notoriously inaccurate" in their analysis. Several said that they discourage corporate representatives from putting facts or thoughts in writing, regardless of whether they involve communications to lawyers, in order to avoid creation of a "paper trail" that could later haunt the client. Others warn their clients that if they put something in writing, even to a lawyer, they should assume that "it will see the light of day in court" and should choose their language accordingly.

471 Outside counsel were much less enthusiastic than were the house counsel with regard to the practice of using privilege notations. Whereas 94% of the fifty respondents in
The most frequently mentioned procedure was the stamping or labelling of memoranda from house counsel to corporate representatives as "privileged" or "confidential." This was the practice in all of the corporations reporting the use of labelling on a routine basis\(^\text{472}\) and was the practice in fifty-eight of the sixty-seven corporations in which labelling was done on an ad hoc basis. Among the examples mentioned by the respondents were captions such as "PRIVILEGED," "CONFIDENTIAL," or "RESTRICTED" and phrases with slightly greater detail such as "CONFIDENTIAL — Subject to Attorney-Client Privilege," "PRIVILEGED AND CONFIDENTIAL — Attorney-Client Communication," or "CONFIDENTIAL — Do Not Circulate." Some reported that lawyers indicate at the top of a memorandum that distribution of the writing should be limited to a particular group of specified individuals unless counsel is first consulted or that the document should be returned to counsel without copying after having been read. Others said that a privilege notation by itself is a signal that the memorandum is for the "recipient's eyes only" or that circulation is to be on a need-to-know basis.\(^\text{473}\)

Stamping or labelling communications to counsel by corporate representatives was much less common. It was mentioned as a practice in only four of the thirteen corporations reporting the use of notations in routine matters and in ten of the sixty-seven corporations that use privilege notations in particular matters. Some of the house counsel suggested they do not encourage business personnel to make privilege notations because such employees cannot be expected to know when a communication may properly be characterized as privileged. These lawyers feared that clients might stamp all communications to counsel as privileged, including purely business matters, and thereby dilute the value of notations on truly privileged documents. In lieu of directing corporate representatives to label their memoranda to counsel, in six corporations the house counsel urge that communications to lawyers be introduced with language such as "This is a request for legal advice" or

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\(^{472}\) Most of the house counsel who reported "routine" use of labels qualified their responses by stressing that labels are applied only to communications relating to legal advice.

\(^{473}\) In one company, house counsel reported that each memorandum from the legal department relating to legal advice bears a legend at the top of the document explaining the need-to-know standard for distribution.
"Written on the advice of counsel."

Regardless of who makes the notations, does the practice carry any evidentiary weight? Some of the lawyers in the study volunteered that labelling written attorney-client communications at the time of their preparation may prove helpful in establishing the privileged character of the documents in those instances in which they become relevant in future litigation. According to these lawyers, a court may infer from the notations that confidentiality and legal services—not business advice—were intended. Since judicial opinions on the evidentiary value of the practice are scarce, the twenty-eight judges and magistrates in the study were asked their opinion. Seventeen of the judicial respondents (60.7%) said that legends or stamps would have little or no influence on their decision as to the privileged status of a document. Some of these respondents criticized the practice as one that is "overdone" or "purely self-serving." These judicial officers would look solely to the content and subject matter of the communication in resolving the privilege question. Ten of the jurists (35.7%), on the other hand, said privilege notations have some evidentiary value in showing that confidentiality was intended: "Legends are not decisive, but they are helpful," was a typical comment.

2. Analysis

Several conclusions are suggested by the findings with respect to the care and maintenance of documentary attorney-client com-

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474 Some of the lawyers in the study said that they discourage the practice of labelling for evidentiary reasons of a different sort. A few argued, for example, that using privilege notations on a routine basis could result in negative inferences that confidentiality was not intended as to documents inadvertently not labelled. Another observation was that if a labelled document were admitted into evidence either as a result of waiver or a court's determination that privilege did not apply, the label might cause the fact-finder to place undue emphasis on the document or to infer a "consciousness of guilt." These objections to the practice of labelling were voiced more often by outside counsel than house counsel. See supra note 471. In any event, a majority of the attorneys in both samples seemed to think that the potential benefits of labelling outweighed whatever harm might result from adverse inferences in litigation.

475 Three of these judges, however, recognized that notations may be valuable for lawyers and clients in preventing waiver of the privilege. Two others said that notations on a document might cause them to consider the document a little more carefully than an unlabelled document. One judge said that he was more likely to be influenced by prefatory language in a memorandum to the effect that it was a request for legal advice than by a simple notation of confidentiality.

476 Four of these respondents indicated that they give "presumptive" effect to labelled documents. One judge had no opinion on the issue.
munications. It appears that the need-to-know standard, which has been applied by some courts as the test for confidentiality in the corporate setting, is consistent with actual practices in a significant number of corporations. It is a standard that both lawyers and corporate executives seem to understand and have come to expect as the governing standard for confidentiality.

Measuring internal confidentiality by the need-to-know standard is also conceptually appropriate. Corporate personnel who have no need to know the contents of a particular attorney-client communication in order to perform specific corporate duties or to assist the lawyer in giving legal advice to the corporation are "outsiders" to whom distribution rightfully should destroy confidentiality. The danger of disclosure to persons outside the corporation grows in proportion to the number of people within the corporation who are privy to the communication. When distribution within the corporation has been made to persons with no role to play in acting upon the advice of counsel, therefore, a strong inference arises that the promise of secrecy implicit in the privilege was not the motivating force behind the communications. The number of individuals with a need to know will, of course, vary from case to case depending on such factors as the size of the corporation, its internal management and the subject matter of the communication. It is accordingly appropriate to impose on the corporation the burden of detailing why particular individuals had a need to know the contents of the communication in question.

Should corporations be required in all cases to show that attorney-client communications were physically segregated from nonlegal communications to ensure compliance with a need-to-know standard of confidentiality? Of all the possible precautions for the maintenance of confidentiality, segregation of documents was performed by the least number of corporations in the study.

477 See supra note 462. The standard has also been advocated by commentators. See, e.g., 2 J. Weinstein & M. Berger, supra note 17, § 503 (b)[04], at 503-49 to -50; Sexton, supra note 14, at 503-04; Note, The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment, 56 Nw. U.L. Rev. 235, 248 (1961); see also Restatement of the Law Governing Lawyers § 123(4)(b) (Tent. Draft No. 2, 1989).

478 See supra notes 469-70 and accompanying text.

479 See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980) ("[i]f facts have been made known to persons other than those who need to know them, there is nothing on which to base a conclusion that they are confidential").
and only then in litigation or sensitive matters. An across-the-board requirement of segregation apparently would disrupt the practices of a large number of organizations and impose an administrative burden that probably could not be effectively policed by counsel.

If corporate realities are to be reflected in the law, courts should consider segregation merely as one factor in determining whether confidentiality was intended and maintained. The intermingling of privileged documents and nonlegal business communications should not, standing alone, result in a loss of privilege. It should be sufficient that a company has taken reasonable steps to assure that access and distribution are in fact restricted to those with a need to know. A number of respondents in the study, for example, pointed out that an executive's files are subject to his sole control, and as a practical matter other personnel have neither access to such files nor authority to go through them. A showing of segregation would appear to be unnecessary in such cases.

On the other hand, if attorney-client communications are placed in general files without any indicia of their confidential nature, and are easily accessible by employees who have no reasonable need to know their contents, an inference surely may be drawn that secrecy was not intended.

Labelling documents "confidential" or "privileged" at the time of their preparation obviously does not make them so, but the results of the study suggest that practitioners would be well advised to use such procedures for several reasons. First, although some judges apparently ignore confidentiality notations, others give them weight as some evidence that confidentiality was intended. Second, unlike the segregation of documents, making notations apparently is an administratively simple task to perform, as evi-

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480 See supra table 6 and note 488 and accompanying text.
481 See, e.g., Dunn Chem. Co. v. Sybron Corp., [1975-2] Trade Cas. (CCH) ¶ 60,561, at 67,461 (S.D.N.Y. 1975) (sufficient confidentiality where vice president's correspondence with attorney was kept in officer's personal corporate files; correspondence was not segregated, but files were within officer's personal control "and apparently were not openly available to just anyone, either within or without the corporation").

A requirement of segregation might even prove counterproductive to the policies advanced by the privilege. Business decisions often must be made with dispatch. In order to take appropriate action, however, a business executive should have all relevant papers before him, including any legal opinions on the matter. If legal opinions are locked away in a separate cabinet, they may be inadvertently overlooked.

482 See supra note 476 and accompanying text.
denced by the fact that so many corporations in the study do it.\(^{483}\)
Such labels could help support a showing of intent in situations in which the physical segregation of documents was not undertaken.
Third, regardless of whether evidentiary value is attributed to the label itself, a label may actually keep access limited. Several respondents in the study indicated that notations are a cue to representatives that distribution should be restricted. Proof that a notation has this effect in a particular corporation will help establish that a need-to-know standard was in fact followed. Finally, placing notations on documents may help avoid waiver of the privilege in the event the documents become relevant in future litigation.\(^{484}\)
Several respondents noted that during pretrial document production, corporate officials and paralegals can be instructed to withdraw labelled documents from the files for further examination by counsel.

In sum, the results of the study suggest the appropriateness of a need-to-know standard for internal confidentiality. This, in turn, will necessitate case-by-case analysis as to whether reasonable care was taken to limit disclosure to employees with a need to know.\(^{485}\)
A showing that appropriate precautions existed is a burden that may fairly be placed on the corporation, which alone has access to the proof concerning its internal procedures.\(^{486}\)

\(^{483}\) See supra table 6 & notes 471-73 and accompanying text.

\(^{484}\) During pretrial discovery, documents covered by the attorney-client privilege may be inadvertently disclosed to adversaries in response to demands for document production. See generally Marcus, supra note 124, at 1633-37. Courts have taken three different approaches in determining whether such inadvertent disclosure constitutes a waiver of the privilege for the particular documents, thus precluding a protective order for return of the documents. One line of authority holds that waiver never occurs in such cases because waiver requires intent, which is lacking. See Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982). At the opposite pole are courts which hold that inadvertent disclosure is always a waiver because absolute confidentiality is required in order to preserve the privilege. See International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988). The middle ground is that each case should be determined separately, taking into account such factors as the reasonableness of the precautions that were taken to prevent disclosure, the number of documents disclosed, and the speed with which return of the documents is sought upon discovery of the inadvertent disclosure. See, e.g., Parkway Gallery Furniture Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 50 (M.D.N.C. 1987).

\(^{485}\) See In re Horowitz, 482 F.2d 72, 82 n.10 (2d Cir.), cert. denied, 414 U.S. 867 (1973) ("determination whether there has been a loss of confidentiality may depend on the facts of each particular case"); see also O'Leary v. Purcell Co., 108 F.R.D. 641, 646 (M.D.N.C. 1985) (test for confidentiality is whether "reasonable precautions" were taken); Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 259 (N.D. Ill. 1981) ("reasonable steps").

\(^{486}\) See In re Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 870
B. Business Communications

Attorney-client communications are not always confined to legal matters; from time to time, the lawyer's business advice is sought and given. Indeed, lawyers' codes of ethics have declared it appropriate for an attorney to make the client aware of pertinent nonlegal factors. The involvement of lawyers in business discussions, however, may jeopardize the applicability of privilege because of the well-settled principle that purely business communications between attorneys and their clients are not protected by privilege. Although the rule is easily stated, the issue becomes

(D. Minn. 1979) (corporation must provide information about its own internal security practices sufficient to support finding of confidentiality); Gorzegno v. Maguire, 62 F.R.D. 617, 620-21 (S.D.N.Y. 1973) (corporation bears burden of proving that documentary attorney-client communications were "in fact regarded and treated as confidential"); 2 J. Weinstein & M. Berger, supra note 17, ¶ 503(b)(04), at 503-49 to 503-50.

Although the rule is easily stated, the issue becomes

The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the public interest that the lawyer should regard himself as more than predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. Id. Nevertheless, business advice is perhaps the most likely type of nonlegal counseling that a lawyer will provide in the corporate context. See Nelson, Ideology, Practice and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm, 37 STAN. L. REV. 503, 533-34 (1985) (in study of corporate law firms in Chicago, predominant situation in which lawyers were found to have given nonlegal advice was in connection with clients' business decisions).


Few authorities have given any reason for the exclusion of business matters from the attorney-client privilege, see 24 C. Wright & K. Graham, supra note 63, § 5478, at 209-10, but one court suggested that no privilege is thought necessary to induce business people to make business communications. SCM Corp. v. Xerox Corp., 30 F.R.D. 508, 517 (D. Conn.), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976); see also Yale Study, supra note 3, at 1251 (privilege "not needed to encourage business communications"). The rule may also be rooted in the notion that the lawyers' independent judgment as a legal adviser becomes diluted when he becomes involved in the client's business decisions, thus making him less an attorney and more a business person. See 24 C. Wright & K. Graham, supra note 63, §
complicated when the communication involves a mixture of legal and business considerations as is often the case in counseling at the transactional stage of corporate affairs. Some of the judges and magistrates in the survey, for example, volunteered that determining whether a communication relating to a corporate transaction involves business or legal advice is one of the most problematical aspects of applying the attorney-client privilege. In reported opinions, most courts have resolved the issue of mixed communications by applying privilege only when legal considerations are "predominant." In this connection, it was previously noted that courts may be more inclined to characterize the communications of house counsel than outside counsel as predominantly business in nature.

A recurring situation in which the legal/business ambiguity has arisen in the caselaw is in connection with a client's unsolicited communication of business information to counsel without an explicit request for legal advice. Pre-existing corporate records do not become privileged merely by placing them in the custody of a lawyer and courts have also denied the applicability of privilege to a business memorandum sent by one corporate officer to another with a copy to counsel if the communication is found to be merely part of a business dialogue. On the other hand, courts have sometimes characterized the transmittal of business correspondence to attorneys as an "implied request" for legal advice, thereby entitling the papers to privileged treatment.

5478, at 210.

489 See supra note 182.


491 See supra notes 292-94 and accompanying text.


493 See, e.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 403-04 (7th Cir. 1987). Similarly, documents prepared for simultaneous review by legal and nonlegal personnel may be denied the benefit of privilege if business considerations are viewed as the primary inducement for the communications. See, e.g., FTC v. TRW, Inc., 479 F. Supp. 160, 163 (D.D.C. 1979).

CORPORATE PRIVILEGE STUDY

Is the giving of business advice a common practice among corporate attorneys? Do corporate clients want their lawyers to infuse legal advice with practical business considerations? Do lawyers segregate business from legal advice? Are house counsel more likely than outside counsel to give business advice? Is business information routinely "funneled" through attorneys' offices in an attempt to cloak the documents with privilege? The survey results suggest that a great deal of business information indeed is exchanged between attorneys and clients in the corporate context, but they contain little evidence of conscious attempts to create privilege for such communications.

1. Findings

When asked whether they would characterize any of the advice they give to their corporate clients as "business advice," the overwhelming majority of the lawyers in the study—ninety-one, or 89.2%—answered "yes." Some of these attorneys at first hesitated to respond to the question, saying that they could not distinguish legal from business advice in their area of practice, but upon reflection they conceded that some of their advice was indeed of a business nature. In addition, the lawyers who answered affirmatively did not share the same degree of enthusiasm for giving business advice. One segment of respondents volunteered that they "avoid" or "resist" giving business advice and do so only because the client asks for it or they "feel compelled" because of "a vacuum." In contrast to the reluctant advisers were several respondents who indicated eagerness to give business advice. Some of these attorneys said that their personal experience in handling particular types of transactions made them especially well qualified to give a broad range of advice. "My clients expect me to serve as a perceptive businessman," declared one of the outside counsel. Another partner observed that clients need to be "walked through" transactions from beginning to end and that the lawyer's counseling necessarily entails the giving of both business and legal advice. Surprisingly, even some of the litigators, who may have fewer op-
opportunities to give business advice,487 displayed enthusiasm for raising nonlegal factors with clients. Most commonly, the litigators said that they raise business considerations in the context of discussions about dispute settlement.

Between the two poles of reluctance and enthusiasm about the giving of business advice were respondents who expressed no strong feelings on the matter. Several of these attorneys stated that whether they give business advice is dependent on the topic or the particular corporate representative with whom they are dealing. Another recurring comment was that business considerations "creep" into legal advice because of the "inevitable" mixture of law and business in corporate representation.488

Based on the results of the pretest, no attempt was made in the final sample to obtain precise percentages as to the amount of business advice given by the attorneys. Rather, the ninety-one attorneys who had given business advice were asked to indicate in broad terms how often they had done so. Choosing from three alternative response categories, 47.3% of the attorneys said "frequently," 42.9% chose "occasionally" and 9.9% indicated "rarely."

Do corporate clients want business advice from their lawyers? Nearly four of every five corporate executives in the survey (78.8%) answered "yes" to this question. "We want legal advice tempered by practical business considerations," was a comment that summarizes the view of several executives. On the other hand, some executives qualified their answers with the caveat that business advice is welcome only from particular attorneys, such as those who are "senior" or "experienced." A similar opinion was expressed by executives who said business advice from attorneys is desirable only "upon request." In a somewhat jocular tone, a few commented that they often receive business advice from lawyers

487 See Nelson, supra note 487, at 532.

488 The ninety-one attorneys who said that they had given business advice were asked in an open-ended question to describe the nature of their advice. Some provided multiple responses. Their descriptions, with an indication of the percentage of respondents who gave each type of response, are as follows: (1) describes legal options and alternative courses of action that are practical from a business perspective (38.5%); (2) volunteers business evaluation of a transaction or litigation (33.0%); (3) gives business judgment in connection with legal advice when asked (31.9%); (4) gives advice in which business and legal considerations are inextricably mixed (22.0%); and (5) gives general business advice (e.g., marketing, pricing, plant location) (19.8%). It is noteworthy that the type of business advice most likely to be characterized as "pure" business advice—the fifth category in the list—was the type mentioned by the fewest number of attorneys. Most of the descriptions are indicative of a mixture of legal and business considerations.
even if they do not want it. Indeed, all but one of the fifty-two executives indicated that lawyers had given their companies business advice from time to time: twenty-four (46.2%) said attorneys “frequently” give such advice; twenty (38.5%) said “occasionally” and seven (13.5%) said “rarely.”

Another recurring comment of the executives who indicated willingness to hear the lawyer’s business point of view was that lawyers should distinguish business advice from legal advice. What is the actual practice of corporate lawyers in this regard? The ninety-one attorneys in the study who said they give business advice were asked to indicate the frequency with which they explicitly segregate it from their legal advice. Twenty-three (25.6%) indicated they “always” do so, twenty-four (26.7%) answered “frequently,” fourteen (15.6%) said “occasionally,” twelve (13.3%) said “rarely” and seventeen (18.9%) said they “never” explicitly set apart the two types of advice. Thus, a clear majority—roughly two of every three attorneys—segregate at least occasionally, and only one-third seldom or never do so. Many of the attorneys who indicated they infrequently or never segregate their advice volunteered one of two alternative explanations: (1) corporate representatives “can usually tell from the context” whether the advice is business or legal; or (2) the precise nature of the advice is “unclear” because it contains a mixture of business and legal considerations. Those who segregate on a more frequent basis volunteered observations such as the following: “I don’t want the client to think my personal opinion is a legal opinion”; “I segregate so they can weigh what I’m saying”; “If an officer would resent getting my business judgment, I preface my remarks with an indication that I’m ‘wearing my business hat’”; “I segregate in order to preserve my role as lawyer”; “I always separate my advice because I don’t want to trespass on the client’s responsibility to make the ultimate business decision.” A few specifically pointed out that they were not motivated by the privilege but by the desire to caution the client not to mistake their business judgment for a legal mandate.

As to whether house counsel in fact give more business advice than do outside counsel, the survey results are mixed. For example, no statistically significant variation appeared in the responses of the house counsel and outside counsel with respect to the fre-

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499 Only 90 responses are reported because of one missing case.
frequency with which they give business advice in the course of providing legal services. Indeed, some of the volunteered comments of the law firm partners, particularly nonlitigators, suggest that they may provide even more business counseling than do in-house attorneys. One such respondent, for example, in a statement that echoed those of other nonlitigators, declared: "About 95% of what I do in putting a deal together for a corporate client is business in nature." On the other hand, when asked to give their view of the matter, 76.5% of the corporate executives said that their companies received business advice "more often" from house counsel than from outside counsel. This perception may be attributable, however, to the fact that most of the executives in the survey had had more frequent contact with house counsel than outside counsel. Some of the executives pointed out, for example, that in-house attorneys give business advice more often because "they are in close proximity" or are "more likely to attend committee meetings." The actual ratio of business advice to legal advice as between the two types of attorneys was said by some of these executives to be about the same. The respondents who thought that more or about the same amount of business advice is given by outside counsel explained that outside counsel have "greater expertise" in specialty areas, such as acquisitions.

The position of some house counsel on the "management team" may also affect perceptions as to the frequency with which they give business advice. Among the fifty respondents in the house counsel sample, for example, thirty-six (72.0%) indicated that they perform some amount of nonlegal work for their employers. The performance of nonlegal duties was especially prevalent among the chief legal officers: thirty-three of the thirty-seven respondents with the title of General Counsel (89.2%) devoted a por-

\[\text{supra notes 54-57 and accompanying text.}\]
tion of their time to nonlegal activities for their corporations, while only three of the thirteen lower-ranking respondents (23.1%) did so. The thirty-six respondents, some of whom performed multiple nonlegal duties, described their activities as follows: twenty-two (61.1%) served as corporate secretary; thirteen (36.1%) participated in business planning; eight (22.2%) served on one or more management committees; seven (19.4%) supervised one or more nonlegal departments; and seven (19.4%) engaged in miscellaneous corporate activities such as lobbying and public relations. The median percentage of time devoted by these attorneys to nonlegal duties was twenty percent. Thus, while the ratio of business advice to legal advice as between house counsel and outside counsel may be about the same when house counsel is performing legal services, an in-house attorney's overall participation in the business affairs of the company may well be higher if the attorney has an additional nonlegal role to play.

To obtain a sense of the general frequency with which business communications are routed to counsel, all of the attorneys in the study were asked to indicate, in general terms, how often employees had sent them copies of business correspondence or memoranda without specifically requesting legal advice. Forty of the 102 attorneys who were interviewed (39.2%) said they had "frequently" received business communications of this nature, thirty-four (33.3%) said "occasionally," and nineteen (18.6%) said the instances were "rare." Only nine attorneys (8.8%) had "never" received such communications. In the interests of simplification, the question was put to the executives in the following form: "Have any managers or employees in your company ever made it a practice regularly to send copies of their business correspondence or memoranda to in-house counsel without a specific request for legal advice?" Twenty-two executives (42.3%) answered "yes," twenty-eight (53.8%) answered "no," and two (3.8%) were unable to say.

In an open-ended question, the respondents (both lawyers and executives) who had experienced the phenomenon were asked to state the purposes behind the sending of business correspondence to counsel. The three reasons mentioned most frequently overall, in descending order, were: (1) to inform the lawyer of develop-
ments in particular matters as to which legal assistance previously had been provided or was currently being sought; (2) to obtain the lawyer's comments on any legal problems the lawyer may perceive; and (3) to keep the lawyer informed about general corporate business.

