Evidence--Privileged Communications--The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach

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The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach

The extent to which the attorney-client evidentiary privilege applies to communications made by employees of a corporation to the corporation's attorney was recently reconsidered in the case of Harper & Row Publishers, Incorporated v. Decker.¹ This issue arose during the pretrial discovery proceedings for a major antitrust suit before the United States District Court for the Northern District of Illinois. A group of state and local governments, public schools, and public libraries sued book publishers and wholesalers for treble damages arising from alleged conspiracies that inflated the price of children's editions of library books.² The plaintiffs deposed approximately one hundred witnesses, many of whom had testified before a federal grand jury that had taken part in prior criminal proceedings against the defendant publishers.³ Due to the passage of time and to the alleged recalcitrance of the deponents, the plaintiffs felt that the testimony produced in the depositions was both incomplete and misleading.⁴ Consequently, they filed a motion pursuant to rule 34 of the Federal Rules of Civil Procedure⁵ seeking inspection of the

³ In 1966 the United States had convened a criminal grand jury to investigate the alleged incidents. After the testimony of nearly ninety witnesses, the United States decided not to seek any indictments. 50 F.R.D. at 39.
⁴ 50 F.R.D. at 39.
⁵ Fed. R. Civ. P. 34 states: "Upon motion by any party showing good cause therefor . . . and subject to the provisions of Rule 30(b), the court . . . may (l) order any party to produce and permit the inspection . . . of any designated documents . . . ." Fed. R. Civ. P. 30(b) allows various orders for the protection of the parties during discovery.
grand-jury transcripts containing the testimony of eleven of the witnesses and of certain "debriefing" statements that the defendants' attorneys had prepared by interviewing the witnesses after they had testified before the grand jury. The defendant publishers resisted the motion on the grounds that the documents were protected against such production by the personal attorney-client privilege, by the corporate attorney-client privilege, or by the "work product" doctrine.

District Judge Bernard Decker ruled that the requested grand-jury transcripts should be released. He further held that the debriefing statements, with one exception, were not protected by the personal attorney-client privilege because "the attorneys did not (1) render personal legal advice after the witnesses completed their grand-jury testimony, (2) advise them on other personal matters, or (3) bill the witnesses for their services." In addition, by utilizing the "control group" test to determine the extent to which the corporate attorney-client privilege applied to the debriefing statements, he held that only two of the witnesses were members of the control group, and that therefore only the statements of those two witnesses were protected. As for the statements that were not protected by either the personal or corporate attorney-client privilege, he held that most of them were not the work product of an attorney, and that those that were could not be protected against

6. The statements consisted of summaries of the witnesses' testimony as prepared by the witnesses themselves or as recorded by the defendants' attorneys on the basis of interviews with the witnesses immediately after testifying. 50 F.R.D. at 42-44.

7. In general, the attorney-client privilege prohibits the compelled disclosure of confidential communications between attorney and client. See text accompanying notes 31-39 infra for Wigmore's statement of the general principle.

8. The "work product" of an attorney includes "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal briefs, and countless other tangible and intangible" items. Hickman v. Taylor, 329 U.S. 495, 511 (1947). In Hickman, the Supreme Court held that under the Federal Rules "adequate reasons" must be established by the moving party in order to justify the production of such material by court order. 329 U.S. at 512.

9. Judge Decker stated, "The disclosure of grand jury minutes is committed to the sound discretion of the trial judge," and concluded that the facts presented in this case revealed "a compelling need for the disclosure of the requested minutes." 50 F.R.D. at 39-40.

10. 50 F.R.D. at 43.

11. Under the control group test, a communication to an attorney is privileged if made by an employee who has the authority to make or take a substantial part in a decision about any action that the corporation might take on the advice of an attorney. See, e.g., City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962). See also text accompanying notes 60-62, and pt. I. C. 3. infra.

12. The court observed that "[w]hile other witnesses, such as sales executives and regional managers, might have shaped the pricing policies concerning library editions, they did not participate in the corporate problem about which legal advice was sought —the company's litigation response to the price fixing cases." 50 F.R.D. at 44.

13. The court reached this conclusion by finding that "[t]he lawyers functioned primarily as investigators. By asking questions and recording