With respect to the second and third purposes, statistically significant variations appeared in the responses of house counsel and outside counsel. Whereas eighteen of forty-four house counsel (40.9%) said that clients seek their comments on any legal problems the lawyer may receive, only five of forty-nine outside counsel (10.2%) mentioned this purpose. This difference may be explained by the modern role played by house counsel in practicing "preventive law." Other research shows that in-house attorneys have increasingly become involved in routine corporate activity in order to identify and prevent legal difficulties before they arise. Several house counsel in the study stressed that "implicit" in their receipt of a great many business communications is the question, "Do you see any problems here?" Another frequent observation was that the business people "may not be sure of what they're doing" so they "run the matter by our office." These observations were corroborated by several executives who said that they send copies of business correspondence to house counsel "in anticipation of legal problems," "for monitoring," "for compliance," "to make counsel aware of anything with legal implications, such as personnel, ERISA or labor matters," "in anticipation of legal problems," or "to be sure we're not infringing antitrust laws." Only a handful of the outside counsel, however, reported receiving communications for this purpose. More common were replies such as the following: "As an outside lawyer, I'm not on the 'mailing list' unless I'm handling a particular matter."

Similarly, while eighteen of forty-four house counsel (40.9%) said that they receive business materials in order to be kept apprised of general corporate activity, only seven of forty-nine law firm partners (14.3%) said that they receive such communications. The difference is perhaps attributable both to house counsel's preventive law function and to the managerial role played by most of the house counsel in the survey. All but one of the eighteen house

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503 See supra note 240. Outside counsel, in contrast, tend to be retained by large corporations to perform litigation and other specialized tasks on an ad hoc basis. See supra notes 280-91 and accompanying text.
counsel who said they receive general business information held the title of General Counsel and also served as a corporate officer. Sixteen of these General Counsel also held the rank of Vice President or higher, and one was Corporate Secretary.

"A lot of general material comes to me for informational purposes because I'm a member of senior management," was the typical explanation of several of these respondents. Some added that they are impliedly being asked to spot any legal problems. The few outside counsel who said they routinely receive business correspondence for informational purposes attributed it either to a "long-standing relationship with a particular client" or the client's desire for "business input."

Noticeably absent from the volunteered reasons for sending copies of business memoranda to counsel was any mention of a desire to obtain privilege for the documents. As a follow-up, therefore, all of the lawyers were asked how often they thought employees had sent copies of documents to their office solely to protect the documents with privilege; the executives were asked if they knew whether any managers or employees had ever sent "copies of business documents to in-house counsel for the primary purpose of obtaining the protections of the attorney-client privilege for the documents." Three-fourths of the lawyers (76 of 102) said that their clients had never sent documents to them solely for privilege purposes, and the majority of the remaining quarter said that this "rarely" occurred. Seventy-six point nine percent of the executives (40 of 52) said they were unaware of any such instances in their companies.

Most of the unsolicited comments of the lawyers who had never been sent documents solely for privilege purposes were to the effect that their clients were "too unsophisticated" to think of this practice or that clients "don't think in terms of attorney-client privilege." Most of the lawyers who reported instances of receiving documents solely for privilege purposes were quick to add that they had disabused their clients of the notion that privilege would apply.

2. Analysis

Although the results of the inquiries into the frequency with which attorneys give business advice lack quantitative precision,
they nonetheless suggest that such advice is liberally given both by high ranking members of internal legal departments and law firm partners. Corporate clients apparently want lawyers—at least those with experience—to include business perspectives in their advice, and lawyers probably enhance the quality of their services when they do. Extension of the attorney-client privilege to business communications, however, would be unwarranted. Since business exchanges between lawyers and corporate managers flourish despite the long-standing unavailability of the attorney-client privilege, no basis exists for applying the privilege to such communications. Any broader approach would extinguish a source of potentially relevant evidence without any corresponding benefit in facilitating open communications between lawyer and client.

Few would contest the foregoing conclusion as it relates to communications that are "purely" business in nature. The results of the survey, however, show that lawyer-client exchanges frequently involve a mixture of legal and business considerations. How should the privilege issue be resolved when business and legal considerations appear in the same communication? A commendable solution—one practiced by some of the judicial respondents in the study—would be for courts to sever the business content from the legal content and order production only of the former, whenever such procedure is feasible. If severance is not possible because business and legal considerations are too closely interwoven, the "predominant purpose" test is an appropriate compromise between the overinclusiveness that would result if all such communications were deemed privileged and the underinclusiveness that would result if privilege were always denied. When mixed communications are motivated predominantly by the desire to receive or give legal assistance, they should be eligible for privilege in toto; if motivated, however, predominantly by nonlegal considerations,

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806 See supra notes 495-98 and accompanying text.
807 See supra note 488.
808 See supra note 498 and accompanying text.
809 Only a few reported decisions have made reference to the practice of severance of portions of a single document. See, e.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 403 (8th Cir. 1987) (special master apparently "carefully applied" law "to the point of redacting sections of privileged material from within individual documents"); see also Cuno, Inc. v. Pall Corp., 121 F.R.D. 199, 205-07 (E.D.N.Y. 1988) (magistrate's rulings with respect to applicability of privilege to particular documents include paragraph-by-paragraph excisions).
810 See supra note 490 and accompanying text.
811 See Sexton, supra note 114, at 490-91.
such communications probably would have occurred without the inducement of privilege and should be fully discoverable. The test is imprecise, to be sure, but it is consistent with the purpose of the privilege to facilitate the giving of legal advice, not to promote the conducting of business.\footnote{See Fisher v. United States, 425 U.S. 391, 403 (1976) (attorney-client privilege “protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege”).}

Because business communications occur on such a frequent basis in the corporate setting, corporate parties claiming privilege rightfully should bear the burden of proving affirmatively that the seeking or giving of legal assistance was the predominant purpose of particular communications. The corporate claimant has better access than outsiders to the proof and it is responsible, in a sense, for the ambiguity created by the intermingling of business and legal matters.\footnote{See Simon, supra note 7, at 978. “Since the client in such a case has placed the attorney in a dual role where his true colors are hard to perceive, it should be up to the client . . . to satisfy the court that a particular communication qualifies for protection . . . .” Id.} One federal court of appeals, however, relying upon Wigmore, has held that matters referred by corporate clients to lawyers are “prima facie” for legal services.\footnote{Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1978) (en banc). The court quotes 8 J. Wigmore, supra note 2, § 2296, at 566-67:

[A] matter committed to a professional legal adviser is prima facie so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.

Id. (Emphasis in original).} Regardless of what may be said for such an approach when applied to individuals who consult lawyers in a noncommercial context, the findings in the survey show that no such presumption is justified in the corporate context.

Should corporate lawyers segregate business from legal advice? Two-thirds of the lawyers in the survey do so at least occasionally and several executives said they prefer the practice.\footnote{See supra note 499 and accompanying text.} Isolation of the two types of advice is indeed appropriate for two reasons. First, segregation is an ethical consideration that helps maintain a proper attorney-client relationship. Business people should be informed when the lawyer is voicing a business judgment, rather than a legal opinion, so that the lawyer’s advice can
be given appropriate weight. Most of the attorneys in the survey said that they segregate their advice for this very purpose. This course of conduct furthers the admonition in lawyers’ codes of ethics that in giving nonlegal advice, attorneys are to leave ultimate decisions to the client. To be sure, counsel’s presentation of the legal consequences of particular action may, as a practical matter, dictate only one feasible outcome, but the attorney owes it to the client to distinguish a legal opinion from a business judgment.

Second, segregation by the lawyer may help prevent the loss of privilege for otherwise mixed legal and business communications that a court might later characterize as predominantly business in nature. One might take the tactical view that mixing legal and business advice could insulate the latter from discovery on the chance that the communication might later be found to have been motivated predominantly by legal considerations. This is a high risk to take, however, at the time of the communication. The better practice, from the vantage point of protecting the privilege, would seem to be segregating the advice whenever possible. Expecting clients to be able to distinguish legal from business matters in their routine communications to counsel, however, is unrealistic, since even some of the lawyers in the study said that they personally have difficulty doing so. Perhaps after initial consultation on a particular matter, counsel may be able to instruct the corporate representative thereafter to address business and legal issues separately in memoranda relating to the matter.

When house counsel are acting in their legal advisory roles, only the executives’ perceptions support the proposition that in-house attorneys are more likely than outside counsel to give business advice. These perceptions may be influenced by the fact that most executives come into contact with house counsel more

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617 See Model Code of Professional Responsibility EC 7-8 (1981) (“[T]he lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself”); Model Rules of Professional Conduct Rule 1.2(a) (1983) (“A lawyer shall abide by a client’s decisions concerning the objectives of representation”).
619 See Brereton, Pye & Withrow, supra note 293, at 235, 247.
620 See Sexton, supra note 114, at 491 n.153; Weissenberger, supra note 371, at 924.
621 See supra notes 500-01 and accompanying text.
often than outside counsel.622 With respect to some matters, in fact, outside counsel may give even more business advice than do house counsel. Thus, as a general matter, there should be no cause to suspect that communications of a corporation’s internal legal department are more likely than those of outside counsel to be business in nature. On the other hand, the data do show that house counsel who serve as chief legal officers are likely to perform various nonlegal duties for the corporations employing them.623 Whenever a member of a corporation’s internal legal department is part of the management team, the burden appropriately should rest with the corporation to demonstrate that the particular communication was made to or by the lawyer in his legal advisory role.624 As suggested by some courts625 and commentators,626 an attorney may enhance the record by specifically designating his status in his writings and instructing corporate representatives to do the same. As shown above with respect to the issue of confidentiality,627 form may have an impact, however slight, on the substance of the matter.

Finally, the interview results suggest that most reports, memoranda and correspondence that are forwarded to counsel without an express request for legal advice probably do not constitute a conscious attempt to “funnel” business papers to counsel simply to

622 See supra note 501 and accompanying text.
623 See supra note 502 and accompanying text.
624 Compare In re Sealed Case, 737 F.2d 94, 99, 101 (D.C. Cir. 1984) (house counsel who was also vice president with responsibilities “outside the lawyer’s sphere” was found to have acted as lawyer when discussing antitrust compliance) with North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 516 (M.D.N.C. 1986) (house counsel who also held management positions were not shown to have received “business updates” in their capacity as lawyers and were not giving legal advice when reporting to management about lobbying activities) and Barr Marine Prods. Co. v. Borg-Warner Corp., 84 F.R.D. 631, 637 (E.D. Pa. 1979) (general counsel who also served as senior vice president was not shown to have been acting in legal role during communications relating to pricing).
625 See, e.g., Hardy v. New York News Inc., 114 F.R.D. 633, 644 (S.D.N.Y. 1987) (court stressed that Vice President and Director of Employee Relations, who also served as house counsel, was neither addressed by others nor identified by himself as “counsel”); Barr Marine Prods. Co. v. Borg-Warner Corp., 84 F.R.D. 631, 637 (E.D. Pa. 1979) (memoranda failed to show that senior vice president was addressed in his capacity as general counsel). But see United States v. Lipshy, 492 F. Supp. 35, 41-42 (N.D. Tex. 1979) (although house counsel signed memorandum as “Senior Vice President” rather than as “Acting General Counsel,” court upheld privilege because of actual legal role involved).
626 See, e.g., Brereton, Pye & Withrow, supra note 293, at 234; Szabad & Gersen, supra note 8, at 245.
627 See supra note 476 and accompanying text.
secrete them from discovery. On the other hand, an affirmative answer to the question might have suggested illegitimate conduct either on the part of the respondent or the respondent's client. Thus, the apparent infrequency of attempts to create privilege for business communications by sending them to counsel may be somewhat exaggerated. During an earlier portion of the interview, for example, three lawyers indicated that in particular matters they had specifically instructed corporate representatives to send "carbon copies" of employee-to-employee communications to counsel "so that privilege will attach."

Nevertheless, on their face, the findings provide evidence that many documentary materials sent to counsel, both in-house and outside, are in fact implied requests for legal advice. Corporate communications to house counsel who have additional nonlegal management responsibilities, however, are more likely than communications to outside counsel to be business status reports that are intended simply to keep counsel apprised of business activities. Adversaries of corporations and courts, therefore, should be particularly skeptical of claims of privilege made for communications that are routed to such attorneys. The efforts of house counsel to practice preventive law are laudable and should be encouraged, but not to the extent of broadening the attorney-client privilege to include routine business communications that are unrelated to the seeking of legal advice. Obviously, the line is not easy to draw. Here again, because of the inherent ambiguity of such communications, corporations should be obligated to prove that the particular memoranda that were routed to counsel contemplated the receipt of legal assistance.

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528 See supra note 505 and accompanying text.
529 See supra note 160 and accompanying text.
530 See supra notes 503-04 and accompanying text.
531 See also supra notes 163 & 252 and accompanying text.
532 See Rossi v. Blue Cross and Blue Shield of Greater New York Inc., 73 N.Y.2d 588, 593, 540 N.E.2d 703, 705, 542 N.Y.S.2d 508, 510 (1989) ("no ready test exists for distinguishing between protected legal communications and unprotected communications; the inquiry is necessarily fact-specific").
533 Compare Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971) (court interpreted communications that were intended to keep counsel apprised of business matters as implied requests for legal advice) with Henson v. Wyeth Laboratories, Inc., 118 F.R.D. 584, 587-88 (W.D. Va. 1987) (corporation failed to demonstrate that memoranda among various departments concerning ongoing business developments were related to seeking of legal advice) and North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 516-17 (M.D.N.C. 1986) (privilege applied only if “updates” to counsel...
In regard to the entire problem of business communications and the maintenance of confidentiality, courts should use and enforce the type of "indexing" rules for privilege claims that have been adopted in the Federal District Courts for the Southern and Eastern Districts of New York. Such rules require litigants in the first instance to provide adequate background information about each privileged communication. Indexing requirements are in harmony with the principle that corporations should bear the burden of proving the confidentiality and legal subject matter of particular communications, and they should help ensure that adversaries are given a basis for determining whether to acquiesce or to seek judicial rejection of the claims.

VII. THE Garner Doctrine

Garner v. Wolfinbarger signaled a significant departure from the long-standing tradition that the attorney-client privilege is absolute. The case held that in an action by shareholders of a corporation against its officers and directors based on wrongdoing injurious to shareholder interests, the privilege for communications between management and the corporation's counsel is "subject to the right of the stockholders to show cause why it should not be invoked in the particular instance." The court thus introduced to the jurisprudence of the corporate attorney-client privilege the notion that the status of the plaintiff as the beneficiary of fiduciary obligations owed by the corporation's management is a factor in determining whether the privilege should apply. According to one of the litigators in the survey, the decision "was a coup for the plaintiff's bar."

Garner arose out of alleged fraud and violations of the federal securities laws by the officers and directors of a life insurance company in the registration and sale of the company's stock. The shareholders filed a class action suit for their personal damages regarding business developments were connected to specific legal problems). See 2 J. WEINSTEIN & M. BERGER, supra note 131, ¶ 503(b)[04], at 503-50 (corporation "must be able to prove connection between communication and rendition of legal advice").

534 See supra notes 184-88 and accompanying text.
535 See supra note 184.
537 See supra note 69 and accompanying text.
538 Garner, 430 F.2d at 1103-04.
and asserted a derivative claim on behalf of the corporation.\footnote{539} During pretrial discovery, the corporation refused to produce documents between it and counsel made contemporaneously with the relevant transactions, and an attorney for the corporation who had played a key role in the events refused to answer pertinent questions during a deposition.\footnote{540} The district court granted a motion to compel, holding that the privilege was totally unavailable in suits between a corporation and its shareholders.\footnote{541} In so holding, the district judge relied upon two English cases that analogize the relationship between management and shareholders to that between trustees and beneficiaries.\footnote{542}

On appeal, the Fifth Circuit rejected both the corporation’s contention that the privilege must be absolute in order to ensure candid legal advice and the shareholders’ position that the privilege must always yield in a suit by stockholders. Instead, the court took a middle ground, creating a qualified privilege that was intended to balance the interests of the corporation against those of the shareholders and the public.\footnote{543} Stressing that “management has duties which run to the benefit ultimately of the stockholders,”\footnote{544} the court viewed the English precedents relied upon by the district court as “persuasive recognition” that management’s fiduciary duties to shareholders should be taken into account in applying the corporation’s attorney-client privilege.\footnote{545}

The court drew additional support for its concept of a qualified privilege from the future crime or fraud exception to the privilege.\footnote{546}

\footnote{539} Id. at 1095.
\footnote{540} Id. at 1095-96.
\footnote{542} Garner, 430 F.2d at 1101-02. The English cases were W. Dennis & Sons, Ltd. v. West Norfolk Farmers’ Manure & Chem. Co-Operative Co., [1943] 2 All E.R. 94 (Ch.) and Gouraud v. Edison Gower Bell Tel. Co., 57 L.J. Ch. (1888). The district court found no American precedent on point, but in Graham v. Allis-Chalmers Mfg. Co., 41 Del. Ch. 78, 188 A.2d 125 (1963), the Delaware Supreme Court, without mentioning the plaintiffs’ status, had denied shareholders in a derivative suit access to statements given to counsel by various employees of the corporation in preparation for the corporation’s defense of a prior antitrust indictment. Id. at 89, 188 A.2d at 132. The Delaware decision does not contradict the ultimate teaching of Garner, however, because the documents in issue were prepared in anticipation of litigation concerning the subject matter of the derivative suit itself. See infra notes 596-601 and accompanying text.
\footnote{543} Garner, 430 F.2d at 1103-04.
\footnote{544} Id. at 1101.
\footnote{545} Id. at 1102.
Differences between prospective crime or fraud and "prospective action of questionable legality," said the court, "are differences of degree, not of principle."\(^{547}\) The court also found "instructive" value in the joint client exception, pursuant to which communications to an attorney representing two parties with respect to a matter of common interest are not privileged from disclosure in subsequent litigation between the two clients.\(^{548}\)

In redefining the scope of the corporate attorney-client privilege in shareholder actions, the Garner court relied in part upon the cost-benefit analysis by which privileges have traditionally been justified: the extent to which the harm that would result from disclosure outweighs the benefits to be gained in the accuracy of adjudication.\(^{549}\) But the court added a new dimension to the calculus by giving consideration to the fiduciary relationship between the parties in the "particularized context" of corporate shareholder litigation.\(^{550}\) Moreover, the court held that the cost-benefit analysis in corporate shareholder cases should occur on a

\(^{546}\) See supra notes 73-74 and accompanying text.

\(^{547}\) Garner, 430 F.2d at 1103. Courts in subsequent cases have noted that Garner's reference to the crime-fraud exception was solely for the purpose of demonstrating the nonabsolute character of the attorney-client privilege and was not the basis for the court's decision. See In re TransOcean Tender Offer Sec. Litig., 78 F.R.D. 692, 696 n.4 (N.D. Ill. 1978); Broad v. Rockwell Int'l Corp., [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,894, at 91,304 (N.D. Tex. 1977). The Garner doctrine, therefore, does not require a prima facie showing of criminal, fraudulent or even tortious conduct. See infra note 552.

\(^{548}\) Garner, 430 F.2d at 1104. See supra note 339 and accompanying text. The joint-client theory, standing alone, would not justify breaching the privilege in suits between the corporation, management and shareholders. Under the entity theory of corporate representation, only the corporation, not its individual officers, directors or shareholders, is the attorney's client. See supra note 117 and accompanying text; see also Burnham, supra note 14, at 912. Furthermore, the conventional rationale of the joint-client exception has little force in the corporate context. The joint-client exception is based on the premise that co-clients who consult the same attorney with respect to a matter of common interest would not expect the confidences of one client to be withheld from the other. See 8 J. Wigmore, supra note 2, § 2312, at 605-06; C. McCormick, supra note 97, § 91, at 220. It is questionable whether corporate managers would have such expectations.

A rationale for the joint-client exception which does not depend on client expectations and therefore may have stronger relevance in the corporate context is that it is simply unfair in litigation between former co-clients for one to be favored over the other with respect to control of the attorney-client privilege. As one court explained:

[T]he court will not allow the attorney to protect the interest of one client by refusing to disclose information received from that client, to the detriment of another client or former client. The fiduciary obligations of an attorney are not served by his later selection of the interests of one client over another.


\(^{549}\) Garner, 430 F.2d at 1100. See supra note 63.

\(^{550}\) Garner, 430 F.2d at 1101.
case-by-case basis,551 a radical approach in light of the long history of absolute treatment of the attorney-client privilege upon satisfaction of its definitional elements. The court suggested several factors to be considered in determining whether good cause exists for denial of the privilege in shareholder actions.552 The most significant are: the number of shareholders and the percentage of stock they represent; the good faith of the shareholders and the apparent legitimacy of the claim; the need or “desirability” of the information and its availability from other sources; the nature of the legal consultation, e.g., whether it related to prospective or past conduct or involved the instant litigation; and the risk of revealing trade secrets or other confidential information in which “the corporation has an interest for independent reasons.”553

The Garner doctrine has been recognized as valid by most courts that have considered the issue.554 Indeed, some courts have extended the “good cause” qualification to other fiduciary relationships.555 Garner’s critics, however, argue that the doctrinal notion

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551 Id. at 1101, 1103-04.
552 Id. at 1104.
553 See id. On remand, the district court found good cause for setting aside the privilege, noting that several key witnesses had taken the fifth amendment, no trade secrets were involved and no improper purpose had been shown on the part of the plaintiffs. Garner v. Wolfinbarger, 56 F.R.D. 499, 504 (S.D. Ala. 1972).
of fiduciary responsibilities should not override the instrumental justification for the attorney-client privilege, i.e., the promotion of candid communications. Management needs the certainty of an absolute privilege, it is contended, in order properly to chart the course of the corporation’s business, and Garner undermines this desirable goal. Traditional limitations on the attorney-client privilege, such as the exception for communications made in contemplation of a future fraud or crime, are cited as sufficient protection for shareholders. For these reasons, a federal district court in Connecticut recently rejected the Garner doctrine.

Does the Garner doctrine in fact have a negative impact on corporate attorney-client communications? The results of the sur-

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555 See, e.g., Kirby, New Life for the Corporate Attorney-Client Privilege in Shareholder Litigation, 69 A.B.A. J. 174, 176 (1983); Saltzburg, Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited, 12 HorsTRA L. Rev. 817, 832, 839, 847 (1984); Note, The Attorney-Client Privilege and the Corporation in Shareholder Litigation, 50 S. Cal. L. Rev. 303, 321-35 (1977); see also Sexton, supra note 114, at 515 (Garner “threatens one of the basic assumptions of the Upjohn Court, to wit, that the corporate attorney-client privilege induces communications with the corporation’s attorney that would not otherwise occur”).

556 See, e.g., Kirby, New Life for the Corporate Attorney-Client Privilege in Shareholder Litigation, 69 A.B.A. J. 174, 176 (1983); Saltzburg, Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited, 12 HorsTRA L. Rev. 817, 832, 839, 847 (1984); Note, The Attorney-Client Privilege and the Corporation in Shareholder Litigation, 50 S. Cal. L. Rev. 303, 321-35 (1977); see also Sexton, supra note 114, at 515 (Garner “threatens one of the basic assumptions of the Upjohn Court, to wit, that the corporate attorney-client privilege induces communications with the corporation’s attorney that would not otherwise occur”).

557 See Saltzburg, supra note 556, at 834, 841-44.

vey suggest that for the most part it does not.

A. Findings

Seventy-two percent of the lawyers in the study (73 of 102) said that the shareholder/fiduciary qualification had never been a factor taken into consideration by them when communicating with representatives of their corporate clients. The explanation offered by nine of the house counsel for ignoring *Garner* was that their companies were closely held, thereby eliminating the issue for them. The most frequent reason given by the other attorneys who had not taken the rule into account was that shareholder litigation was not a realistic threat. “Shareholder suits are so rare you simply don’t worry about them,” was a typical response.

Primarily for the same reasons, a slight majority of the attorneys responding to the question (53 of 101, or 52.5%) said that the shareholder/fiduciary rule does not have any impact on their ability to predict whether the privilege will attach to their communications. Of the forty-seven attorneys who said that the rule does affect predictability, two out of three indicated that they are only “somewhat” or “slightly” less able to predict the applicability of privilege. According to several lawyers in the latter group, *Garner* decreases certainty only in situations where shareholder rights are implicated, and such occurrences are rare.\(^6\) Only eleven attorneys said they were “much less able” to predict as a result of the shareholder/fiduciary rule, and they indicated that they were answering only with respect to situations in which shareholder litigation was a threat.

The attorneys’ perceptions that the potential loss of privilege due to shareholder litigation is a rare threat seem well founded, based on the data obtained in the survey of judges and magistrates. Only eight judicial respondents—one-third of those who had adjudicated attorney-client privilege questions in the corporate context—recalled having had cases in which the *Garner* issue had been litigated. Of these eight, only two had ever ordered production based on a showing of good cause; one failed to find good cause in the particular case; three others said the issue had become moot in their cases either because of the parties’ voluntary produc-

\(^6\) A half dozen attorneys who said that predictability was affected only slightly or not at all pointed out that they seldom try to make predictions about the privilege under any circumstances because it is “always subject to exceptions and the waiver doctrine.”
tion or due to judicial orders directing production on other grounds; and two did not remember the outcome.\textsuperscript{660}

To what extent are corporate representatives aware of the shareholder/fiduciary qualification? A majority of the attorneys (56.4\%) were of the opinion that no one at any level of the corporate hierarchy knew about the rule. About one-third (29.7\%) believed that knowledge was limited either to senior executives or to “a few individuals” at various levels. Three respondents indicated that even lawyers are sometimes surprised to learn about the rule. Based on the survey of executives, the lawyers’ perceptions about lack of knowledge among corporate representatives are probably accurate, and perhaps even somewhat optimistic. Only nine executives (17.3\%) indicated prior awareness, while forty-three (82.7\%) said they did not know that the privilege was qualified in the shareholder/fiduciary context. Interestingly, about one of every five executives made a spontaneous comment to the effect that the rule was “reasonable” or “understandable” because “shareholders own the company.”

What is the effect of \textit{Garner} in situations in which it poses an imminent threat to the privilege, \textit{i.e.}, prospective transactions in which shareholder interests are implicated and in actual shareholder litigation? Twenty-nine of the lawyers who were interviewed (28.4\%) had had occasion to take the shareholder/fiduciary qualification into account in their communications with corporate representatives. They were asked to describe the circumstances in which \textit{Garner} had been a factor and the impact of the potential loss of privilege. The circumstances fell into three basic categories: (1) counseling with respect to prospective corporate transactions that might affect shareholder interests, such as recapitalizations, mergers, acquisitions or takeovers (nine respondents);\textsuperscript{661} (2) invest-

\textsuperscript{660} The results of a study published in 1980 also indicate that shareholder litigation is relatively infrequent. See Jones, \textit{An Empirical Examination of the Incidence of Shareholder Derivative and Class Action Lawsuits, 1971-1978}, 60 B.U.L. Rev. 306 (1980). Only 30.5\% of a nationwide sample of 190 publicly traded corporations had experienced such litigation between 1971 and 1978. \textit{Id.} at 313. After accounting for the fact that one event may trigger multiple lawsuits, the study found that, on the average, a company is involved in a shareholder dispute only once every 17.5 years. \textit{Id.} The data also showed that larger corporations are more likely to encounter shareholder suits than are their smaller counterparts. \textit{Id.} at 315-17.

\textsuperscript{661} Included in this group is one respondent who said that he had experienced the \textit{Garner} doctrine most often in connection with general representation of trustees of pension funds. Several recent cases hold that plan beneficiaries may be entitled to discovery of the trustee’s communications with counsel concerning management of the fund. See \textit{supra} note
tigations into past corporate transactions as to which shareholder litigation was anticipated (nine respondents); and (3) the defense of actual derivative or class actions (eleven respondents). Five of the respondents in the first category said that corporate representatives' knowledge of the Garner qualification had no perceived impact on the nature of their communications with counsel. Four, on the other hand, reported that client conduct was affected: communications to counsel were either "more guarded" or fewer in number. One of the outside counsel in the latter group, for example, had had extensive experience in representing corporations that were "takeover targets." He indicated that executives are no less candid when apprised of Garner but they do take fewer notes at meetings with counsel (at counsel's prompting) and are more inclined to communicate only with senior-level law-firm partners.  

Seven of the nine respondents who had dealt with investigations of matters likely to result in litigation with shareholders—the second category of circumstances in which Garner may affect the privilege—also reported that communications with their clients were affected. Knowledge of the shareholder/fiduciary exception was said to result in "less candor," "circumspection," "restraint," or "fewer communications." One respondent, however, said that it is the lawyer's conduct that is affected, not the client's; he still prepared memoranda of interviews with corporate representatives but put fewer conclusions in writing. Only one respondent in this category said that Garner had had no effect on communications.

Of the lawyers who had actually defended derivative or class actions, seven said that neither they nor their clients were affected by Garner; two indicated that only the lawyer's "strategy" of communication was altered; and two more indicated that clients exercised "caution" when discussing the litigation. Some of the respondents said that once a matter is in litigation, Garner is a "backward-looking" concept. The principal issue becomes which discussions between management and counsel at the time of the challenged transaction must be produced during discovery.

To obtain the corporate client's perspective on the potential impact of the Garner doctrine, the executives in the survey were

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662 Interestingly, another lawyer in the survey who had frequently represented corporate "raiders" reported that, for him, the Garner doctrine had not been a factor. In his experience, shareholders of raiders, unlike those of targets, seldom complain about management's conduct in connection with takeover activities.
asked the following question: "If management were made aware of the shareholder rule in a transaction that might give rise to litigation with shareholders, do you think managers would be tempted to be less candid in their communications with counsel?" The respondents were about evenly divided between those who did and those who did not think that Garner would reduce management’s candor: Twenty (38.5%) answered "yes," twenty-two (42.3%) answered "no," and ten (19.2%) could not say how the management of their companies would react.\textsuperscript{653}

B. Analysis

The results strongly suggest that the Garner qualification to the privilege is not currently a spectre that haunts the corporate attorney-client relationship. It seems that most executives do not know that the rule exists, and most lawyers experience little or no anxiety over it. The Garner doctrine probably is not a pressing concern in most corporate counseling because shareholder litigation is perceived to be an infrequent occurrence.\textsuperscript{654} For the lawyers who have taken Garner into account, its potentially inhibiting effect on communications appears to be felt most strongly in connection with investigations into past transactions that could generate shareholder litigation and felt the least when actual litigation materializes. When transactions are at the prospective stage, the effects are mixed. This is evidenced most clearly by the survey of executives, who were about evenly divided between those who said that management would be less candid and those who anticipated no effect on candor in transactions as to which the Garner rule might apply.\textsuperscript{655} Interestingly, one lawyer reported that Garner performs a prophylactic function at the transactional stage: In advising clients against entering into transactions that are clearly inimical to shareholder interests, a warning that his advice may be subject to discovery can dissuade them from proceeding with the

\textsuperscript{653} The following typical comments were volunteered by the executives who said that candor would most likely be reduced: "The lawyer will say 'I don't want to hear about it'"; "Yes, but only as to written communications"; "It would have a chilling effect"; "We'd be more judicious in what we say"; and "Yes, as to certain subjects." Those who thought that candor would not be reduced made remarks such as the following: "Legal advice would be necessary no matter what we do"; "The cost of illegality is too high, so we'd be as candid as possible in seeking advice"; and "The effect would be to reduce the number of writings, but we'd be just as candid in what we tell counsel."

\textsuperscript{654} See supra notes 559-60 and accompanying text.

\textsuperscript{655} See supra note 563 and accompanying text.
On the whole, the potential loss of privilege introduced by the Garner doctrine has not caused an overall chill in corporate attorney-client communications. Nor does Garner appear to have inflicted too much damage even in the occasional situations in which it is most likely to affect the candor of attorney-client communications, i.e., threatened shareholder litigation. In such instances, courts applying Garner are not likely in any event to find good cause for lifting the privilege, a point that will be discussed below.668

The data thus provide little basis for retreating from Garner, as some have advocated, on the ground that it interferes with the instrumental goals of the corporate attorney-client privilege.667 Furthermore, the doctrine is sound. The ultimate beneficiaries of management action are the shareholders of the corporation. Although the fiduciary duties of corporate officers and directors may not equate with those of trustees, "when all is said and done management is not managing for itself."668 Because of their status as beneficiaries of fiduciary obligations, shareholders have an interest in evaluating management's performance through scrutiny of their relevant communications with counsel.669 A court's decision to give

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666 See infra notes 596-601 and accompanying text.
667 See supra notes 556-58 and accompanying text.
668 Garner, 430 F.2d at 1101. The well-established rule in England, and the apparent rule in this country, is that trustees generally must provide full disclosure to beneficiaries of all matters concerning the routine administration of the trust, including legal advice sought by the trustee in his fiduciary capacity. See supra note 555; see also G.G. Bogert & G.T. Bogert, The Law of Trusts and Trustees § 961 (2d ed. 1965). But see In re Prudence-Bonds Corp., 76 F. Supp. 643 (E.D.N.Y. 1948) (corporate trustee of indenture trust not required to disclose opinions of counsel to bondholders in surcharge proceeding). The Garner court took care to avoid holding that the same rule applis to the management of a corporation. There are a number of theoretical and practical distinctions between corporations and trusts, including the notion that the corporation is an independent legal entity with a need for broad and flexible discretion in the conduct of its business and the fact that often there are a great many more shareholders of a corporation than there are beneficiaries of a trust. See G.G. Bogert & G.T. Bogert, supra, § 16; Burnham, supra note 104, at 908-09. Accordingly, it is generally accepted by modern authorities that corporate officers and directors, although charged as agents with fiduciary duties to the corporation and its shareholders, do not have the identical degree of fiduciary responsibility as trustees. G. Henn & J. Alexander, Laws of Corporations § 235 (3d ed. 1983); Note, The Corporate Attorney-Client Privilege in the Federal Courts, 22 Cath. Law. 138, 155-56 (1976). The trust analogy, therefore, is not entirely satisfactory as a basis for denying the availability of the attorney-client privilege to corporate management. See Burnham, supra note 104, at 908-10; Note, supra note 556, at 317-20.
shareholders access to such communications upon a showing of good cause does not make them the clients of the corporation's attorney.\textsuperscript{570} Judicial power over the privilege question simply recognizes that when the constituents of the corporate entity become involved in an internecine dispute, the management group should not retain exclusive authority to assert the privilege. Since management has an inherent conflict of interest in such cases, the Garner doctrine in effect provides for a neutral arbiter to weigh the discovery needs of the shareholders against the potential harm to corporate interests.\textsuperscript{571}

Additional sustenance for the conceptual premise of Garner is found in the Supreme Court's decision in Commodity Futures Trading Commission v. Weintraub.\textsuperscript{572} There, the Court held that when a corporation goes into bankruptcy, management forfeits its power to exercise or waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications.\textsuperscript{573} Administration of the corporation's privilege was said to be ordinarily a management prerogative to be exercised "in a manner consistent with [the managers'] fiduciary duty to act in the best interests of the corporation and not of themselves as individuals."\textsuperscript{574} Since virtually all managerial authority passes to the trustee in bankruptcy, control over the corporation's privilege likewise passes to the trustee.\textsuperscript{575} In support of its holding, the Court stressed that one of the important goals of the bankruptcy laws is to enable the trustee to uncover insider fraud by the corporation's officers and directors. If managers could "use the privilege as a shield against the trustee's efforts," they might "thwart an investigation into their own conduct."\textsuperscript{576}

A bankruptcy trustee's inquiry into possible wrongdoing by management obviously is not a perfect analogy to shareholder litigation because management in such cases retains its authority to

\textsuperscript{570} See supra notes 117 & 548.  
\textsuperscript{571} See Burnham, supra note 104, at 910-11.  
\textsuperscript{572} 471 U.S. 343 (1985).  
\textsuperscript{573} Id. at 352-54.  
\textsuperscript{574} Id. at 349.  
\textsuperscript{575} Id. at 351-53.  
\textsuperscript{576} Id. at 353-54.
manage the corporation. The Supreme Court's reasoning, however, supports the view that when management, charged with its own wrongdoing, may be motivated to exercise the corporation's privilege primarily in its own self-interest, someone other than existing management should determine the privilege question. In the context of shareholder litigation, it is the court that is in the best position to weigh the competing interests.577

The argument made by opponents of Garner that a good cause standard is unnecessary in light of the traditional crime/fraud exception to the attorney-client privilege is unpersuasive.578 The type of conduct through which officers and directors may have injured the corporation may not fall neatly into the category of a crime or fraud.579 Even if it did, courts have imposed on proponents of the crime/fraud exception the burden of making a prima facie showing that the client had a criminal or fraudulent purpose and that the communications with counsel were related to the prima facie wrong.580 The Supreme Court in Weintraub noted the difficulty of

677 Another possibility would be delegation of the decision to an independent committee of the board of directors of the corporation. See, e.g., Burnham, supra note 104, at 911. Committees of this nature are sometimes formed at the outset of a derivative action for the purpose of investigation and determination whether the best interests of the corporation lie in continuation of the litigation or in recommendation to the court of dismissal. See, e.g., Zapata Corp. v. Maldonado, 439 A.2d 779 (Del. 1981); Auerbach v. Bennett, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979); see generally Coffee & Schwartz, The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform, 81 Colum. L. Rev. 261 (1981). Formation of such a committee for the limited purpose of deciding an evidentiary question, however, does not seem practical. Furthermore, such a committee is not in as good a position as the court to consider the evidentiary and procedural issues involved, such as relevance and the plaintiff's inability to obtain the information from other sources. In any event, even a committee's recommendation to maintain the privilege should be subject to judicial review. Cf. American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.08 (Discussion Draft No. 1, 1985) (court determines whether to dismiss derivative action after review of independent committee's recommendation).

578 See supra note 577 and accompanying text.

579 See Note, supra note 556, at 327.

580 See, e.g., In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985). The prima facie standard has also been described as one of "probable cause," or one which "require[s] that a prudent person have a reasonable basis to suspect the perpetration of a crime or fraud." In re Antitrust Grand Jury, 805 F.2d 155, 166 (6th Cir. 1986), (quoting In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1039 (2d Cir. 1984)). The Supreme Court has not yet resolved the precise evidentiary burden that the opponent of the privilege must meet in establishing applicability of the crime/fraud exception. See United States v. Zolin, 109 S. Ct. 2619, 2626 n.7 (1989). With respect to the second requirement for establishing the exception, it is not enough that the client was engaged in wrongful conduct at the time of its communications with counsel; for the privilege to be lost, the particular communication must facilitate the wrongdoing. In re Grand Jury Subpoenas Duces Tecum,
making such a showing to buttress its conclusion that the crime/fraud exception is inadequate to facilitate the investigatory efforts of bankruptcy trustees. The same can be said about the efforts of shareholders in litigation against corporate management.

It bears emphasizing that Garner's good cause standard does not invariably result in loss of the privilege. The Garner court recognized that management's decision-making is aided by legal advice and that there is utility in maintaining the confidentiality of most of counsel's communications with management. Furthermore, management's flexibility and exercise of independent judgment can be jeopardized by vexatious interference from a handful of disgruntled shareholders. Giving proper regard to the realities of corporate life, therefore, the Garner court considered it inappropriate to abrogate the privilege entirely in shareholder litigation. While the argument for piercing the privilege may be strong, for example, when all or nearly all shareholders desire disclosure, it weakens when only a few seek such access. Furthermore, aside from possible adverse interests between the corporation and the party-shareholders, the interests of shareholders who are not parties to the particular litigation may also diverge from those who are. Both the corporation and the shareholders at large may legitimately desire to avoid the risk that disclosure of sensitive communications will cause a disruption of business, competitive harm or additional costly litigation against the corporation, any of which could decrease the long-term value of the shareholders' investment. These competing interests can and should be taken into account by courts in individual cases when determining whether shareholders have shown good cause for disclosure of privileged communications.
Another important factor for a court to consider is whether the shareholder claims are derivative or nonderivative in nature. In a derivative action, shareholders theoretically are asserting a claim belonging to the corporation, which is merely a nominal defendant, and any damages will be paid to the corporation. Unlike derivative suits, individual actions and claims made on behalf of a class usually seek damages for the shareholders personally, perhaps not only from officers and directors but also from the corporation itself. It has been argued that in such cases, shareholders' interests are inherently adverse to those of the corporation. This criticism, however, ignores the underlying rationale of Garner. Shareholder interests in disclosure are not dependent upon an absolute identity of interest between the shareholders and the corporation. Rather, they flow from the fiduciary duties owed to the shareholders by management. These duties are owed regardless of whether the suit seeks derivative or personal relief, a point that is underscored by the increasing number of decisions that have applied Garner in cases involving other types of fiduciary relationships. Shareholders are not necessarily less pure in motive when they sue for personal damages than when they seek damages solely for the corporation; in both instances they are suing to protect their investment. Certainly, the fiduciary rationale loses some of its

counsel or delete discussions relating to commercially sensitive information. See, e.g., Idaho R. Evid. 502(d)(6) (in ordering discovery of attorney-client communications in shareholder actions pursuant to finding of good cause, court may grant protective orders to prevent unnecessary or unwarranted disclosure). In general, the same procedural protections that are discussed below with respect to a qualified corporate attorney-client privilege would be appropriate in Garner situations as well. See infra notes 768-94 and accompanying text.

668 See George v. LeBlanc, 78 F.R.D. 281, 291-92 (N.D. Tex.) (shareholders and corporation do not have adverse interests in derivative action against officers and directors), aff'd, 565 F.2d 1213 (5th Cir. 1977).

669 See supra note 262, at 35. Garner itself indicated that the good cause test was intended to be available in both derivative and class actions. Garner v. Wolfinbarger, 430 F.2d 1093, 1097 n.11 (5th Cir. 1970) ("our decision does not turn on whether [the derivative] claim is in the case or out"), cert. denied, 401 U.S. 974 (1971); see also In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1239 n.3 (5th Cir. 1982) (Garner applies to class actions). But see Weil v. Investment/Indicators, Res. & Mgt., Inc., 647 F.2d 18, 23 (9th Cir. 1981) (Garner held inapplicable because plaintiff was former shareholder, action was not derivative, and proposed class was not certified; court erroneously characterized Garner as solely derivative suit).

670 See supra note 555.

671 See Neusteter v. District Court, 675 P.2d 1, 8 (Colo. 1984) (Garner applied to statutory accountant-client privilege in action by minority shareholders asserting claims for dissolution of closely held corporations and derivative claims for damages; court held that both remedies were directed at protection of plaintiffs' investments).
force if the plaintiff class includes former shareholders as to whom fiduciary duties are no longer owed at the time of suit. The enhanced right of shareholder discovery, however, should apply regardless of whether a fiduciary relationship existed at the time of suit or at the time of the transaction giving rise to the cause of action.590

Nevertheless, nonderivative claims are somewhat more suspect than derivative claims because of the diminished mutuality of interest between the plaintiffs and the corporation. The Fifth Circuit Court of Appeals, for example, recently refused to find good cause in an action by former shareholders of a closely held corporation whose management allegedly had redeemed their shares for inadequate consideration as part of a "freeze out" of minority shareholders.591 Declaring that "careful scrutiny" is required when shareholders seek pecuniary gain only for themselves, rather than for shareholders at large,592 the court held that good cause was lacking because the transaction sued upon—a stock redemption—involved inherent adversity between shareholders and management from the outset;593 the plaintiffs’ aggregate holdings were

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590 See Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 484 (E.D. Pa. 1978) ("That the special relationship of management-to-stockholder existed as to all class members for some period, however brief, thrusts those class members ineluctably within the scope of the protection afforded by the Garner doctrine"); class included persons who purchased stock after the alleged misconduct occurred; Saltzburg, supra note 556, at 841 (assuming Garner is good law, "[a]ny unique relationship between management and shareholders that warrants a special rule ought to include any shareholders who claim to have been hurt qua shareholders as a result of the action of corporate officials") (emphasis in original). Contra, In re Atlantic Fin. Mgt. Sec. Litig., 121 F.R.D. 141, 145-46 (D. Mass. 1988) (court refused to apply Garner where attorney-client communications in issue related to matters that allegedly induced plaintiffs to purchase their stock: "If the stock had not yet been purchased a fiduciary relationship did not yet exist").

591 Ward v. Succession of Freeman, 854 F.2d 780 (5th Cir. 1988).
592 Id. at 786.
593 Id. at 786. The adversity of interest was described by the defendants in the case as follows:
Managers of a tendering corporation must seek to conserve assets by not over-paying for redeemed stock; shareholders wishing to redeem, however, are naturally interested in obtaining the highest price they can get. Shareholders redeem their stock voluntarily, based upon whether the price being offered is satisfactory to them individually. Valuing a closed corporation for purposes of redeeming its stock is a difficult task because the mutual interest commonly shared between management and stockholders partially unravels; some shareholders and managers will elect redemption and others will not, as each consults his own self-interest.
594 Id. at 784. The defendants argued that good cause is lacking as a matter of law in such cases, but the court rejected this position, holding instead that the issue should be resolved on a case-by-case basis. Id. at 785.
less than four per cent,\textsuperscript{594} and the plaintiffs had made no attempt to obtain the requested information from nonprivileged sources.\textsuperscript{595}

Another situation in which courts have been reluctant to find good cause is when the communications at issue concern preparation for defense of the shareholder litigation itself. One court reasoned that good cause is difficult to justify when the relevant communications occurred “after the fact” as part of counsel’s remedial advice or trial strategy.\textsuperscript{596} In such circumstances, the adversity of interests between shareholders and management has become manifest at the time of the communications.\textsuperscript{597} Management, in fairness, ought to be able to consult with counsel to defend against possible charges with a certain amount of assurance that the communications will not be disclosed.\textsuperscript{598} As the survey findings show,

\textsuperscript{594} Id. at 786. Other courts that have found good cause to be lacking due in part to the fact that the plaintiffs represented only a small fraction of the overall number of shareholders include Weil v. Investment/Indicators, Research and Management Inc., 647 F.2d 18, 23-25 (9th Cir. 1981) and Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 26 (N.D. Ill. 1980).

\textsuperscript{595} Succession of Freeman, 854 F.2d at 786. “Although the attorney-client communications were not publicly available, the information presented in them may have been known by other corporate employees or contained in other business documents.” Id.

The court also suggested that the merits of plaintiffs’ claims were weak. Stressing that the sale of the company had occurred three years after the redemption, the court observed that “[a]nyone even casually familiar with the intense competition in most industries in our economy knows . . . that the value of a company can change dramatically in three years or, for that matter, in three months.” Id.


\textsuperscript{597} It has been held that Garner’s standard of good cause does not even apply to attorney work product because the “mutuality of interest” between shareholders and management upon which Garner is premised is “destroyed” when shareholder litigation is anticipated. See In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1239 (6th Cir. 1982). Work product, therefore, can only be obtained upon a showing of substantial need and the inability without undue hardship to obtain the materials elsewhere. See id. at 1239-40; In re Dayco Corp. Derivative Sec. Litig., 99 F.R.D. 616, 620-21 (S.D. Ohio 1983). But see Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 682 (D. Kan. 1986) (work product materials held discoverable because they provided “unique source of evidence”).

\textsuperscript{598} The joint-client exception to the attorney-client privilege, to which the Garner court analogized in creating the good cause standard, see supra note 548 and accompanying text, has also been circumscribed in cases in which the joint clients had adverse interests at the time of their consultations with counsel. See, e.g., Eureka Inv. Corp. v. Chicago Title Ins.
anxiety over the attorney-client privilege is at its highest when litigation is anticipated, both in general and at the investigatory stage before actual shareholder litigation occurs. Since freedom of communication is most likely to be inhibited in the litigation context, courts should continue to strictly apply the good cause test with respect to communications made in anticipation of litigation. Thus, the Garner rule will most often result in loss of privilege for communications that are relatively contemporaneous with the transactions comprising the subject matter of the shareholder litigation. As the survey findings show, these are the situations that are least likely to cause concern over the possible absence of attorney-client privilege.

In sum, the Garner doctrine provides an appropriate resolution of the question of who should control the exercise of the corporate attorney-client privilege in shareholder litigation against corporate management. The survey data lend support to this con-

Co., 743 F.2d 932, 937 (D.C. Cir. 1984). Whereas co-clients who consult one attorney about a particular matter may expect their confidences to be shared so long as their interests are congruent, such expectations are diminished when one of the clients consults the same attorney about the matter following a divergence of interests. In the latter situation, the privilege may still be asserted in litigation between the co-clients. Id.

The privilege for litigation-related communications with counsel, however, may be lost for a reason entirely independent of Garner. A derivative suit may be dismissed at an early stage of the proceedings on the basis of the conclusion of a special investigatory committee of independent directors that the suit itself is not in the best interests of the corporation. See supra note 577. Such committees invariably rely upon the efforts and advice of counsel, and attorney-client communications may therefore form an integral part of the committee's report. At least two courts have held that when the committee's report is submitted in support of a motion for summary judgment, it becomes part of the evidentiary record, resulting in a waiver of otherwise privileged information contained in the report. See In re Continental Illinois Sec. Litig., 732 F.2d 1302, 1304, 1313-16 (7th Cir. 1984); Joy v. North, 692 F.2d 880, 893-94 (2d Cir. 1982), cert. denied, 460 U.S. 1051 (1983).

See supra note 228 and accompanying text.

See supra notes 559-63 and accompanying text.

See, e.g., Garner, 430 F.2d at 1096 (at issue was content of communications between counsel and company officials at time of allegedly fraudulent issuance and sale of company's stock); Penter v. Marshall Field & Co., 80 F.R.D. 718, 723 (N.D. Ill. 1978) (in class action challenging management's opposition to tender offer in 1977, attorneys' correspondence with management relating to prior proposed mergers and 1977 tender offer held subject to disclosure); Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 484-85 (E.D. Pa. 1978) (in securities fraud class action, contemporaneous legal opinions and attorney-client communications relating to corporation's fraudulent activities held to be discoverable; court stressed that requested data would be particularly effective in showing corporation's state of knowledge at relevant time); In re TransOcean Tender Offer Sec. Litig., 78 F.R.D. 692, 696-97 (N.D. Ill. 1978) (in class and derivative actions alleging fraud and other improprieties in merger, attorney-client documents with respect to merger and prior transactions between defendants held discoverable).
clusion with evidence that Garner's limited incursion on the "absoluteness" of the corporate attorney-client privilege has done little thus far to chill the candor of corporate attorney-client communications and is unlikely to do so in the future.

VIII. A QUALIFIED APPROACH TO THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

Aside from the Garner doctrine, the corporate attorney-client privilege has been treated as absolute. Once the prerequisites for application of the privilege have been met, no particularized showing of need by the adversary for the information contained in the confidential communication will overcome the privilege. Professor McCormick, however, argued that a trial judge should have the discretion to set aside any privilege "in order to secure the facts essential to do justice in the case before him." Application of a qualified attorney-client privilege to corporations has been of particular appeal to some commentators primarily for the reason that such an approach would help compensate for the large number of communications that conceivably may be brought within the shield of privilege in the corporate context. Should a court be able to order discovery of corporate attorney-client communica-

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602 See supra notes 536-55 and accompanying text.
604 McCormick, The Scope of Privilege in the Law of Evidence, 16 Tex. L. Rev. 447, 469-70 (1938); see also C. McCormick, supra note 97, § 87, at 206 (in order to ensure just results, trial judge should be permitted to set aside privileged communications).

A number of commentators, however, have argued that a qualified privilege lacks the certainty believed necessary to effectuate the goals of the privilege. See Nath, supra note 114, at 37 n.95; Sexton, supra note 114, at 482-83; Weissenberger, supra note 371, at 918; The Control Group Test, supra note 114, at 426; Note, The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach, 69 Mich. L. Rev. 360, 370-75 (1970); Note, supra note 556, at 321-24.
tions if significant information contained therein is unavailable from nonprivileged sources with reasonable effort? To what extent might such an approach conflict with the instrumental objectives of the corporate privilege?

A. Findings

The concept of a qualified corporate attorney-client privilege was briefly described to the participants in the study as a hypothetical change in the law, and they were then asked their views as to the probable effects of such a change. They were told to assume that information otherwise covered by the corporate privilege could lose its protection, in the court's discretion, upon a showing by the corporation's adversary of a special need for the privileged information due to an inability to obtain it through reasonable effort from alternative sources. They were also told to assume that under a qualification based on need, the privilege would in practice rarely be lifted because of the difficulty litigants, in most cases, would have in showing the court that the facts could not be obtained elsewhere.

The lawyers were almost unanimous (95.0%) in stating that a qualified privilege would reduce their ability to predict the applicability of privilege. This response is not surprising because the evidentiary needs of a future opponent cannot be foreseen. About a quarter of the lawyers, however, said that predictability would be decreased only "slightly," either because the applicability of privilege already is uncertain, as, for example, in the case of mixed business and legal communications, or because privileged information would usually be available from other sources. Some noted that predictability ultimately would turn on whether the judiciary limited its exercise of discretion to extraordinary cases.

Despite their negative views with respect to the effect of a qualified privilege on predictability, nearly two-thirds of the lawyers (63.7%) felt that a qualified privilege would have no effect on the frequency with which corporate clients would seek their legal advice. The most common observation was that the need for le-

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608 The standard described to the respondents is similar to the qualification applicable to the immunity for ordinary work product. See supra note 66.

607 Some of the lawyers complained that a discretionary approach would be too dependent on the "vicissitudes" of individual judges who may be "anti-privilege" and desirous of "evening up the score" between a corporation and its adversary.

608 In this and all other questions relating to the impact of a qualified privilege on the
gal advice would exist regardless of the standard of privilege. As one attorney put it, “The risks of foregoing legal advice would be too great.” Some remarked that corporations might seek legal advice even more frequently if the privilege were qualified in order to avoid getting into legal difficulties that could lead to litigation. One out of three lawyers, on the other hand, forecast a reduction in the use of legal services. “The frequency of consultation would decrease in proportion to their comfort level” is how one of these respondents described the effect.

The corporate executives’ views closely parallel those of the lawyers with respect to the frequency of seeking legal advice. When asked whether a qualified privilege would most likely cause the management of their companies to seek legal advice less often, thirty-six (69.2%) said “no,” eleven (21.2%) said “yes,” four (7.7%) said “it would depend on the circumstances,” and one (1.9%) could not say. Some of the comments of executives in the two-thirds majority who foresaw no decrease in the seeking of legal advice were similar to those of the lawyers. For example, a few indicated that “the cost of illegality would be too high,” and others suggested that legal advice would be sought “more often, not less, in order to stay out of trouble.” One of the executives summarized an apparently widely shared view when he said: “The benefits outweigh the risks. You have to run a business and the attorney-client privilege is only one of many factors to worry about.”

If the privilege were qualified, would the lawyers probably communicate less often with employees at lower levels of the corporation? Nearly three of every four attorneys (73.5%) answered “no” to this question. Some said the “ground rules” might be different, “fewer writings might be generated” or “certain topics might be avoided,” but the vast majority indicated that they would still communicate with lower-level employees if necessary to obtain information. The corporate executives, on the other hand, showed greater apprehension over the potential loss of privilege for
lower-level communications. They were asked: "If the privilege were subject to the [described] exception, do you think management would probably encourage counsel to communicate with lower-level managers and employees less often?" Twenty-four (46.2%) answered "yes," eight (15.4%) said "it would depend on the circumstances," eighteen (34.6%) said "no," and two (3.8%) could not say. A majority, therefore, predicted negative consequences, at least in certain circumstances. 6¹¹ Those who said that it would depend on the circumstances indicated they would either wait and see what experience proved to be like under a qualified privilege, leave the matter to the discretion of counsel, or continue to encourage lower-level communications except in sensitive areas or during litigation.

What would be the impact of a qualified privilege on candor? With respect to managerial-level employees, a slight majority of the attorneys thought that both upper management (54.9%) and middle management (52.9%) would be less candid. The responses of the executives were similar to those of the attorneys. Twenty-one executives (40.4%) said that management would be less candid, eight (15.4%) said the extent of candor would depend on the circumstances, nineteen (36.5%) said candor would not be affected, and four (7.7%) could not say. "We'd communicate more shrewdly and cautiously," typifies the comments of the majority of executives. Another frequent comment was to the effect that candor would not be affected unless the loss of privilege became common. Several attorneys and executives qualified their answers with the observation that candor would be reduced only with respect to written communications: Writings would be "more circumspect" but oral conversations would be as candid as always. 6¹² One of the executives who thought management's candor would not be affected at all asked rhetorically, "What's the point of seeking legal advice if you don't tell the lawyer all of the facts?"

With respect to employees below the level of middle management, a little over one-third of the attorneys (36.3%) thought that there would be less candor in communications. 6¹³ Some of these

6¹¹ Some of the executives expressed concern that lower-level employees would be less able to speak "judiciously" about corporate activity, thereby generating "possibly harmful data" that could be used against the corporation.

6¹² See also infra note 616 and accompanying text.

6¹³ The corporate executives were not asked to hypothesize whether the communications of lower-level employees would be less candid.
respondents felt strongly that a qualified privilege would have its most serious impact at this level. Nearly two-thirds of the attorneys, however, felt just as strongly that the candor of communications with lower-level employees would not be affected. Volunteered comments suggest three reasons why the majority thought that lower-level communications would be no less candid: lower-level employees have less at stake in corporate affairs because the matters do not affect them personally; lower-level employees simply do not think about privilege; and the privilege “does not belong to them, anyway.”

In addition to testing the potential impact of a qualified privilege on the communications of employees at various levels of the corporate hierarchy, the interview questionnaire sought to ascertain whether certain areas of legal counseling might be more seriously affected than others. A total of sixty-four lawyers had said that a qualified privilege would affect the candor of at least one of the levels of the corporate hierarchy. These respondents were shown a card containing five areas of legal counseling and were asked to rank the categories from one to five as to the seriousness with which candor in each area would be affected by a qualified privilege. “One” was to be used for the area most seriously affected, “two” the next most seriously affected and so on up to “five” as the area least seriously affected. Table 7 displays the average numerical rank for each category.614

614 For each area of counseling, the total number of responses in each numerical rank were compiled, and the average rank for each category was then calculated.
TABLE 7. Lawyers' Views of the Relative Seriousness of the Effect of a Qualified Privilege on Candor in Five Areas of Legal Counseling (N=102).

<table>
<thead>
<tr>
<th>Area of Legal Counseling</th>
<th>Average Numerical Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1 = most serious, 5 = least serious)</td>
</tr>
<tr>
<td>Investigations of specific problem situations involving possible corporate liability</td>
<td>1.79</td>
</tr>
<tr>
<td>Actual litigation</td>
<td>1.85</td>
</tr>
<tr>
<td>Investigations for routine compliance with government regulations</td>
<td>2.88</td>
</tr>
<tr>
<td>Non-routine transactions (e.g., acquisitions or divestitures)</td>
<td>3.36</td>
</tr>
<tr>
<td>Corporate transactions in the ordinary course of business (e.g., contract preparation or review)</td>
<td>4.57</td>
</tr>
</tbody>
</table>

As the results indicate, the two areas in which a qualified privilege would have its most serious impact on candor are internal investigations of specific problems involving potential corporate liability and actual litigation. Interestingly, the average numerical rank for communications relating to litigation was somewhat higher than that for internal investigations. This result is explained by a recurring comment volunteered by a few lawyers, mostly litigators, who gave the litigation category a high ranking: "Once a matter goes into litigation, they have to tell you all of the facts." Nevertheless, the overwhelming number of attorneys ranked litigation as "one" or "two" with respect to diminished candor. Conversely, the higher end of the rankings were matters less likely to result in litigation: routine "legal audits" for regulatory compliance, major business transactions, and routine transactions.616

The final question put to the lawyers and executives was whether a qualified approach to privilege would have any effect on record-keeping practices with respect to lawyer-client communications. Two-thirds of the attorneys (66.7%) thought that their personal record-keeping would change. When asked to describe the ef-

616 While willing to rank the categories in accordance with the given instructions, some of the lawyers nevertheless pointed out that depending on the circumstances, any one of the listed counseling areas might be affected by a qualified privilege.
fect on record-keeping, the most frequent responses, in descending order, were as follows: they would put less in writing, be more circumspect in their writings, or save fewer documents for a shorter period of time. “Why create writings that will help an adversary?” was a commonly voiced sentiment. The lawyers who anticipated no effect on their record-keeping gave one of the following explanations: either few attorney-client communications are reduced to writing as it is (“especially if the matter is sensitive”), or the need to keep written records for informational purposes would outweigh the risks of discovery. Would corporate representatives also put fewer attorney-client communications in writing? Seventy-one percent of the lawyers thought so, and an even larger percentage of corporate executives—86.5%—agreed.

To assess the judiciary’s point of view, the twenty-eight judges and magistrates were asked to state their general reactions to the merits of applying the corporate privilege on a qualified basis to counsel’s communications with lower-level employees. Four principal views were expressed. The majority—sixteen respondents—had a negative reaction. They were of the opinion that a qualified approach would chill candor and that the evidentiary needs of an adversary should remain irrelevant when it comes to privileged communications. Two were uncertain in their views; they questioned whether the privilege has very much impact on candor in the corporate sector but said that they would want more information on this point. Four thought that a qualified approach is “unnecessary” either because (1) the elements of the privilege are “flexible enough” to permit a judge to compel production in cases of true need, (2) judges already have a “repository power” to override privilege, or (3) because parties can be “persuaded” in pretrial conferences to make reciprocal exchanges of

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616 Several of the respondents asserted that recording fewer matters in reaction to a diminished privilege would make the job of lawyering more difficult. Without a memorandum, the details of discussions that occurred months or weeks ago would be forgotten and could not be dealt with as effectively at a later point in time.

617 Based on the results of the interviews of lawyers and executives, I decided to ask the judicial officers about a needs-based qualification only with respect to lower-level communications.

618 Two of the respondents in this group, however, pointed out that precedent exists under current law for just about any conclusion that a judge might personally desire to reach with respect to particular disputed communications.

619 The judicial respondents were not advised of the results of the survey of attorneys and corporate executives.
necessary information. Six respondents indicated that they would have "no objection" to a qualified approach if restricted to "extraordinary cases." Two of these respondents suggested that judicial power already exists under the current state of the law to lift the privilege "in the interests of justice."\footnote{\textsuperscript{620}}

Since negative responses were more numerous among the jurists than neutral or favorable ones, it would appear that even if a qualified approach were mandated by legislation or Supreme Court directive, the number of occasions in which the privilege would be lifted would be few in number. Additional evidence for this conclusion is contained in the results of a question to the judicial respondents as to the frequency with which they had overridden claims of attorney work product, which is already a qualified immunity,\footnote{\textsuperscript{621}} based on an adversary's showing of need.\footnote{\textsuperscript{622}} Of twenty-five respondents with experience, eight (32.0%) said "never," thirteen (52.0%) said "rarely," and four (16.0%) said "in about half" the cases in which the issue had arisen.

In sum, the results are mixed with respect to the potential impact of a needs-based qualification to the corporate attorney-client privilege. Although predictability about the privilege probably would be reduced and the number of written communications might decrease, most of the lawyers and executives agreed that corporations would continue to seek legal advice to the same extent as under current law. A qualified approach probably would reduce candor in communications with management, but nearly two-thirds of the lawyers thought that lower-echelon employees would be just as candid. In addition, most lawyers would still communicate with lower-level employees if necessary to develop the facts. A potential tension between attorneys and clients might arise, however, with respect to lower-level communications because a majority of the executives suggested that management would be less likely to encourage such communications. A qualified privilege probably would not affect all topics of communication in equal

\footnote{\textsuperscript{620} With respect to the cost of a qualified privilege in terms of administrative burdens on the judiciary, 14 of the 22 respondents who answered the question (63.6\%) thought that such an approach would produce no increase in the consumption of judicial time in deciding corporate attorney-client privilege issues. Of the remaining eight respondents, one thought there would be a "slight" increase, one said "moderate," and six predicted a "large" increase in the consumption of time.}

\footnote{\textsuperscript{621} See supra note 65.}

\footnote{\textsuperscript{622} In this question, the judicial respondents were asked to answer on the basis of their experience both in corporate and noncorporate cases.}
measure, as suggested by the lawyers' views that candor would be reduced to a greater extent in communications relating to litigation and internal investigations than in communications relating to more routine matters.

As some of the respondents noted, the actual impact of a qualified privilege would depend in substantial part on the manner in which judges applied the qualification. If the results of the survey of judicial respondents are any indication, judges apparently would hesitate to lift the privilege, even with respect to communications between counsel and lower-level employees, except in cases of significant need for the information contained in the communications. If this is so, a needs-based qualification limited to lower-level communications would do little to diminish the effectiveness of the privilege in the corporate context.

B. The Case for a Qualified Privilege

1. Recapitulation and a Proposal

The tortuous history of the corporate attorney-client privilege demonstrates unease with its potentially obstructive effects on the fact-finding process.623 In the Garner doctrine, courts have found a principled basis for setting aside the privilege in appropriate circumstances if the corporation or its management owes a fiduciary duty to the opponents, such as a group of shareholders.624 The control group test, which limits eligible corporate spokespersons to managerial agents who play a participatory role in the decision-making process for which legal advice was sought, is another way of narrowing the scope of the privilege that has appealed to several courts and state lawmakers.625 By narrowing the number of corporate representatives who may speak for the client, however, the control group test accomplishes its goal of limitation in a way that may discourage corporate managers from allowing lawyers to gather important facts necessary for the provision of sound legal advice. Upjohn rejected the narrow approach, suggesting a rule of flexibility that focuses on the purpose and nature of the communication rather than the decision-making authority of the corporate

624 See supra notes 536-55 & 567-601 and accompanying text.
625 See supra notes 358-66 and accompanying text.
employee. This solution to the problem of identifying appropriate spokespersons for the corporate client is preferable because it enhances the potential for fulfillment of the instrumental objectives of the corporate privilege.

At the same time, the inevitable consequence of the Upjohn approach is the creation of a large zone of silence that may directly conflict with the goals of modern discovery and rules of evidence. Since major corporations use lawyers in all phases of their decision-making activities, the Upjohn approach will sometimes bring a large amount of significant information under the umbrella of the privilege. The information in counsel's files may become relevant in the resolution of subsequent litigation and yet be beyond reach due to the adversary's inability to reproduce the information. Memories of corporate employees may fade, and those who were originally candid with the corporation's lawyer may later be unavailable or obstructive when the corporation's adversary seeks to depose them. The judges and magistrates in the survey suggested that such circumstances may not occur very often, but only a third of them said that the situation had never arisen in their experience.

The Upjohn model thus poses a conundrum: To maximize the social utility of the privilege, a broad approach should be taken with respect to the number of employee communications that qualify for privileged treatment; but when this standard is combined with the traditional absolute nature of the privilege, the result in some cases may be an unwarranted frustration of society's interest in fair and accurate adjudication. A solution to this dilemma lies in permitting greater judicial discretion to reject claims of privilege by corporations. Since the number of privileged communications has expanded, there is a corresponding need to increase the circumstances in which the privilege can be set aside in litigation against corporations. A qualified approach would continue to give corporations prima facie entitlement to privilege but would allow the privilege to yield when evidentiary needs in a particular case

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626 See supra notes 377-93 and accompanying text.
627 See supra notes 433-44 and accompanying text.
628 See supra notes 4-7 and accompanying text.
629 See, e.g., supra notes 8, 240, 279-80, & 503-04 and accompanying text.
630 See supra notes 127-36 and accompanying text.
631 See supra notes 405-06 and accompanying text. As noted in the earlier section, judicial experience does not include privilege claims that are not litigated.
outweigh the potential benefits of confidentiality.

As noted previously, a few commentators have advocated the concept of a qualified corporate attorney-client privilege, but few courts have openly embraced the idea except in actions involving parties in fiduciary relationships. Some fertile seeds, however, have been planted along the way.

In Upjohn itself, the Court placed heavy emphasis on the ability of the IRS to gather the evidence it needed directly from the corporation's employees. Indeed, the Upjohn Company provided the IRS with a list of the eighty-six persons interviewed by its counsel, and the IRS had already conducted twenty-five of its own interviews. At two points in the opinion, the Court stressed that it was deciding only the instant case and was refraining from announcing any rule "to govern all conceivable future questions in this area." The Court's preference for case-by-case development is not, of course, an invitation for federal courts to employ a totally ad hoc approach, but it does leave room for a measure of flexibility. For example, if Upjohn's employees had proven to be either obstructive or unavailable during the course of discovery, perhaps

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632 See supra note 605.


635 Id. at 396.

636 Id. at 366, 396. It has also been noted that the Court spoke of "the control group test adopted by the court below," Id. at 392, 397 (emphasis added), suggesting that "some other 'control group' test might escape the Court's condemnation." 24 C. WRIGHT & K. GRAHAM, supra note 63, § 5483, at 308.
a different result would have been reached.\textsuperscript{379}

Subsequent to \textit{Upjohn}, two federal district court opinions have suggested the possibility of movement away from the traditional absolute approach. In \textit{Royal Embassy of Saudi Arabia v. Steamship Mount Dirfys},\textsuperscript{380} a ship's master in an admiralty case had given a statement to the attorney for his corporate employer's liability insurer. The chief officer and an engineer, whose whereabouts subsequently became unknown, had verified the report as true.\textsuperscript{381} The court, using language traditionally encountered only in connection with the work product immunity, stated that the report was "subject to disclosure only upon a showing of truly substantial need and undue hardship."\textsuperscript{382} Discovery was denied because the master had been made available for a deposition, but the court indicated that "further inquiry might be in order" if the statement became necessary for impeachment purposes.\textsuperscript{383}

In \textit{Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc.},\textsuperscript{384} the court came very close to breaching the privilege in a case in which numerous current and former executives of the defendant corporation asserted their individual privileges against self-incrimination during depositions.\textsuperscript{385} "This shield," said the court, effectively blocked plaintiff's efforts to obtain information about an internal investigation into the employees' alleged wrongdoing that had been conducted by defendant's counsel in anticipation of litigation.\textsuperscript{386} While holding that counsel's interviews with employees

\textsuperscript{379} In Gergacz, \textit{Attorney-Corporate Client Privilege}, 37 Bus. Law. 461, 507-08 (1982), the author suggests that a private litigant with fewer resources than the federal government might have fared better. In the analogous situation of work product, however, the financial resources of the adversary have seldom provided a basis for overcoming the qualified immunity. \textit{See}, e.g., \textit{In re LTV Sec. Litig.}, 89 F.R.D. 595, 616 (N.D. Tex. 1981) (cost of duplicating other party's investigation is not basis for discovery unless cost would be "prohibitive"); \textit{see also In re Dayco Corp. Derivative Sec. Litig.}, 99 F.R.D. 616, 621 (S.D. Ohio 1983) (in shareholder action, court held that large expense of deposing corporation's employees was not "particularly onerous" in light of the financial claims at stake); \textit{see generally Note}, supra note 66, at 810-11.


\textsuperscript{381} Id. at 55.

\textsuperscript{382} Id. at 56.

\textsuperscript{383} Id. at 57. \textit{See also Civil Serv. Employees Ass'n v. Ontario County Health Facility}, 103 App. Div. 2d 1000, 1001, 473 N.Y.S.2d 380, 382 (4th Dep't 1984) (court refused to apply \textit{Upjohn} to written statements of county employees obtained by county's attorney, stressing that statements were needed for purpose of cross-examining employees during arbitration proceeding).

\textsuperscript{384} 553 F. Supp. 45 (S.D.N.Y. 1982).

\textsuperscript{385} Id. at 48.

\textsuperscript{386} Id. at 50.
were protected by the attorney-client privilege, the court characterized the factual findings contained in counsel's report as work product and held that plaintiff had made a sufficient showing of need to overcome the immunity.\textsuperscript{646} The same need might have justified disclosure of the interviewees' actual statements to counsel if no separate factual findings had been prepared.

Thus, some judicial authority, albeit scant, supports the notion of a needs-based qualification to serve as a "safety valve" to relieve the pressure that the broad approach of Upjohn may sometimes put on the adjudicatory system.\textsuperscript{646} My own proposal, which draws upon the findings of the survey, is that the corporate attorney-client privilege should continue to operate in traditional absolute fashion with respect to counsel's communications with members of the corporate control group, but should be qualified as to noncontrol group communications.\textsuperscript{647} The results of the empirical

\textsuperscript{646} Id. at 50-51. A similar situation with a different outcome occurred in In re Grand Jury Subpoena Dated December 19, 1978, 81 F.R.D. 691 (S.D.N.Y. 1979), in which a grand jury was held entitled to the factual contents of attorneys' questionnaires and interview memoranda concerning questionable foreign payments by the corporation's employees because all of the employees were either foreign nationals who were not subject to subpoena or had refused to testify in the absence of a grant of immunity. Id. at 695. Because the court applied the control group standard to determine which employee communications were absolutely privileged, the disclosed materials involving noncontrol group members were characterized as work product as to which the Government had made a sufficient showing of need. Id. The attorneys were held in contempt when they refused to comply with the subpoena, but the Second Circuit reversed. In re Grand Jury Subpoena, 599 F.2d 504 (2d Cir. 1979). The court of appeals held that the work product immunity had not been overcome, stressing new factual developments: the attorneys had furnished the identity and addresses of all relevant employees and descriptions of the questionable payments; fourteen employees had been interviewed by the United States Attorney without claiming the privilege against self-incrimination; two had testified before the grand jury; and separate counsel had been recommended to the employees to reduce the risk of a concerted claim of privilege by all of the employees. Id. at 512-13.

\textsuperscript{646} See J. Gergacz, Attorney-Corporate Client Privilege \S 3.02[3][d][iii], at 3-74 (1987) (consideration of adversary's needs described as "safety valve for the fears of the proponents of the control group test").

\textsuperscript{647} At least two other commentators have reached the same conclusion. See 24 C. Wright & K. Graham, supra note 63, \S 5476, at 191 & 192 n.366; Note, Attorney-Client Privilege—The Supreme Court Rejects the Control Group Test as Applied to Corporations, 57 Tul. L. Rev. 165, 176-78 (1982); see also infra note 656.

The recent decision in Admiral Ins. Co. v. United States District Court, No. 88-7345 (9th Cir. Aug. 9, 1989) (available on WESTLAW), appears to be inconsistent with my proposal. In Admiral, the Ninth Circuit rejected a needs-based qualification to the corporate attorney-client privilege where two corporate officers who had been interviewed by the corporation's attorney later became "unavailable" to testify at a deposition because of an expressed intent to invoke their privilege against self-incrimination. The court's reasoning was that the corporate attorney-client privilege should admit of no exception grounded on the
study lend strong support to the merits of the proposition and suggest some of the factors that a court should consider in determining whether to lift the privilege for lower-level communications.

2. Empirical Basis for a Qualified Privilege

The survey findings demonstrate that an absolute privilege for lower-level communications is not necessary to achieve the principal goals of the attorney-client privilege in the corporate context. Two-thirds of the lawyers and executives were in agreement that qualifying the privilege would not decrease the frequency with which legal advice is sought. Moreover, nearly two-thirds of the lawyers said that a qualified privilege would have no effect on the candor of lower-level employees and almost three-fourths said that if such an approach were taken, they would probably communicate with such employees just as often as they do now.

To qualify the privilege for communications with upper management, however, would probably have a more damaging impact. A slight majority of both the lawyers and executives predicted less candor in managerial-level communications if the privilege were qualified. The corporate privilege probably is a greater incentive for candor at the upper levels of management because executives have frequent contact with lawyers, and they are more likely than lower-level employees to know about the privilege and to expect it to be used to prevent disclosure to outsiders. Although executives have no ultimate guarantee that the privilege will protect their communications from disclosure to third parties, expectations of confidentiality undoubtedly rise in proportion to

adversary's discovery burdens because of the negative impact that such an exception would have on the instrumental goals of the privilege. Insofar as communications with noncontrol group employees are concerned, much of the data in my study undermine the court's rationale. See, e.g., supra notes 606-16 and accompanying text. On the other hand, the Admiral court might have reached the same result even under my proposal, because the corporate attorney-client privilege should remain absolute for counsel's communications with members of the control group. See infra notes 651-60 and accompanying text. It is unclear whether the corporate officers in Admiral fell within the control group.

448 See supra notes 608-09 and accompanying text.
449 See supra note 613 and accompanying text.
450 See supra note 610 and accompanying text.
451 See supra notes 612 & 616 and accompanying text.
452 See supra notes 54-57 and accompanying text.
453 See supra note 610 and accompanying text.
454 See infra notes 651-60 and accompanying text.
455 See supra notes 121-25 and accompanying text.
one's position in the corporate hierarchy.\textsuperscript{[556]}

The results thus indicate that an absolute privilege may be an important factor in assuring candor in upper management's communications with counsel but that a qualified privilege is sufficient as to lower-level communications. The probable impact of a qualified privilege on middle management is less clear. Almost an equal number of lawyers in the survey thought that middle management's communications would be less candid as those that thought upper managers would be less candid.\textsuperscript{[557]} At the same time, most of the lawyers thought that fewer in middle management were aware of the privilege.\textsuperscript{[558]} Levels of management, therefore, do not necessarily provide an appropriate dividing line for determining which communications should be absolutely privileged and which should be subject to a qualified privilege. The control group standard provides a practical demarcation.\textsuperscript{[559]} Since almost all upper managers would fall within the control group, their communications with counsel would qualify for absolute treatment. To the extent a middle manager was within the control group, his communications would likewise be within the absolute privilege when expectations of confidentiality are probably at their highest, i.e., when he is participating in the decision-making process as to which legal advice was sought.\textsuperscript{[560]}

A potential negative consequence of a qualified privilege is

\textsuperscript{[556]} See supra notes 208-13 and accompanying text. As noted previously, Professor Saltzburg's proposed approach to the corporate privilege would make its applicability turn on whether or not the particular employee could control the corporation's use of his communication with counsel. See supra note 365. No employee at any rank, however, ultimately has such control. Nevertheless, Professor Saltzburg is correct in suggesting that expectations of confidentiality may vary depending on an employee's status in the corporation. The practical effect of his proposal and mine are similar to the extent that attorney-client communications with upper-level management will almost always be absolutely privileged. At the lower-levels, however, Professor Saltzburg would remove the privilege entirely, leaving only the qualified protection of work product immunity in matters involving litigation. See Saltzburg, supra note 124, at 306; see also Waldman, supra note 605, at 503-05 (attorney-client privilege should not apply at lower levels until litigation has commenced). The effect of my proposal would be somewhat broader in that qualified protection would still be available regardless of whether litigation was anticipated. See infra notes 705-56 and accompanying text.

\textsuperscript{[557]} See supra notes 559-63 and accompanying text.

\textsuperscript{[558]} See supra table 1, section III.B.1 at 236.

\textsuperscript{[559]} See supra notes 359 & 434 and accompanying text.

\textsuperscript{[560]} See In re Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979) ("We believe that it is socially desirable to protect, at a minimum, communications made by a person who has the authority to take part in a decision about any action to be taken in response to the solicited advice").
suggested by the executives’ beliefs that at least in some circumstances, they might not encourage counsel to speak to lower-level employees. To the extent management restricted the scope of counsel’s employment, the corporation might not receive legal advice that is sufficiently well informed to forestall or correct violations of law. But counsel could make clear to management the risks of “playing ostrich,” as one of the lawyers in the study put it. Furthermore, management can be reminded that prima facie entitlement would still exist for most communications at all levels of the corporate hierarchy. In situations in which litigation is anticipated, the attorney-client privilege would be augmented by the work product doctrine. Moreover, as will be developed below, in litigation and similar situations in which management’s concern over privilege protection is probably at its highest, the burden on the adversary in overcoming the privilege is likely to be proportionately high.

Another risk in qualifying the privilege is that lawyers would stop making records of their employee interviews out of fear that such documents might contain damaging information subject to discovery. Two-thirds of the lawyers and executives in the survey hypothesized this result if the privilege were to become qualified. With fewer records, the quality of legal services might suffer. But the question that was put to the respondents about record-keeping dealt with the issue of a top-to-bottom qualified privilege. It is doubtful that very much reduction in the documentation of employee interviews would occur if the qualified approach were limited to communications with employees outside the control group. The hazards of forgetting what an employee said, losing a source of potentially helpful evidence or relinquishing a means of impeachment in the event the employee becomes a turncoat witness would be too great. Experience under the work product doctrine, which is already qualified, belies the prospect of any radi-

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681 See supra note 611 and accompanying text.
682 The percentage of executives who thought that management would be less inclined to encourage counsel to communicate with lower-level employees under a qualified privilege (61.6%) is almost as high as in the case of total unavailability of the privilege for lower-level employees (nearly 70%). See supra notes 404-05 and accompanying text. The executives may have mistakenly assumed that a qualified privilege is tantamount to no privilege.
683 See supra notes 66-68 and accompanying text.
684 See infra notes 721-24 & 754 and accompanying text.
685 See supra note 616 and accompanying text.
686 See supra note 225.
cal change in the way lawyers would preserve the results of employee interviews. The threat of an occasional loss of work product immunity due to an adversary's inability to obtain equivalent information from other sources has little inhibiting effect in the recording of witness statements.

It might be argued that taking a qualified approach to the corporate privilege would be discriminatory since the individual client's privilege is absolute. But since the most important goal of litigation is to ascertain the truth, the proper approach to the privilege should be one which strictly confines it "within the narrowest possible limits consistent with the logic of its principle." The empirical findings show that an absolute privilege is simply not necessary to further the goals of the privilege in the corporate context.

Furthermore, the privilege as applied to corporations has the potential for the loss of a great deal more relevant information than is lost in the case of an individual. Whereas an individual opponent can be questioned about the facts with relative ease, extracting information from a host of corporate employees sometimes may be not only burdensome but also impossible to achieve if the witnesses are unavailable or uncooperative.

Finally, as discussed in an earlier section of the Article, the attorney-client privilege for individuals may be justified both by instrumental goals and personal privacy interests. When two such principles underlie a privilege, the case for absolute protection is at its strongest. For this reason, a sound basis exists for an essentially inviolable privilege for confidential communications between individual clients and their attorneys. The same cannot be said in the case of corporate clients, because the personal privacy dimension is lacking, especially outside the control group. Corporations are state-created artificial entities that are incapable of ex-

667 See supra notes 4-5 and accompanying text.
668 8 J. Wigmore, supra note 2, § 2291, at 554. See also Trammel v. United States, 445 U.S. 40, 50 (1980) (privileges are subject to rule of strict construction); Fisher v. United States, 425 U.S. 391, 403 (1976) (attorney-client privilege "applies only where necessary to achieve its purpose"); United States v. Nixon, 418 U.S. 683, 710 (1974) (privileges are not to be "expansively construed").
669 See J. Weinstein & M. Berger, supra note 17, ¶ 503(b)(04), at 503-41 to 503-42; see also Saltzburg, supra note 124, at 309 (increased difficulty of discovery from corporate employees "is a reason not to expand a privilege beyond the rationale that supports it").
670 See supra notes 126-32 and accompanying text.
671 See supra notes 79-92 and accompanying text.
experiencing the sense of trust, intimacy and sharing that is experienced by individuals in private counseling relationships.\textsuperscript{672} Although upper-level corporate officers may interact on a personal level with counsel, none of the corporation’s agents are the lawyer’s clients under ordinary circumstances.\textsuperscript{673} Corporations have some legitimate needs for institutional secrecy, but such privacy interests are not of the same dignity as those of individuals.

Because there are no personal privacy rights to be protected, the corporate attorney-client privilege is supported only by instrumentalist arguments. When the putative utility of the privilege with respect to lower-level communications is doubtful, a case-by-case balancing approach, pursuant to which the interests in accurate fact-finding are weighed against the interests in secrecy, is appropriate.

3. Reconciliation with the Need for Certainty

Perhaps the most serious objection to a qualified privilege is the uncertainty that it may cause client and counsel at the time of their communications.\textsuperscript{674} It was the absence of certainty, for example, that contributed to rejection of the control group test in \textit{Upjohn}.\textsuperscript{675} As the Supreme Court observed, “An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”\textsuperscript{676} By parity of reasoning, it is arguable that if the maximum benefits of the corporate attorney-client privilege are to be realized, the corporate client and its counsel must not be left to wonder whether a court’s discretionary judgment will override the privilege for lower-level communications.

For several reasons, however, the certainty argument is not a basis for rejection of the proposal for qualifying the privilege for communications between counsel and employees outside the control group. First, the empirical findings show that certainty in the application of the privilege to lower-level communications is not essential to secure open communications. Second, qualifying the privilege for noncontrol group communications may have the ac-

\textsuperscript{672} \textit{See supra} notes 107-11 and accompanying text.
\textsuperscript{673} \textit{See supra} note 273.
\textsuperscript{674} \textit{See supra} note 607 and accompanying text.
\textsuperscript{675} \textit{See supra} notes 387-88 and accompanying text.
tual effect of increasing certainty in the law of corporate privilege. Some courts purporting to follow *Upjohn* have narrowly construed its extension of the privilege to the lower levels of the corporate hierarchy. If courts knew that the privilege need not be applied in an absolute manner, they might be more willing to bring a larger number of lower-level communications within the privilege. This would help offset whatever predictability is thought to be lost due to the nonabsolute nature of the privilege. In any event, the proposal provides greater certainty than does the control group test as originally formulated because prima facie entitlement would almost always apply throughout the corporation.

A third reason that certainty is not likely to be seriously affected by the proposed qualified approach is that courts can be expected to lift the privilege only rarely. Experience under the work product doctrine suggests that adversaries are seldom capable of making the necessary showing that they are unable to obtain the evidence they need from nonprivileged sources. The same result is contemplated in the case of a qualified corporate attorney-client privilege.

Finally, uncertainty about the applicability of the corporate privilege already prevails. Despite the Supreme Court’s rejection of the control group test in federal courts, the states are still free to employ it, and a significant minority do. Thus, many communications that might be privileged in federal court would still be subject to disclosure in a suit in one of those states or possibly even in a federal court if the law of such a state were controlling on a particular substantive issue, as, for example, in a diversity action.

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677 See supra note 441.
678 See Kelly v. City of San Jose, 114 F.R.D. 653, 658 (N.D. Cal. 1987). In Kelly, a civil rights action in which the plaintiff sought to overcome application of the government’s privilege for police department files, Magistrate Wayne D. Brazil made the following cogent observation that applies, by analogy, to the corporate attorney-client privilege:

[A]n important argument in favor of rejecting an absolute privilege for information gathered by police departments is that courts will be willing to consider more kinds of information as falling within the scope of the privilege (thus entitled to some level of qualified protection) if they can use a more flexible analysis thereafter to decide whether, in a given situation, a plaintiff should have access to the material.

*Id.*

679 See supra notes 620-21 and accompanying text.
680 See infra notes 705-56 and accompanying text.
681 See supra note 361.
682 See supra note 401.
Since a corporation cannot always control the choice of forum, counsel's ability to determine which communications will be privileged is circumscribed. Even without reference to state law, twenty per cent of the lawyers in the study said that they were still uneasy after *Upjohn* about the applicability of privilege to lower-level corporate communications.663

Also contributing to existing uncertainty is the inherent lack of precision that accompanies judicial application of the privilege in the corporate context. The definitional elements of the privilege and existing exceptions give trial judges the ability to make what are essentially ad hoc decisions that may be affected by the judge's perception of the adversary's need for the evidence.684 Thus, a backdoor balancing of interests may already be occurring under the existing "absolute" approach. The comments of a few of the judges in the survey lend credence to this possibility,685 and some of the lawyers in the survey said that they already warn their corporate clients that the privilege is not absolute.686

Perhaps the leading source of definitional uncertainty is the rule that "predominantly business" communications fall outside the privilege,687 which, as previously discussed, may be of particular concern to house counsel who provide counseling in the ordinary course of the corporation's business.688 Whether a document containing mixed business and legal matters ultimately will be classified as privileged is not always capable of prediction.689 The corporation's failure to maintain internal confidentiality690 and the possibility of waiver through a myriad of circumstances691 are further limitations on certainty.692 Indeed, these are uncertainties about which corporate clients are frequently explicitly warned.693 To be sure, the corporation itself can minimize the danger of waiver by maintaining strict confidentiality. But from the perspective of the persons whose conduct is supposed to be influenced by

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663 See supra note 402 and accompanying text.
664 See Note, supra note 113, at 471-72.
665 See supra notes 617-19 and accompanying text.
666 See supra table 3, section III.B.3, at 240; see also supra note 559.
667 See supra notes 487-94 and accompanying text.
668 See id.; supra notes 292-94 and accompanying text.
669 See supra note 189 and accompanying text.
670 See supra notes 451-55 and accompanying text.
671 See, e.g., supra note 455; supra note 598.
672 See supra note 189 and accompanying text.
673 See supra table 3, section III.B.3. at 240.
the privilege—the individual corporate employees—the possibility of waiver is always present. Employees, especially those outside the control group, can never be certain that their communications will not be subsequently revealed to outsiders because the decision whether to waive the corporate privilege is not theirs to make. In a sense, then, the privilege is already qualified from the vantage point of the employees. Even if employees are not, in general, aware of the fact that the privilege does not belong to them personally, they may be so advised when their interests conflict with those of the corporation.

Exceptions to the privilege, such as the crime/fraud rule and the Garner doctrine, are more likely to be a source of uncertainty for lawyers than for clients because the survey results suggest that clients generally are not made aware of them. These exceptions apparently are rarely applied and may come as a surprise to clients when they become relevant. Another troubling exception that may come as a surprise to clients is the rule that permits a lawyer to reveal confidences in order to collect a fee from the client or in defense of charges of wrongdoing made either by the client or third parties. The potential for occasional loss of the privilege due to such exceptions has long been tolerated in the interests of justice.

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694 See supra notes 117-25 and accompanying text.
695 See supra notes 174-78 and accompanying text.
696 See supra notes 73-74 and accompanying text.
697 See supra notes 536-55 and accompanying text.
698 See supra table 3, section III.B.3., at 240.
699 See supra note 189.
700 See, e.g., Cannon v. U.S. Acoustics Corp., 532 F.2d 1118, 1120 (7th Cir. 1976) (action by attorney for fee); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1981).
703 See, e.g., Stern v. Daniel, 47 Wash. 96, 98, 91 P. 552, 553 (1907) (privilege is unenforceable "where it would be manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of the attorney"). In light of the fee-collection and self-defense exceptions, the McCormick treatise asks "whether in all cases the privilege ought not to be subject to the same qualification, that it should yield when the evidence sought is necessary to the attainment of justice." C. McCormick, supra note 97, § 92, at 221. Similarly, in support of his provocative argument that lawyers should be required to disclose adverse information about their cases, former Judge Marvin Frankel cites the fee-collection and self-defense exceptions to make the point "that life is filled with surprises for clients
In light of the foregoing elements of uncertainty that are interwoven in the current fabric of the law of attorney-client privilege, predictability obviously is not a hallmark. Giving judges an additional amount of discretion to weigh the benefits of applying the corporate privilege to noncontrol group communications against the harm that will result to accurate adjudication probably would not hamper the attorney’s ability to obtain information necessary to provide sound legal advice. An occasional loss of privilege due to an adversary’s discovery needs is not likely to chill the corporate attorney-client relationship because each future case would involve a fresh balancing of the competing interests based on the particular facts and circumstances with a presumption against discovery. In any event, certainty is simply too high a price to pay when the corporation’s assertion of privilege effectively precludes an adversary from obtaining evidence that is necessary to his case.

4. Suggested Contours of a Qualified Privilege for Noncontrol Group Communications

If the parties seek judicial intervention to resolve a dispute over the discovery of allegedly privileged material, the burden of proof should lie on the corporation to establish all of the prerequisites for application of the privilege. In this connection, the corporation should have to prove which attorney-client communications involved members of the control group in order to obtain the benefits of the traditional absolute protection. This burden is fairly placed on the corporation because it is in the best position to prove which of its managers had the authority to participate in the decision.
sion-making process for which legal advice was sought. To establish entitlement to the qualified privilege for noncontrol group employees, it should be sufficient for the corporation to show that the communication with the attorney was kept confidential, related primarily to legal advice and concerned matters within the scope of the particular employee's corporate duties.\textsuperscript{6}

The party seeking discovery should bear the burden of proof in overcoming the privilege, either by showing that an existing exception applies or by persuading the court that the privilege for noncontrol group communications should be set aside due to need. A traditional exception, of course, would lift the privilege for communications at any level of the corporate hierarchy. The qualification based on need would be an independent basis for lifting the privilege only with respect to counsel's communications with employees who are not within the control group.

In applying the qualified privilege, courts should balance the potential harm to corporate interests in the confidentiality of attorney-client communications with noncontrol group employees against the adversary's need for the information contained in the communications. Despite the legitimacy of a flexible balancing approach, more specific guidance is appropriate with respect to the criteria to be employed in the process. From the perspective of client and counsel, some measure of predictability is essential if the privilege is to accomplish its intended purpose of facilitating candid attorney-client communications throughout the corporation. From the court's perspective, another "decision point" should not be added to an already complex matter without fairly specific guidelines.\textsuperscript{7}

In the paragraphs that follow, I will suggest various factors that a court should consider in weighing corporate interests in confidentiality against the adversary's needs. Under a qualified approach, additional relevant factors undoubtedly would be identified by courts as the caselaw developed.

Commentators sometimes criticize balancing tests that contain lists of factors to guide judicial discretion when no indication of the relative importance of the factors is given.\textsuperscript{8} In discussing the

\textsuperscript{6} See supra notes 433-40 and accompanying text.


\textsuperscript{8} See, e.g., Berger, Court Awarded Attorney's Fees: What is "Reasonable"?, 126 U. PA. L. REV. 281, 286-92 (1977) (criticizing listing of factors for judicial determination of attorney's fee awards); Note, supra note 556, at 322 (criticizing Garner court's listing of factors for judicial determination of "good cause" as basis for overcoming corporate privi-
factors that I deem relevant in application of a qualified corporate attorney-client privilege, I will attempt to meet such criticism, at least in part, by identifying those factual circumstances that I feel favor discovery and those which weigh against it. In this endeavor, I draw upon the approach taken by Judge Weinstein in a case involving one of the government's qualified privileges for official information. As Judge Weinstein observed, "[T]he general importance of each set of interests can provide useful—but not decisive—content and guidance to applications of the balancing test in individual cases." Beyond indicating what I believe are the circumstances generally favoring and disfavoring disclosure in the corporate context, I do not offer any mathematical pre-weighting of particular factors. It is impossible to foresee every combination of circumstances, and predetermined outcomes would undermine the flexible nature of the proposed privilege. The purpose of qualifying the privilege, after all, is to make it "amenable to the finer touch of the specific solution."

a. Factors Relating to Corporate Interests in Confidentiality

At least four factors should be taken into account in marshaling a corporation's interests in preserving the confidentiality of the

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70 See King v. Conde, 121 F.R.D. 180, 188-95 (E.D.N.Y. 1988); see also Kelly v. City of San Jose, 114 F.R.D. 653, 660-71 (N.D. Cal. 1987).

King was a civil rights action against a county police department and individual officers in which the plaintiff sought access to information in the police department's files. The defendants asserted the privilege for police records, which is a subspecies of the government's qualified privilege for official information. King, 121 F.R.D. at 188. In most cases, the government's privilege for official information is subject to a balancing test that weighs various public policy considerations against the adversary's discovery needs. See, e.g., Association for Reduction of Violence v. Hall, 734 F.2d 63, 65-66 (1st Cir. 1984). On the other hand, the privilege for "state secrets," which includes matters of national security, defense and foreign relations, is absolute. See United States v. Reynolds, 345 U.S. 1, 10-11 (1953).

71 See id. ("The enterprise of suggesting weights for each interest is treacherous for it risks being perceived as prejudging disputes in the abstract").

72 C. McCormick, supra note 97, at 187.

In his proposal for codification of the emerging qualified privilege for self-critical analysis, see supra note 254, Professor Leonard makes the following relevant observation about case-by-case balancing:

Although the lack of specificity in discretionary standards can lead to inconsistent application, the flexibility afforded by such standards allows the courts greater opportunity to view each case in light of its own facts and circumstances and to reach decisions consistent with the goals of justice and the needs of the litigants. Leonard, supra note 254, at 135 (footnote omitted).
communications in issue: (1) the general subject matter of the legal counseling; (2) the status of the lawyer, i.e., house counsel or outside counsel; (3) the extent to which the contents of the communication are evaluative or factual; and (4) whether the communication was oral or written.

The results of the empirical study suggest that an important factor in determining corporate interests in confidentiality is the context in which the legal counseling took place. Certain types of lawyer-client communications need a greater sense of security than others. Thus, an appropriate inquiry is whether the communications related to (1) legal advice with respect to routine transactions, (2) actual or anticipated litigation, or (3) some particularly sensitive matter. The survey results repeatedly show that corporate clients are most often concerned about the protections of the attorney-client privilege when they anticipate or are involved in litigation or a sensitive transaction as to which confidentiality is desired. The most graphic illustration of the point is the relative ranking that the attorneys gave to the potential negative impact on candor of a qualified privilege in five areas of legal counseling.

In an earlier part of the Article, I suggested that the survey results provide a rational basis for reviving the rule that the attorney-client privilege, at least in the corporate context, should be limited to communications relating to litigation. I argued, however, that such an approach might unduly exclude areas of counseling in which candor would be affected and that a precise standard for inclusion of only certain other areas would be extremely difficult to fashion. Under a case-by-case balancing approach, however, such precision is unnecessary. The nature of the legal counseling would thus be a relevant factor because different interests are at stake depending on the nature of the matter.

Legal counseling in connection with routine transactions in the ordinary course of business requires the least amount of judicially protected secrecy. The communications and documents generated in routine business affairs and corporate operations are so often interwoven with legal and business considerations that appli-

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713 See supra note 228 and accompanying text.
714 See supra table 7, section VIII.A. at 372.
715 See supra notes 233-37 and accompanying text.
716 See supra notes 241-43 and accompanying text.
717 See supra table 7, section VIII.A. at 372.
cability of the privilege in subsequent litigation is already difficult to predict.\textsuperscript{718} This is particularly true if the attorney whose advice has been sought is house counsel, whose role as legal adviser is often hard to differentiate from that of business adviser.\textsuperscript{719} It is also doubtful that the need for confidentiality comes even close to approaching the absolute in this area, since management is probably sufficiently motivated by business considerations to seek the advice of counsel and to encourage employees to be forthright in order for the corporation to achieve its objectives without legal difficulties.\textsuperscript{720} The prospect of litigation—with its possible chilling effect on such communications if confidentiality is not assured—would be remote since most corporate transactions do not result in litigation. The routineness of the matter, therefore, is a factor weighing in favor of discovery.

Corporate concern over privilege protection is likely to be at its highest, however, when the communications relate to litigation that has been or is about to be commenced by or against the corporation and the lawyer is consulted in order to prepare a case with respect to a past transaction.\textsuperscript{721} Such concern is probably equally high during internal investigations into specific problems involving possible corporate liability, which are often conducted in anticipation of litigation.\textsuperscript{722} In all of these circumstances, there would appear to be a greater interest in confidentiality than in the case of prospective corporate transactions in the ordinary course of business. With litigation on the horizon, the fear of courtroom disclosure may be a deterrent to management's authorization of communications between counsel and lower-echelon employees. When the lawyer is acting as litigator, he is performing the role with which he is commonly associated in the public eye, and confidentiality of communications would usually be assumed in such a setting. Furthermore, the communications more clearly involve legal rather than business advice, thus increasing the expectation that the privilege will attach. An element of fairness is also operative. The same considerations that underlie the attorney work product doctrine also support application of the attorney-client privilege in this context: Each side should prepare its own case and not seek to "bor-

\textsuperscript{718} See supra notes 487-535 and accompanying text.
\textsuperscript{719} See id.; supra notes 292-94 and accompanying text.
\textsuperscript{720} See, e.g., supra note 609 and accompanying text.
\textsuperscript{721} See supra table 7, section VIIA. at 372.
\textsuperscript{722} See id.
row the wits" of the adversary's advocate in unearthing the facts from his client. 723

Although the relation of the communications to potential litigation should be a factor weighing against discovery, it should not be conclusive. Expectations of confidentiality are not necessarily absolute in these contexts. For example, an internal investigation by a corporation into specific illegal transactions might result in a decision to participate in a "voluntary disclosure program" pursuant to which the information obtained during the investigation is shared with a government agency in exchange for lenient treatment. 724 Such disclosure may cause a general loss of privilege through waiver. 725 Even under current law, other forms of waiver and exceptions also preclude an absolute guarantee of privilege for litigation-related communications. 726

Thus, there may be occasions when the needs of the adjudicatory process may properly override the corporation's interest in

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In the litigation context, the proposed qualified approach to the attorney-client privilege would be essentially coterminous with the work product doctrine. Under either theory of protection, the adversary would have to demonstrate "substantial" need for the desired material. See Fed. R. Civ. P. 26(b)(3); supra notes 66-69 and infra notes 746-56 and accompanying text.

724 The SEC, for example, has used a voluntary disclosure program designed to ease burdens on its staff and to provide an incentive to corporations to police their own misconduct. By making disclosure of the results of self-investigations to the SEC, corporations may be able to convince the agency that an enforcement action is not warranted. See Note, Discovery of Internal Corporate Investigations, 32 Stan. L. Rev. 1163, 1166-68 (1980).

725 Courts are split over whether a corporation's disclosure of the results of counsel's investigation to an agency constitutes a "limited" waiver such that privilege is not deemed waived vis-a-vis third parties or, on the other hand, whether it is a general waiver that will enable other litigants to obtain discovery of the materials given to the government. See, e.g., In re Subpoenas Duces Tecum, 738 F.2d 1367, 1369-70 (D.C. Cir. 1984) (disclosure of privileged documents to SEC and grand jury results in general waiver, entitling class-action plaintiffs to discovery); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (in order to encourage internal investigations, disclosure of documents to SEC does not waive privilege as to private party in subsequent civil action); Teachers Ins. & Annuity Ass'n v. Shamrock Broadcasting Co., 521 F. Supp. 638, 645 (S.D.N.Y. 1981) (general waiver occurs upon disclosure to SEC unless right to assert privilege in subsequent proceedings is explicitly reserved). Some courts have held that third parties are entitled to access not only to the privileged communications that were actually disclosed to the government but also to all other privileged communications relating to the same subject matter. See, e.g., In re Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988). See generally Developments in the Law, supra note 79, at 1650-56; Comment, Stuffing the Rabbit Back Into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Proceeding, 130 U. Pa. L. Rev. 1198, 1209-28 (1982).

726 See, e.g., supra notes 73-74, 455, 484, 548 & 681-82 and accompanying text.
confidentiality even as to litigation-related communications. For example, if all of the noncontrol group employees with material information have become unavailable, either because of death, physical inability to testify, or invocation of their personal privilege against self-incrimination, and their prior communications with the corporation’s lawyer are essential to a claim or defense, discovery might be deemed appropriate.

Between the poles of routine transactions and litigation-related matters are numerous other types of corporate matters that defy categorization in terms of expectations of confidentiality. In general, the more sensitive the matter, the more likely it is that management would expect and desire confidentiality in the lawyer’s communications with employees. Discussions about personnel decisions, for example, might be an area in which litigation is not necessarily anticipated but which implicates a number of privacy concerns both for the corporation and its employees. Similarly, a routine legal audit of compliance with rules against payments to government officials might begin without any fear of problems, but mushroom into a sensitive situation upon discovery of a specific questionable payment. Further, a proposed tender offer might start out as a routine matter yet later give reasonable cause to anticipate litigation, if, for example, it became hostile. Courts should consider all of the surrounding circumstances in determining the degree of expected certainty of confidentiality that a specific type of situation warrants and weigh it, together with other factors favoring nondisclosure, against the strength of the competing evidentiary needs in the particular case.

The second factor that the court should consider in the exercise of its discretion is whether the communication in issue was with house counsel or outside counsel. As previously discussed, the survey findings raise doubts about the value of the attorney-client privilege as an encouragement to open communications when the lawyer is a member of the corporation’s internal legal depart-

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727 See, e.g., supra note 155.
728 Cf. Panter v. Marshall Field & Co., 80 F.R.D. 718, 725 n.6 (N.D. Ill. 1978) (court rejected per se rule that tender offers or other business combinations have inherent potential for litigation; in order to invoke work product immunity, court required showing of “clear threat of litigation” involving claims that have already arisen).

Many potentially sensitive transactions, such as tender offers and corporate reorganizations, are not likely in any event to involve communications with noncontrol group employees.
The nature of the ongoing relationship between employees and internal lawyers and their shared institutional incentives to achieve their employer’s business objectives may be far greater inducements to candor than the privilege. Furthermore, the corporate client’s ability to predict that the privilege will apply to house counsel’s communications is already weak because of the potential for a court’s characterization of the communications as having been motivated predominantly by a desire for business advice rather than legal advice. The privilege may very well play a more significant role in encouraging candor with outside counsel, and whether accurate or not, outside counsel are more likely to be perceived as giving predominantly legal advice. Since the value of the privilege and corporate expectations of confidentiality vary depending on the status of the lawyer, discovery should be favored when the communications are with house counsel and disfavored in the case of outside counsel.

A third factor for the court to consider is the extent to which the contents of the communication are evaluative or factual. A few of the lawyers and executives in the survey, for example, made unsolicited comments suggesting that one of the principal reasons they might fear disclosure of a lower-level employee’s communications with counsel is that such employees often do not speak “judiciously.” They may be quick to offer theories, opinions and conclusions to counsel about matters as to which they are inadequately informed. Such untested opinions, however, might be helpful to the corporation and its counsel in ascertaining the actual facts. If attorney-client communications of this nature were easily discoverable, counsel might hesitate to solicit such opinions in the future and management might cut off the channels of communication entirely. Objective facts, on the other hand, are more

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729 See supra notes 277-87 & 298-333 and accompanying text.
720 See supra notes 292-94 and accompanying text.
731 See supra notes 500-02 and accompanying text.
732 See supra note 611.
733 One of the respondents in the sample of house counsel said that the principal value of the attorney-client privilege, in his view, is the protection it offers to “the mistakes, speculations, opinions, theories, ideas, and inferences” that clients communicate to lawyers. For him, a higher level of confidentiality is more important for “nonfactual elements than for the facts themselves.” One of the business executives expressed a similar thought: “The privilege should protect subjective inferences and opinions, which can be so bizarre and misleading to a judge and jury. Facts aren’t such a problem.” See also supra note 470 (lawyers’ complaints that written analyses by corporate representatives are “notoriously inaccurate”).
likely to become known during pretrial discovery in any event. Counsel, therefore, will not stop eliciting factual statements from employees even if disclosure of such statements is occasionally compelled by operation of the qualified privilege.

Thus, the more factual the nature of the communication, the greater should be the court's inclination to grant discovery. A rough analogy is provided by the government's qualified privilege for deliberative processes. Whereas factual information in government documents usually is freely discoverable, opinions, evaluations, and conclusions are subject to the privilege in order to encourage a frank exchange of ideas. In the case of the proposed qualified corporate attorney-client privilege, both types of communications would be conditionally privileged, except that factual content should be more readily subject to discovery.

This is not to suggest that evaluative statements to counsel

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734 The deliberative process privilege is close in theory to the corporate attorney-client privilege in that its safeguard against public disclosure is intended to promote effective government operations by encouraging the free expression of ideas and a candid exchange of views among decision-makers. See In re Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 581 (E.D.N.Y. 1979).

735 Sec, e.g., Environmental Protection Agency v. Mink, 410 U.S. 73, 87-88 (1973) ("memoranda consisting only of compiled factual material or purely factual material contained in deliberative memorandum and severable from its context would generally be available for discovery by private parties in litigation with the Government"); Ackerley v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969) (deliberative process privilege is intended to encourage "exchange and communication of opinions, ideas and points of view"); In re Franklin Nat'l Bank Sec. Litig., 478 F. Supp. at 581 (deliberative process privilege "protects only expressions of opinion or recommendations in intragovernmental documents; it does not protect purely factual material").

736 See Brazil, supra note 127, at 1351 (if scope of attorney-client privilege were narrowed during pretrial discovery in order to facilitate adversary's access to material evidence, "[c]lients still might be permitted to prevent disclosure of specific feelings, opinions, and theories that relate to the litigation").

If the communication in issue was made in anticipation of litigation and contained "mental impressions, conclusions, opinions, or legal theories," it would often receive special protection in any event as opinion work product. See supra note 66. The showing that is necessary to overcome the immunity for opinion work product has never been definitively established, but the Supreme Court has stressed that such materials "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." Upjohn Co. v. United States, 449 U.S. 383, 401 (1981). It has been said that an attorney's memorandum containing his account of interviews of witnesses will "rarely" be discoverable because it will reveal his mental impressions. See In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979). The evaluative content of an attorney's memorandum, however, can be a matter of degree. See Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1199-1200 (D.S.C. 1974) ("as the work product of the attorney becomes less a matter of creative legal thought and more a mere recognition of observed fact, the work product becomes increasingly susceptible to discovery").
should never be discoverable, because the only information avail-
able on an important issue may be embodied in such a statement. Fur-
thermore, the line between “opinion” and “fact” is seldom
clear, because “opinions often represent a summary of statements
of fact.” If the court leans toward discovery, redaction of purely
evaluative content should be ordered to the extent feasible. Alter-
natively, the corporation might be directed to prepare a generic
abstract or summary of the facts contained in the privileged com-
munication, which is an approach that has been suggested in con-
nection with the government’s qualified privilege for official infor-
mation. Even if an employee’s evaluative statement is held to be
discoverable as is, it will not necessarily be admissible in evidence
against the corporation at trial.

The fourth factor that I believe should be a part of the balanc-
ing test is whether the communication was oral or written. If the
communication is embodied in a document, the likelihood of need-
ing the attorney’s testimony is diminished. As discussed previ-

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727 In re Franklin Nat’l Bank Sec. Litig., 478 F. Supp. at 584 (in applying government’s
official information privilege, court found that bank examiner’s comment—“Directors exer-
cised reasonable and independent supervision, however, daily supervision is left largely to
active management”—had “conclusory ring of an opinion” but was predominantly factual in
content).

The Supreme Court recently acknowledged the “analytical difficulty of drawing [the]
line” between fact and opinion with respect to the admissibility of “factual findings” in
government reports pursuant to the hearsay exception for public records. Beech Aircraft
Corp. v. Rainey, 109 S. Ct. 439, 449 (1988). The Court held that applying a broad standard
of admissibility for government investigatory reports would be “consistent with the Federal
Rules’ general approach of relaxing the traditional barriers to ‘opinion testimony.’” Id. at
450. By way of example, the Court cited Fed. R. Evid. 701, which allows even a lay witness
to testify in the form of an opinion if it is based on actual observations and the testimony
would be “helpful” to the fact-finder. Beech Aircraft, 109 S. Ct. at 450.

728 Cf. In re Grand Jury Investigation, 599 F.2d at 1231-32 (in ordering discovery of
attorney’s memorandum of interview with now-deceased witness, court noted appropriaten-
ness of severing attorney’s opinions from factual content). If the evaluative content is only
minor, however, redaction should not be ordered if it would distort the balance of the com-
munication. See In re Franklin Nat’l Bank Sec. Litig., 478 F. Supp. at 585 (official informa-
tion privilege).

La. 1949), aff’d, 339 U.S. 940 (1950) (government offered to file “an abstract of factual infor-
mation” contained in FBI documents).

740 Despite the modern liberal approach to opinion testimony by lay witnesses, see supra note 737;
an employee’s conclusory statement may not be admissible as an admission
against the corporation if it is a mere “legal conclusion” that would not be helpful to the
trier of facts. See, e.g., Mitroff v. Xomox Corp., 797 F.2d 271, 276 (6th Cir. 1986) (in em-
ployment discrimination action, assistant personnel manager’s out-of-court statement to fel-
low employee “that there was a pattern of age discrimination” in company held inadmissible
against employer at trial in part because of its conclusory form).
ously, one of the justifications for the attorney-client privilege is the strong tradition in the adversary system against compelling an attorney to give testimony that would reveal information given to him in confidence by his client.\(^4\) Aside from the noninstrumental consideration of "treachery" that is implicated, counsel's testimony may prove disruptive to the progress of the litigation, as, for example, where his testimony at trial would result in disqualification.\(^4\)

The fact that particular communications were oral rather than in writing, therefore, ought to be a factor weighing against discovery.\(^4\) On the other hand, if the oral communications were with house counsel, the danger of disqualification at trial might not exist because trial advocacy on behalf of corporations, at least in major cases, is often handled by outside counsel.\(^4\) Furthermore, as an alternative to maintaining the privilege in toto when the communication is oral, the court might enter an order that any evidence from the attorney be obtained only during pretrial discovery by interrogatories or deposition and that the interrogatory answers or testimony be used only as a lead to other evidence.\(^4\)

\(^4\) See supra notes 84-86 and accompanying text. The same sentiment was also expressed in Justice Jackson's concurring opinion in Hickman v. Taylor, 329 U.S. 495, 517 (1947) (Jackson, J., concurring), in support of recognition of the work product immunity:

Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it.

Id. Some courts are loath to compel attorneys to testify at pretrial depositions even if their testimony would not reveal privileged communications or work product. See supra note 311; see also Herzl & Hagan, Do Corporations Really Have an Attorney-Client Privilege?, 1978 Cm. B. REO. 296, 300 (when showing of good cause results in loss of privilege in shareholder action, courts should exercise "close control" over questioning of counsel to avoid intimidation of corporate lawyers).

\(^4\) See supra note 64 and accompanying text.

\(^4\) If an employee's oral statement was made to counsel in connection with litigation, the attorney's recollection of the statement would also be entitled to the heightened protection that is afforded opinion work product. See In re Sealed Case, 856 F.2d 268, 273 (D.C. Cir. 1988) (to overcome work product immunity for attorney's memory of oral statements, "a far stronger showing is required than the 'substantial need' and 'without undue hardship' standard applicable to discovery of work-product protected documents and other tangible things"); see also supra notes 66 & 736.

\(^4\) See supra notes 291 & 305-12 and accompanying text.

\(^4\) In advocating elimination of work product protection for the substance of statements by witnesses to attorneys, Professor Shapiro makes the following suggestion for a procedure that may be equally appropriate in application of the qualified corporate attorney-client privilege: "For those who are concerned about making the lawyer a witness, it may be necessary to bar any use of the [interrogatory] answer except as a lead to other evidence, and to preclude compelling a lawyer to testify at trial about what he was told in a
would prevent the attorney from being called by the adversary at the trial to testify to what he was told, thus minimizing the potential for disqualification. Any such order might be subject to modification in the event the attorney's testimony turns out to be the only form through which a crucial element of the case can be proven.

b. Factors Relating to the Adversary's Need

Guidelines developed by the courts in applying balancing tests for other types of qualified privileges, such as the government privilege for official information,\(^{746}\) suggest that the "importance" or "relevance" of the requested evidence are factors to be considered in evaluating the need criterion.\(^{747}\) Professor Margaret Berger is even more specific in recommending that among the factors to be taken into account in application of a qualified privilege are the significance of the issue to which the evidence is addressed and the probative value of the evidence.\(^{748}\) Thus, for example, is the communication in question a remote link in a chain of circumstantial evidence on an ancillary issue or does it bear substantially on a fact that is central to the case? The adversary's need for the evidence presumably is increased by the significance of the issue and the probative value of the evidence. Although the standard of relevance for pretrial discovery ordinarily is broad,\(^{749}\) in the context of balancing need against the policies served by the attorney-client privilege, it is appropriate to consider the relative importance of the requested data. Since the court may have difficulty evaluating the importance of the evidence at the pretrial stage,\(^{750}\) it might be appropriate to postpone determination of the qualified privilege issue until pretrial discovery is nearly complete. This would be consistent with the next factor to be discussed, to wit, the extent to which the adversary has pursued and exhausted other avenues of

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\(^{746}\) See supra notes 709 & 734-35.

\(^{747}\) See, e.g., In re Franklin National Bank Sec. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979) (five-factor list for official information privilege includes "the relevance of the evidence sought to be protected"); Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973) (ten-factor list for official information privilege includes consideration of "importance of the information sought").

\(^{748}\) Berger, supra note 63, at 1412.

\(^{749}\) See, e.g., supra note 5.

\(^{750}\) This problem was noted by one of the magistrates in the survey. See supra notes 196-97 and accompanying text.
inquiry.

The most important element of the need criterion is the unavailability of substantially equivalent information from nonprivileged sources. The adversary should be required to demonstrate with particularity the futility of his attempts to obtain the information he seeks directly from the corporation's employees or other nonprivileged sources, such as business documents. A similar requirement has been imposed, for example, on litigants seeking to overcome the qualified work product immunity\(^{751}\) or to demonstrate good cause for the discovery of privileged communications in shareholder actions.\(^{752}\) Even if an employee is available and testifies at a deposition or at trial, however, his prior statement to counsel might be a unique form of impeachment evidence with respect to a crucial issue, thus tipping the scales in favor of production following the testimony.\(^{753}\)

In all cases, the adversary's need must outweigh the corporation's interests in confidentiality for noncontrol group communications. Since the privilege creates a presumption against disclosure, the ultimate burden properly lies with the adversary to show that the aggregate of factors favoring need in the particular case outweigh those favoring the preservation of confidentiality. The ad-

\(^{751}\) See, e.g., \textit{In re Grand Jury Investigation}, 599 F.2d 1224, 1231-33 (3d Cir. 1979) (in grand jury investigation, government showed sufficient need for statements to counsel of deceased witness; statements of living witnesses, however, were held nondiscoverable because grand jury had not yet attempted to subpoena them); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 153 (D. Del. 1977) (no basis shown for overcoming work product immunity where party made no requests for interrogatories or depositions); Xerox v. IBM Corp., 64 F.R.D. 367, 375, 382 (S.D.N.Y. 1974) (plaintiff deposed 23 of 37 relevant employees and each one disclaimed memory of any pertinent facts; court ordered discovery of prior statements to counsel by 23 employees, but required plaintiff to attempt to interview remaining 14 as precondition to discovery of their statements); Almagner v. Chicago, R.I. & P.R.R., 55 F.R.D. 147, 150 (D. Neb. 1972) (in seeking to overcome work product immunity, "some diligence on the part of the plaintiff" must be shown; plaintiff gave no explanation for failing to take depositions); see also notes 642-45 and accompanying text.

\(^{752}\) See, e.g., \textit{Ward v. Succession of Freeman}, 854 F.2d 780, 786 (5th Cir. 1988) (plaintiffs made "unsupported assertion" that privileged information was unavailable); \textit{In re Dayco Corp. Derivative Sec. Litig.}, 99 F.R.D. 616, 621 (S.D. Ohio 1983) (court concluded "at this time" that plaintiff was merely speculating that corporate employees would be obstructive or that cost of obtaining information through alternative sources would be prohibitively expensive; court indicated willingness to reconsider its ruling upon showing of new or changed circumstances).

\(^{753}\) See, e.g., \textit{In re Grand Jury Investigation}, 599 F.2d at 1231-33 (employees' written answers to questionnaire circulated by counsel were work product but were subject to possible disclosure for impeachment or corroboration purposes following issuance of grand jury subpoenas); see also \textit{supra} note 641 and accompanying text.
versary's burden will thus rise or fall in proportion to the strength of the factors favoring nondisclosure. By way of example, but without intending to prejudge any particular case, a relatively modest threshold of need may well overcome a claim of privilege for a factual memorandum from a lower-level employee to house counsel regarding a prospective business transaction that, at the time of the writing, presented no realistic threat of a dispute. Conversely, a description of a past transaction made to outside counsel retained for the purpose of defending the corporation in litigation should require a substantial showing of need. These examples obviously lie at the extremes, and cases lying in between will require refined analysis. In general, however, corporate clients can be advised that communications relating to litigation and sensitive matters would be the least likely to lose the privilege. This will provide an increased level of predictability for those matters that were shown by the results of the empirical study to cause concern over privilege protection.

It bears emphasizing that since the main linchpin for defeasance of the privilege under the proposed balancing guidelines is the adversary's inability to obtain the information from nonprivileged sources, the corporation and its lawyers can minimize the potential for losing the privilege by actively seeking to make those sources available upon proper request. For example, the corporation can diligently cooperate in complying with discovery demands for nonprivileged information as well as encourage its employees to do the same. For adversaries who may not be financially able to utilize expensive discovery techniques, the corporation's counsel should be receptive to the adversary's requests for informal interviews with employees. The corporation can thus help preserve its privilege by making it difficult for the adversary to demonstrate frustration in obtaining information from nonprivileged sources. A possible collateral benefit of such cooperation would be a reduction in the obstructionist tactics that other empirical research has shown to be common in corporate litigation.

754 The greater likelihood of discovery of communications that take place in the context of routine business transactions than of those that relate to litigation parallels the line of cases applying Garner's good cause standard in shareholder actions: attorney-client communications that are made on a relatively contemporaneous basis with relevant corporate transactions are more likely to be subject to disclosure than communications made in anticipation of litigation. See supra notes 596-601 and accompanying text.

755 See supra notes 127-30 and accompanying text.

756 See Brazil, Views from the Front Lines, supra note 127, at 229-35, 243-44; Brazil,
5. Implementation of a Qualified Privilege

a. Impact on the Judiciary

How would a qualified corporate attorney-client privilege be managed by the courts? The advent of a balancing test might increase the consumption of a very important resource: the judge’s time. A proper weighing of interests in most cases would require in camera review of the privileged material by the court, which can be a burdensome and time-consuming task in large cases.767 Most of the judges and magistrates in the survey, however, indicated that they would not expect a qualified privilege for lower-level communications to increase significantly the amount of time that they spend in deciding corporate attorney-client privilege issues.768

Even under current law, claims of corporate attorney-client privilege can force judges to painstakingly labor over such close questions as whether the content of communications relates to legal or business matters, whether the test of confidentiality has been satisfied, whether good cause to overcome the privilege has been shown in a shareholder action, and whether one of the traditional exceptions applies, such as that for future crime or fraud. Adding the question of whether, in a case involving lower-level communications, practical necessities outweigh the prospect of future reticence by corporate employees probably would not significantly increase the judiciary’s task in this area of the law. Many of the suggested guidelines described above769 are drawn principally from existing rules governing such qualified privileges as the work product immunity and the government privilege for official information, with which judges are already familiar. Finally, if the amount of privileged material to be considered is large, courts can utilize magistrates or special masters to make preliminary determinations.770

supra note 143, at 851.

767 See supra notes 182-83 and accompanying text.

768 See supra note 620.

769 See supra notes 732-53 and accompanying text.

b. Procedure for Resolution of Privilege Claims

In using a balancing approach, in camera review of the privileged material by the court may be necessary to resolve the issue unless the opponent's showing of need is inadequate on its face.761 In camera proceedings are often employed by federal courts not only in adjudicating other types of qualified privileges762 but also in deciding traditional questions concerning the applicability of the attorney-client privilege.763

In camera proceedings, however, can impose several burdens on the adjudicatory system.764 It is unfair to leave the opponent of

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763 The Supreme Court, for example, recently affirmed the right of federal courts to conduct in camera inspection of attorney-client communications for the purpose of determining the applicability of the crime/fraud exception. Zolin, 109 S. Ct. at 2632; see also Schwimmer v. United States, 232 F.2d 855, 864 (8th Cir.) (“court is entitled to an opportunity to make inspection of any such documents in order to satisfy itself that they are in fact privileged”), cert. denied, 352 U.S. 833 (1956); North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 512 n.1, 515-18 (M.D.N.C. 1986) (magistrate reviewed over 200 documents that were “representative of categories of documents” withheld on ground of privilege and work product); Weil Ceramics & Glass, Inc. v. Work, 110 F.R.D. 500, 505-11 (E.D.N.Y. 1986) (listing of magistrate’s rulings with respect to 175 documents reviewed in camera to determine claims of privilege and work product); Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971) (court reviewed 415 corporate documents in camera to determine which fell within boundaries of attorney-client privilege).

In contrast, section 915(a) of the California Evidence Code prohibits courts from conducting in camera inspections for the purpose of deciding claims of attorney-client privilege unless the privilege-holder voluntarily produces documents for such inspection. See Transamerica Title Ins. Co. v. Superior Court, 188 Cal. App. 3d 1047, 1051, 233 Cal. Rptr. 825, 828 (1987). In camera inspection specifically is allowed, however, with respect to the qualified privileges for government information and trade secrets in order to facilitate judicial balancing of the competing interests. Cal. Evid. Code § 915(b) comment.

764 In litigation under the Freedom of Information Act, for example, the benefits and costs of in camera proceedings have been summarized as follows:

In camera inspection, which provides a basis for an individualized determina-
the privilege to play a game of "blindman's buff" while the judge decides the issue in secret,\textsuperscript{765} and the court itself should not be deprived of a meaningful adversarial presentation that will sharpen the issues and facilitate the judicial function.\textsuperscript{766} Guidelines developed over the past few years by judges and masters for the resolution of privilege disputes in complex litigation provide useful models for procedures to resolve the issues that would arise in connection with a qualified corporate attorney-client privilege.\textsuperscript{767}

To expedite the decision-making process, a corporation should be required to provide adequate factual support for the prima facie applicability of the privilege, including the following information:

- A detailed analysis of whether a particular document is factually exempt, has a certain surface appeal as a technique for exercising \textit{de novo} review and ensuring the validity of alleged exemptions. But, the inability of the party making a request under FOIA to offer an alternative interpretation of the records, the difficulty of contesting such a ruling on appeal, the burden such a time-consuming procedure places on district courts, the paucity of information available to appellate courts on review, and the limited precedential value of decisions based on \textit{in camera} scrutiny all underscore the inadequacies of such an arrangement.

Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969, 984 (3d Cir. 1981) (footnote omitted); \textit{see also} Note, supra note 762, at 558-61 (cost/benefit analysis of judicial use of in camera inspection under FOIA).


The leading case on in camera proceedings is Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), in which the court analyzed the problems of in camera review in litigation under the Freedom of Information Act and proposed the following guidelines for deciding government claims of exemptions from disclosure: (1) the agency must submit a "relatively detailed analysis [of the privileged material] in manageable segments"; (2) the agency must provide "an indexing system [subdividing] the document into manageable parts cross-referenced to the relevant portion of the Government's justification"; (3) "adequate adversary testing" must occur by the agency providing its justification and index to the opponent and by in camera judicial inspection; and (4) the court should consider possible use of a master in examining and evaluating documents to ease its burden. \textit{Id.} at 822-26; \textit{see also} Ray v. Turner, 537 F.2d 1187, 1203-05, 1214-15 (D.C. Cir. 1978) (Wright, C.J., concurring) (review of guidelines for deciding government claims of exemption from disclosure).
if a document—the type of document (letter, memorandum, etc.), date, author, addressee, other recipients, general subject matter, and the relationships of the participants (including the employee's status in the company and role with respect to the attorney-client communication and whether the lawyer involved is a member of the corporation's internal legal department or is outside counsel); if an oral communication—its date, the speaker, persons present, general subject matter, and the relationship of the speaker to those present (including the status and role of the participants). Local court rules requiring similar information with respect to all privilege claims are already in force in the Federal District Courts for the Southern and Eastern Districts of New York. The factual data, provided by a person with the requisite knowledge, should set forth all of the elements necessary to sustain the claim of privilege and should be made available to all parties and the court prior to any in camera inspection.

Some corporate litigators have objected to such requirements for resolving privilege questions on the ground that it is unfair to impose them in the first instance on the party claiming privilege because of the burden, expense and threat to the sanctity of the privilege that they cause.

Good reasons, however, support stringent requirements for substantiation at the outset. First, in the case of corporations, prima facie applicability of the privilege turns on the satisfaction of so many elements that they should be set forth in some detail. Under the qualified approach proposed in this Article, the court must also know the basic circumstances surrounding the communication in order to be able to weigh the suggested factors in decid-

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768 Information of this nature was required with respect to assertions of attorney-client communications, work product and other privileged documents in United States v. AT&T Co., 86 F.R.D. 603, 604-08, 651 (D.D.C. 1979) (Special Masters' Guidelines for Submission and Resolution of Privilege Claims). See also Coastal States Gas Corp. v. Dep't of Energy, 644 F.2d 969, 972 n.5 (3d Cir. 1981) (FOIA exemptions); International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 93-94 (D. Del. 1974) (corporate attorney-client privilege).

769 See supra note 184.

770 See supra notes 705-06 and accompanying text.

771 The suggested procedure is analogous to "Vaughn indexing." Vaughn, 484 F.2d at 826-28; see supra note 767.

772 See, e.g., Davidson, supra note 250, at 36-38; cf. McLean, supra note 765, at 285-86 (questioning whether rigorous substantiation requirements are appropriate in situations other than complex litigation in which stakes are high, parties' resources are vast and documents could have appreciable impact on outcome).

773 Rice, supra note 267, at 298-99.
ing whether the privilege should be breached.\textsuperscript{774} If in camera inspection becomes necessary, the court’s burden will be eased if its attention has been directed to the key issues.

Second, the requirement of a detailed showing will deter the making of blanket claims of privilege. The corporation will be induced to consider seriously the prospects for sustaining its claims of privilege and the possibility that assertion of privilege is not worth the effort with respect to some communications.\textsuperscript{775} Third, a “costly” initial showing may actually reduce the overall expense and delay incurred in resolving the privilege claim because all of the necessary information to sustain it will have been placed “up front.” This may avoid the need to come forward with additional data in response to the opponent’s papers or a request from the court while it is reviewing the material in camera.\textsuperscript{776} Moreover, an initially strong substantiation of the claim may persuade the opponent not to challenge it.\textsuperscript{777}

Finally, preliminary proof in support of the privilege claim enhances the adversarial quality of the proceedings by giving the opponent a reasonable amount of information to fairly contest the applicability of the privilege, establish an exception, or make a case for overriding the privilege for noncontrol group communications due to the necessity of the circumstances. If revelation of the identifying information for a particular confidential communication would, in itself, raise a strong inference as to its contents,\textsuperscript{778} the corporation could request in camera review at the outset.\textsuperscript{779} Comments by some of the judges and magistrates in the empirical study lend support to the argument that indexing procedures would help to achieve the foregoing goals.\textsuperscript{780}

\textsuperscript{774} See supra notes 713-53 and accompanying text.
\textsuperscript{775} Hazard & Rice, supra note 767, at 96.
\textsuperscript{776} Id. at 96-97, 100.
\textsuperscript{778} See, e.g., In re Shargel, 742 F.2d 61, 64 (2d Cir. 1984) (group consultation by multiple clients with single attorney might raise inference of discussions about concerted activity).
\textsuperscript{779} The indexing rules in effect in the Southern and Eastern Districts of New York explicitly provide that the party asserting a privilege may withhold the required background information if “divulgence of such information would cause disclosure” of the privileged communication. S.D.N.Y. Civ. R. 46(d)(2)(ii); E.D.N.Y. Standing Order on Effective Discovery in Civil Cases No. 21(a)(2), (b)(2).
\textsuperscript{780} See supra notes 184-87 and accompanying text.
c. Protective Orders

If a claim of corporate privilege is overridden because of the particular evidentiary needs of the litigants, the court should be receptive to the corporation's request for a protective order to minimize the risk of dissemination of the attorney-client communications to the public or to parties in other proceedings. During pretrial proceedings, for example, Rule 26(c) of the Federal Rules of Civil Procedure provides a basis for a protective order that would limit access to the immediate parties and their consultants and restrict use of the discovered materials, under seal, to the instant litigation. An order of this scope would be virtually essential with respect to attorney-client communications held discoverable pursuant to a particularized balancing of interests because the communications would still be prima facie privileged vis-a-vis non-parties. If disclosure has been compelled by the court due to the needs of the individual case, there has been no voluntary waiver of the privilege by the corporation. This fact alone should satisfy

781 The rule allows the court "for good cause shown . . . [to] make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. Civ. P. 26(c). For an example of a protective order that limited the use of documents produced during discovery to the instant litigation and precluded access thereto by third parties, see Pretrial Order No. 7, United States v. AT&T Co., Civ. No. 74-1698, filed Dec. 16, 1976, reproduced in Hazard & Rice, supra note 767, at 180-83.

782 Waiver requires a voluntary act by the privilege-holder. See supra notes 454-55. The court in Shields v. Sturm, Ruger & Co., 864 F.2d 379 (5th Cir. 1989), analyzed a similar waiver issue in a manner that would be appropriate in applying the qualified corporate attorney-client privilege. A corporate defendant in a state-court action had been compelled to disclose a document over an objection based on the qualified work product immunity. In the state court, the plaintiff used the document at trial, again over defendant's objection, and the defendant thereupon relied upon the same document in rebuttal. Id. at 380. In the subsequent federal action, a different party sought to introduce the same document against the corporate defendant, arguing that any work product immunity had been waived in the prior action. Id. at 382. The federal court disagreed:

When a party is compelled to disclose privileged work product and does so only after objecting and taking other reasonable steps to protect the privilege, one court's disregard of the privileged character of the material does not waive the privilege before another court. The record is clear that Ruger's attorneys asserted the privileged character of their work product at every opportunity before the California court, that they objected to any disclosure of the [document], and that they disclosed the [document] under compulsion by the court, not voluntarily. Id.

It is unclear whether the state court had properly applied the work product immunity. If the immunity had been overcome by the plaintiff's need in the particular case, the lifting of the immunity would have been legitimate. If this is so, the Shields case is persuasive authority for the proposition that disclosure of corporate attorney-client communications
the burden of proof for issuance of a protective order. The extent to which such a protective order could effectively deny access to the public at large or other litigants upon termination of the litigation, however, is an unsettled question. Whether the court will modify an order that imposes a long-term seal may turn upon the use that is made of the corporation's attorney-client communications in the first lawsuit and the status of the party seeking access. If the materials are held to be discoverable at the pretrial stage of the proceedings, and the action is privately settled before trial, the Supreme Court's decision in Seattle Times Co. v. Rhinehart suggests that a continuing protective order could preclude dissemination of the materials to the press or other members pursuant to a balancing of interests in the particular case should not be considered a waiver with respect to other litigants. Shields stands for a somewhat-different proposition if it is based on the notion that the prior court erroneously lifted the privilege. See, e.g., Ward v. Succession of Freeman, 854 F.2d 780, 788-89 (5th Cir. 1988) (in shareholder action in which district court erroneously ordered disclosure of attorney-client communications pursuant to Garner doctrine, corporate defendant's reliance at trial on same communications in support of "advice-of-counsel" defense did not constitute waiver of privilege; corporation was merely rebutting plaintiff's evidentiary use of the same communications); Unif. R. Evid. 511 (privilege not waived if disclosure was "compelled erroneously"). In either situation, however, the rationale is the same: a party does not waive privilege if the disclosure is not voluntary.

The party seeking a protective order pursuant to rule 26(c) bears the burden of proving good cause for its issuance. See In re "Agent Orange" Prod. Liab. Litig., 821 F.2d 139, 145 (2d Cir.), cert. denied, 108 S. Ct. 289 (1987). See generally Note, Rule 26(c) Protective Orders and the First Amendment, 80 COLUM. L. RAV. 1645, passim (1980).

The Court rejected the defendants' argument that the protective order was a prior restraint on speech, thus requiring a stricter showing of necessity than the good cause standard of rule 26(c). The Court stressed that defendants' acquisition of the information through discovery was a matter of "legislative grace." Seattle Times, 467 U.S. at 32. Further, since discovery is not a public component of a civil trial, "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." Id. at 33. Finally, because of the liberality of modern pretrial discovery, courts have a substantial interest in limiting the potential for abuse due to public dissemination of information that could damage the reputation and privacy interests of litigants and third parties. Id. at 34-36. The Court therefore held: "[W]here, as in this case, a protective order is entered on a showing of good cause..., is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." Id. at 37.
of the public at large.785

If modification of the protective order is sought by litigants asserting a specific interest in the materials in other actions, the prospects for continued secrecy are less clear. When nonprivileged information is at stake, courts generally favor dissemination to other litigants.786 If the information is privileged, however, which would be the case as to corporate attorney-client communications held discoverable in the first action only because of the particular balance of interests that was struck therein, the new parties seeking access should have to make an independent showing of their entitlement to the materials.787 Otherwise, they would gain the unfair advantage of avoiding the need to prove a basis for overcoming the privilege that should still stand as to them.788 Before modifying

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If a pretrial settlement requires no judicial approval and results in a voluntary stipulation of dismissal, courts may treat the discovery exchange essentially as a private matter and extend the protective order indefinitely upon a modest showing of good cause. See, e.g., Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 343-44 (3d Cir. 1986). On the other hand, if the settlement agreement must be filed with the court, the matter takes on a public character that may trigger a presumption of public access to the agreement and any exhibits, transcripts or motion papers submitted in connection with it. See, e.g., id. at 343-46; Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 205 (Minn. 1986); Shenandoah Publishing House, 235 Va. at 260-62, 368 S.E.2d at 255-56. Any such presumption of access, however, is rebuttable. See infra notes 793-94 and accompanying text.

786 See, e.g., Ex parte Uppercu, 239 U.S. 435, 440 (1915) (“So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it . . . however proper and effective the sealing may have been as against the public at large”); Olympic Ref. Co. v. Carter, 332 F.2d 260, 264-66 (9th Cir.), cert. denied, 379 U.S. 900 (1964) (records in prior government antitrust action ordered unsealed for benefit of litigants in subsequent private action involving some of the same parties, subject to reasonable restrictions regarding continuing trade secrets or sensitive competitive information). See generally Note, Protective Orders and the Use of Discovery Materials Following Seattle Times, 71 MINN. L. REV. 171, 186-98 (1986). One of the reasons for a liberal approach to discovery transfers is that they increase the overall efficiency of litigation by reducing duplicative discovery. See Marcus, Myth and Reality in Protective Order Litigation, 69 CORNELL L. REV. 1, 41-43 (1983).

787 See Marcus, supra note 786, at 43 (“in order to obtain access to materials produced under a protective order in litigation number one, the party involved in litigation number two should demonstrate that he would have the right to obtain them in the second action”).

788 See Crystal Grower’s Corp. v. Dobbins, 616 F.2d 468, 461 (10th Cir. 1980) (court refused to remove seal on documents in appellate record containing corporate attorney-client communications that were presumptively privileged; court stressed that parties in other
the original protective order, therefore, the court should engage in a fresh balancing of the competing interests.

The matter becomes more complicated if the attorney-client communications, although kept under seal, are relied upon in the first action as a basis for a judicial ruling on the merits, either at trial or by summary judgment. The general public, and by implication, other litigants, would have a presumptive right of access to such materials in the interest of public evaluation of the judicial process. In shareholder derivative actions, for example, it has been held that when the corporation obtains a dismissal of the action on the basis of the recommendation of a special committee of the board of directors, attorney-client communications contained in the recommendation lose the benefit of whatever seal was previously placed on them. In such circumstances, however, the corporation itself has affirmatively relied upon communications with its attorneys in support of its own case, and therefore has waived the privilege. In the converse situation in which the corporation's adversary has relied upon privileged material that was held discoverable only because of the particular evidentiary needs of the

actions against same corporation "might obtain information that would be nondiscoverable absent a determination that the documents were not privileged").

See, e.g., Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252-54 (4th Cir. 1988) (presumption of access attaches to exhibits submitted in connection with motion for summary judgment); Wilson v. American Motors Corp., 759 F.2d 1568, 1570-71 (11th Cir. 1985) (district court abused discretion in sealing records of civil trial proceedings). There exists a general interest in understanding disputes that are resolved in a public forum, and the public has an interest in ensuring that judges act fairly and honestly. See Crystal Grower's Corp., 616 F.2d at 461. But see Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 902-05 (6th Cir. 1988) (no right of access to "summary jury trial," pursuant to which attorneys argue their cases before jury in order to obtain nonbinding prediction of probable outcome of an actual trial, because procedure is "much like a settlement conference"), cert. denied, 109 S. Ct. 1171 (1989); Littlejohn v. BIC Corp., 851 F.2d 673, 681-83 (3d Cir. 1988) (no presumptive right of access to documents admitted into evidence during liability phase of bifurcated trial if they are returned to party-owner by court clerk following settlement and closing of case).

In re Continental Illinois Sec. Litig., 732 F.2d 1302, 1314 (7th Cir. 1984) ("special litigation committee reports used in the adjudication stages of derivative litigation should be available for public inspection unless exceptional circumstances require confidentiality") (emphasis in original); Joy v. North, 692 F.2d 880, 893-94 (2d Cir. 1982) (derivative actions may not be "routinely dismissed on the basis of secret documents"), cert. denied, 469 U.S. 1051 (1983).

Reliance upon the advice of counsel in connection with a claim or defense or placing a privileged document in issue are traditional bases for waiver of the attorney-client privilege. See, e.g., United States v. Woodall, 438 F.2d 1317, 1324 (5th Cir.) (en banc), cert. denied, 403 U.S. 933 (1971); Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964), cert. dismissed, 380 U.S. 248, 249 (1965).
case, the waiver argument should be rejected. Moreover, the presumption of public access is rebuttable. The public interest in monitoring the judicial process should yield to the compelling public interest in preservation of the confidentiality of attorney-client communications.

d. Implementing a New Approach

Whether courts should take a qualified approach to the corporate attorney-client privilege in the absence of legislation is a troubling question. Adoption of a balancing standard through legislation would be the ideal solution because the policy issues could be thoroughly debated, specific guidelines such as those suggested in this Article could be codified, and the predictability that comes from prospective application of a new rule of law could be achieved. The absence of such legislation, however, should not cause courts to retreat from the traditional absolute nature of the corporate privilege where, in an exceptional case, the adversary has evidentiary needs that outweigh the corporation's interests in confidentiality. Such judicial action is permissible in federal courts under Federal Rule of Evidence 501, which provides that privileges are to be interpreted "in the light of reason and experience." Even in states with codified versions of the attorney-client privilege, exceptions based on public policy may be engrafted onto statutes by the courts. The courts' presumptive entitlement to all

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792 See supra note 782 and accompanying text.
794 See In re "Agent Orange" Prod. Liab. Litig., 98 F.R.D. 539, 546 (E.D.N.Y. 1983) ("Where unsealing of documents might reveal material governed by the work product privilege or the contents of communications between an attorney and client might be disclosed, the public interest in protecting those privileges would take precedence over its interest in inspecting and copying court records").
795 See Berger, supra note 63, at 1415-16.
796 FED. R. EVID. 501. In Trammel v. United States, 445 U.S. 40, 47 (1980), the Supreme Court stressed that Congress' purpose was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,... and to leave the door open to change." The Trammel Court thus relied upon rule 501 to modify an ancient common law rule of privilege and thereby permit a spouse to voluntarily testify against her husband in a criminal trial.
797 See Priest v. Hennessy, 51 N.Y.2d 62, 69, 409 N.E.2d 983, 986, 431 N.Y.S.2d 511, 514 (1980) ("[E]ven where the technical requirements of the privilege are satisfied, it may,
relevant evidence and the increased potential for obstruction caused by *Upjohn*'s broad approach to the scope of the corporate privilege arguably constitute sufficient public policy grounds for courts to adopt a qualified approach.

It bears emphasizing that *Upjohn* itself is not a bar to implementation of a qualified approach. The Supreme Court’s extension of the corporate privilege to lower-level communications does not necessarily mean that the privilege must apply to such communications in an absolute fashion. The Court did not consider the issue, and on the facts, the IRS had not made a very persuasive showing that the information it desired was inaccessible directly from *Upjohn*'s employees. The vagueness of the *Upjohn* Court’s opinion may be its greatest strength as future courts grapple with the problem of leashing the attorney-client privilege in the corporate context. The proposal for qualifying the privilege for counsel’s communications with noncontrol group employees offers a reasonable accommodation of the goals sought to be achieved by the corporate attorney-client privilege and the needs of the adjudicatory system.

**CONCLUSION**

The empirical study upon which this Article is based attempts to shed new light on how the attorney-client privilege affects, and in some hypothetical circumstances how it might affect, the behavior of attorneys and their corporate clients. To be sure, gaps remain in the research. For example, two untouched areas of inquiry that would further illuminate the issues include the views of mid-

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798 In the section of the opinion dealing with Upjohn’s assertion of the qualified work product immunity, the Court was unimpressed with the IRS’s argument that the employees whose statements it sought were “scattered across the globe” and that the employees had been told not to answer “irrelevant” questions. *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981). No claim was made by the IRS that the employees were otherwise unavailable or that their communications with Upjohn’s counsel were necessary to ascertain the truth. *See supra* note 635 and accompanying text.

799 *See supra* notes 389-93 & 636-37 and accompanying text.
dle management and lower-echelon employees concerning the effect of the corporate privilege on their communications and the views of lawyers who litigate against corporations concerning the costs that the privilege imposes on adversaries. Other potentially productive areas of research were suggested at relevant points in the Article.

Empirical data alone, however, will never resolve all of the problems generated by the corporate privilege. Policy considerations should also play a role in shaping it. Furthermore, the type of empirical data collected in a survey of attorneys and corporate executives unavoidably contains a certain amount of professional bias. It is undoubtedly true "that one’s evaluation of the corporate attorney-client privilege will reflect the way one views the power of multinational corporations." Since law professors are also influenced by such "political considerations," I make no personal claim to any superior objectivity in my analysis and conclusions.

No attempt will be made here to summarize all of the findings of the study. The discussion in each section of the Article endeavors to synthesize the pertinent data that were collected with respect to the principal issues surrounding the corporate privilege. Some concluding observations about the major findings, however, are in order.

The study does not prove, by any means, that the attorney-client privilege actually encourages candor in communications between attorneys and corporate management, but it contains more evidence tending toward that conclusion than has been systematically gathered to date. At the same time, the circumstances in which the privilege plays a major role in influencing candor seem to be relatively rare. In day-to-day corporate counseling, the findings suggest that a manager’s need to cope with a heavily regulated business environment and his sense of trust in counsel are probably sufficient to produce open communications. It is in situations involving potential litigation and matters of a "sensitive" nature, as the respondents repeatedly described them, that the privilege becomes a conscious concern. In addition, there is some indication that the relationship between corporate representatives and house counsel is not nearly as dependent on the privilege as an incentive to candor as is the relationship with outside counsel.

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\[^{800}\text{24 C. Wright & K. Graham, supra note 63, § 5476, at 190.}\]
\[^{801}\text{Id.}\]
Restricting the type of legal counseling to which the corporate privilege applies or eliminating the privilege for house counsel, however, probably would be inappropriate. Litigation is a potential risk in any transaction, routine matters may unexpectedly become "sensitive," and the survey results are too ambiguous to support a call for total abolition of the privilege for house counsel. Until further experience shows more precisely how the privilege affects specific types of communications, the privilege should continue to be made available to corporations in all matters with respect to which legal advice is sought, whether from house counsel or outside counsel.

The data also support the conclusion, although not nearly as convincingly as one might have expected, that the Upjohn approach, which favors inclusion of communications of lower-level employees within the privilege, is more likely than the control group standard to encourage voluntary corporate legal compliance. If Upjohn had been decided differently, and the control group test had become the norm, the results of the interviews suggest that counsel would still communicate with lower-echelon employees because of the necessity of learning the facts. Corporate management, on the other hand, apparently would be tempted to curb such communications in order to avoid the creation of potentially harmful evidence. To the extent management were to restrict the scope of counsel's employment in response to the control group standard, the client might not receive legal advice that is sufficiently well informed to prevent or correct violations of law. In general, then, inclusion of lower-level communications within the corporate privilege may serve socially useful goals.

Cloaking substantially all employee communications relating to the provision of legal services with an absolute privilege, however, may occasionally result in an unwarranted obstruction to fact-finding. Since the cost of the corporate attorney-client privilege may be too high in particular cases, consideration ought to be given to converting the corporate privilege to a qualified standard, at least with respect to communications outside the control group.

The questions that were put to the respondents in the study about such a change in the law suggest that breaking with the tradition of absolute privilege would have little or no effect on the candor of lower-level attorney-client communications, and would not deter, in most instances, the frequency of communication between attorneys and corporate employees. The experience of the
respondents with the “good cause” qualification in shareholder actions also shows that the prospect of an occasional loss of privilege due to the unforeseen needs of the adversary has not caused much of a chill in the corporate attorney-client relationship. Furthermore, uncertainty is already inherent in the process of analyzing prospective applicability of the corporate privilege, yet corporations continue increasingly to consult lawyers. If courts applied a balancing test to the communications of noncontrol group employees in accordance with the approach suggested in this Article, there would be little diminution in the ability of the affected parties “to predict with some degree of certainty whether particular discussions will be protected.” The empirical data tend to confirm that a qualified approach would be a legitimate means of facilitating the search for truth in the adjudicatory process without diminishing the benefits of the corporate attorney-client privilege.

Most of the attorneys in the study felt that the corporate privilege was “alive and well” as a result of the Supreme Court’s decision in Upjohn. But they also demonstrated a keen awareness that "murky lines" still exist due to continued uncertainty in rules regarding the mixture of business and law-related communications, the dissemination of attorney-client documents within the corporation, the exact depth within the corporate hierarchy to which the privilege extends, and the problem of who actually “owns” the privilege in particular matters—management, shareholders or the corporate entity. This Article may not make the lines any clearer, but it shows how lawyers, corporate clients and members of the federal bench cope with them. In the words of one of the lawyers in the study, “It would be nice if the lines were black and white, instead of gray, but the same can be said about most areas of the law.”

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APPENDIX
INTERVIEW QUESTIONNAIRE
IN-HOUSE COUNSEL
COVER SHEET

RESPONDENT INFORMATION

Name:
Title:
Firm:
Address:

Phone:

DATE OF INTERVIEW:
LENGTH OF INTERVIEW:
COMMENTS:
INTRODUCTION

1. Thank you for your willingness to participate in this study.

2. My purpose is to gather information about the practical effects of the attorney-client privilege in the corporate setting. The study will compare the views of corporate counsel, outside counsel, corporate executives and federal judges regarding the privilege. Let me assure you that neither your name nor that of your company will be identified in any reports of the study.

3. Please do not hesitate to ask for an explanation if you do not understand any question. Some questions will ask you to estimate percentages as to when different things occur. I do not expect you to be able to answer with precision; rough estimates will be fine.

4. Please consider only the past five years of your experience unless the question asks you whether certain things have ever happened in your experience.

5. Let me define two terms: "Corporate representative" means any person who is a member of the board of directors or an employee of the corporation, regardless of rank.

"Attorney-client privilege" refers to the rule of evidence that prevents courtroom disclosure of confidential communications between attorney and client. This does not include attorney work product except to the extent that work product may overlap with confidential communications with the client.
I. RESPONDENT’S PROFESSIONAL BACKGROUND

1. What is the general type of business in which your corporate client is engaged? (SHOW RESPONDENT CARD # 1).

   1. Manufacturing
   2. Transportation or Utility
   3. Bank
   4. Investment Banking, Stock Brokerage, or Other Financial Services
   5. Insurance
   6. Miscellaneous Commercial Services (e.g., Management Consulting, Retail, Advertising)
   7. Diversified and/or Conglomerate
   8. Publishing or Broadcasting
   9. Oil, Gas, Metals or Mining
   10. Other

2. Approximately how many employees work for your company (a)___ and what is the company’s latest annual revenue (b)___?

3. How long have you been on the legal staff of your corporation? ____ (IF LESS THAN 5 YEARS, ASK PREVIOUS EMPLOYER.)

4. (a) Do you perform any non-legal duties for your corporation? Yes___, No____
   IF YES, could you briefly describe the nature of these duties:

   (b) What % of your time is devoted to these duties?____

5. To what extent does your company utilize the services of outside counsel and for what types of matters?

6. What % of your time as lawyer to the corporation has been devoted to matters relating to:
(a) Litigation (In this category, include litigation before administrative agencies and also your participation in matters handled by outside counsel.)

___%

(b) Non-Litigation (IF 100% NON-LITIGATION, GO TO Q. 8)

___%

7. With respect to Corporate Litigation (IF APPLICABLE):

(a) What % of time was spent on civil matters (including adjudication by administrative agencies)? ___% 

(b) What % of time was spent on criminal matters? ___% 

(c) Of time spent on civil litigation, what % was devoted to representing the corporation as plaintiff, ___%, and what % was devoted to representing the corporation as defendant, ___%?

(d) During the past five years, what types of cases have you handled for this company? (SHOW RESPONDENT CARD #2).

1. Antitrust 10. Civil Rights, Title VII
2. Securities 11. Labor Law
3. Commercial Transactions 12. Corporate Governance
4. Environmental 13. Business Fraud (Civil)
6. Trademarks 15. Insurance
7. Copyright 16. Banking
8. Admiralty 17. Administrative Law
9. Products Liability 18. Other (please specify)

(e) What % of your time has been devoted to matters in federal court, ___%, and what % has been devoted to matters in state court (regardless of state), ___%?

8. With respect to Non-Litigation-related corporate matters (IF APPLICABLE), what are the types of matters you have handled? (SHOW RESPONDENT CARD # 3).

1. Corporate Governance 3. Acquisitions and Mergers
2. Antitrust/Trade Regulation 4. Banking
5. Tax Compliance (e.g., FDA, OSHA, EEOC)
6. Financing Review
7. Trademarks 12. Contract Preparation and/or Review
8. Securities 13. Patents
10. Environmental 15. Other (please specify)
11. Miscellaneous Government

II. GENERAL QUESTIONS CONCERNING CORPORATE ATTORNEY-CLIENT PRIVILEGE

9. During the past five years, in your communications with individual representatives of the company, how often have you explicitly raised with the representative an issue of attorney-client confidentiality with respect to those communications? (SHOW RESPONDENT CARD # 4).

___Never (IF NEVER, GO TO (d))
___Once Or Twice
___2 - 6 Times
___7 - 12 Times
___13 - 24 Times
___25 - 50 Times
___51 - 100 Times
___Over 100 Times

(a) Under what circumstances do you raise the issue?

(b) For what purposes do you raise the issue?

(c) Have you ever raised the issue for the specific purpose of encouraging candor on the part of a corporate representative? Yes___, No____.

10. During the past five years, have corporate representatives ever taken the initiative in raising an issue of attorney-client confidentiality with you? Yes___, No____.

. IF YES, under what circumstances?
11. When the issue of confidentiality is raised, either by you or corporate representatives, what do you usually tell them about the attorney-client privilege?

12. (a) To what extent do you think that members of upper management believe, without any prompting, that their communications with you concerning the corporation are protected by the attorney-client privilege from disclosure to outsiders?

(b) To what extent do members of middle management believe their communications are protected from disclosure to outsiders?

(c) How about employees below the level of middle management?

13. I'd like to concentrate now on the corporate representatives, regardless of rank, who believe that the attorney-client privilege covers their communications with counsel. It doesn't matter whether you told them about it, or you are confident they have become aware through other sources.

(a) (i) Based on your experience, does the privilege serve to increase their candor? Yes__, No__, Don't know ____.  

(IF NO OR D/K, GO TO (iii))

(ii) IF YES, is their candor increased somewhat ____, or a great deal ____?

(iii) (1) In your experience, are there any factors other than the privilege that encourage or discourage candor? Yes__, No__.  

IF YES, what are they:
(2) You have identified ____, ____, and ____ as other factors that may affect candor. Considering privilege together with these other factors:

Which one would you say is the most important in affecting candor: __________

Which is the least important: __________

[Equal Weight (volunteered response)]: __________

(b) (i) Based on your experience, does the privilege serve to increase the frequency with which corporate representatives seek your legal advice? Yes__, No__, Don’t know__.

(ii) IF YES, does the privilege increase frequency somewhat__, or a great deal__?

(iii) (1) In your experience, are there any factors other than the privilege that affect the frequency with which legal advice is sought? Yes__, No__.

IF YES, what are they:

(2) You have identified ____, ____, and ____ as other factors that may affect the frequency with which legal advice is sought. Considering privilege together with the other factors:

Which would you say is the most important one affecting frequency: __________

Which is the least important: __________

[Equal Weight (volunteered response)]: __________

14. Several courts have held that unless the lawyer affirmatively undertakes to represent both the corporation and an employee, the attorney-client privilege belongs solely to the corporation. That means, of course, that the privilege may be waived by the corporation and the communications can be disclosed to outsiders, such as the government, despite the objections of the individual whose communications are involved.
(a) To what extent do you think that individual representatives of your client are aware of this probable limitation on their ability to assert the privilege in their own behalf?

(b) Is there any difference in the degree of awareness as between upper, middle and below-middle management? Yes__, No__.

IF YES, what is the difference?

(c) Have you ever told an individual representative that the privilege belongs solely to the corporation? Yes__, No__.

IF YES, under what circumstances do you tell them about the rule and when do you not tell them about the rule?

IF NO, what are your reasons for not telling people about the rule?

15. (a) Have you ever provided legal representation to your company with respect to matters in foreign countries or tribunals in which, to your knowledge, the attorney-client privilege was unavailable or substantially curtailed? Yes__, No__.

IF YES, please describe the circumstances.

(b) IF YES, did the nature of your communications with corporate representatives differ in any respect from communications as to which the applicability of U.S. privilege law was expected? Yes__, No__.

Please elaborate:

III. PROCEDURES FOR PRESERVING ATTORNEY-CLIENT PRIVILEGE

16. (a) Do the employees of your company segregate docu-
mentary communications with counsel from the general files on a routine basis? Yes, No. (IF YES, GO TO Q. 17).

IF NO: (b) Have you ever advised the company to segregate attorney-client documents in particular matters? Yes, No.

IF YES, under what circumstances:

17. Does your company have a policy or practice that routinely limits the personnel within the company who may have access to documentary communications with counsel? Yes, No. (IF NO, GO TO Q. 18)

IF YES: In general terms, to whom is access usually restricted? (AFTER ANSWER IS GIVEN, GO TO Q. 19)

18. Have you ever instructed company personnel to limit access to attorney-client documents in particular matters? Yes, No.

IF YES: Under what circumstances, and to whom was the access limited, in general terms?

19. (a) Does your company have any special procedures, other than the possibilities I've mentioned, such as using labels or stamps, for the routine handling of attorney-client communications? Yes, No.

IF YES, could you please describe them:

(b) Have you ever implemented any special procedures in particular matters? Yes, No.

IF YES, could you please describe the circumstances and the procedures that were implemented:

20. (a) Do middle-management employees have the authority to seek legal advice for the company from your office without the need to first obtain specific permission from superiors to do so?
Yes, No.

(b) Do employees below the level of middle management have the authority to seek legal advice from your office without first obtaining permission from their superiors? Yes, No.

(c) Does your company distribute or make available to employees any policy manual, handbook or memorandum which includes a discussion of communications with counsel? Yes, No. IF YES, would it be possible for me to obtain a copy?

21. (a) How often in your experience have employees sent copies of their business correspondence or memorandums to your office without a specific request for legal advice? (SHOW RESPONDENT CARD #5)
Frequently Occasionally Rarely Never

IF EVER: (b) Typically, what is their purpose in doing so?

(c) How often do you think employees have sent copies of documents to your office solely to protect the documents with privilege? (SHOW RESPONDENT CARD #5)
Frequently Occasionally Rarely Never

22. (a) In your capacity as lawyer to the corporation, would you characterize any of the advice that you give as "business advice"? Yes, No. (IF NO, GO TO Q. 23)

IF YES: (b) How often do you give business advice?
Frequently Occasionally Rarely

(c) Under what circumstances do you usually give such advice?

(d) When you give business advice, how often do you seek to explicitly segregate the business from the legal? (SHOW RESPONDENT CARD #6)
Always Frequently Occasionally Rarely Never
IV. EFFECTS OF UPJOHN AND OTHER DOCTRINAL FACTORS

The 1981 decision of the Supreme Court in *Upjohn Co. v. United States* held that, in federal courts, the attorney-client privilege may attach to communications at all levels of the corporate hierarchy. Prior to *Upjohn*, some federal courts held that the corporate attorney-client privilege attaches only to communications with the "control group" (managers who have the authority to take action on the basis of counsel's legal advice). A few state courts still adhere to the control group standard.

23. (a) Before the decision in *Upjohn*, was the control group standard ever a factor that you took into consideration when communicating with representatives of your corporate client? Yes_, No_. (IF NO, GO TO (c))

(b) IF YES, did you ever seek to arrange your communications so that only members of a control group were privy to them? Yes_, No_.
   IF YES, under what circumstances?

(c) After *Upjohn*, has the control group standard ever been a factor that you took into consideration when communicating with representatives of the corporation? Yes_, No_. (IF NO, GO TO Q. 24)

(d) IF YES, did you ever seek to arrange your communications so that only members of a control group were privy to them? Yes_, No_.
   IF YES, under what circumstances?

24. I'd like to ask some questions about the effect, if any, that the *Upjohn* decision has had in the representation of your corporate client.

(a) In your experience, would you say that, in comparison to the control group standard, the *Upjohn* approach makes a large improvement _____ or a slight improvement _____ in your ability to predict that privilege will attach to particular
communications?
   IF ONLY "SLIGHT": Why only "slight" rather than large improvement?

   (b) Does Upjohn have any effect on the frequency with which you communicate with employees at lower levels of the corporation? Yes___, No____.

   (c) In actual practice, does Upjohn have any effect on your overall ability to gather facts when representing the corporation? Yes___, No____.
   IF YES, does it make a large improvement _____ or a slight improvement ______ in fact-gathering?

25. According to several courts, the corporate privilege becomes qualified in litigation with shareholders or other persons to whom the corporation owes a fiduciary duty. In such cases, the court, in its discretion, may order disclosure of corporate attorney-client communications.

   (a) In your experience, has the shareholder/fiduciary rule ever been a factor that you took into consideration when communicating with representatives of your clients? Yes___, No____. (IF NO GO TO Q. 26)
   IF YES, please describe the circumstances.

   (b) If you advised any corporate representatives of the rule, was there any effect on the nature of their communications with you? Yes___, No____.
   IF YES, please describe the effect.

26. To what extent are corporate representatives of your company aware of the shareholder/fiduciary rule?

27. What is the effect, if any, of the shareholder/fiduciary rule on your ability to predict that privilege will attach to particu-
lar communications? Is there no effect, are you somewhat less able to predict, or are you much less able to predict?

LET ME GIVE YOU A HYPOTHETICAL. Assume that the privilege were to be treated as a qualified privilege in all cases, not just shareholder actions, using the same standard that is applied in the case of attorney work product. Under the qualified standard, information that would otherwise be covered by the corporate privilege would lose its protection, in the court’s discretion, upon a showing by the corporation’s adversary of a special need for the privileged information due to an inability to obtain it from alternative sources through reasonable effort. Assume that as in the case of work product, the privilege would be lost only rarely under a qualified standard.

If the corporate privilege were applied in this manner:

28. What do you think would be the probable effect on your ability to predict that privilege will ultimately attach to particular communications? Would there be no effect, would you be slightly less able to predict, or much less able to predict?

29. Assuming that representatives of your client were aware that a court occasionally might not uphold the privilege under this qualified approach, do you think they would probably seek your legal advice less often? Yes, No.

IF YES, would it probably be somewhat less often, or much less often?

30. Would you probably communicate with employees at lower levels of the corporation less often? Yes, No.

IF YES, would it probably be somewhat less often, or much less often?

31. (a) Assuming their awareness that the privilege was qualified, would members of upper management probably be less candid in their communications with you? Yes, No.

IF YES, would they probably be somewhat less candid, or much less candid?

(b) Would communications with middle management probably be less candid? Yes, No.
IF YES, would they probably be somewhat less candid, or much less candid?

(c) Would communications with employees below the level of middle management probably be less candid? Yes, No.

IF YES, would they probably be somewhat less candid, or much less candid?

(IF RESPONDENT ANSWERS “NO” IN ALL CATEGORIES, GO TO Q. 33)

32. Of the counseling situations appearing on this card (SHOW RESPONDENT CARD # 7), in which ones do you think the qualified privilege would have its most serious adverse effect on candor? I'd like for you to rank each category from 1 to 5 as to the seriousness of the effect. “One” would be the area which you think would be the most seriously affected, “2” the next most seriously affected, and so on down to “5” as the area that would be the least seriously affected.

Corporate Transactions In The Ordinary Course Of Business (E.G., Contract Preparation Or Review)

Non-Routine Transactions (E.G., Acquisitions Or Divestitures)

Investigations For Routine Compliance With Government Regulations

Investigations Of Specific Problem Situations Involving Possible Corporate Liability

Actual Litigation

33. Would the qualified approach probably have an effect on your record-keeping of communications with corporate representatives? Yes, No.

Please explain:

34. Would a qualified approach probably have an effect on your client’s record-keeping practices? Yes, No.

Please explain.
V. CONCLUDING PERSONAL DATA

35. In what year were you first admitted to a bar?____

36. For statistical purposes, would you please indicate your age:____

37. How many lawyers currently are on your legal staff?____

38. Do you have any comments or observations about the corporate attorney-client privilege that my other questions have not given you an opportunity to express?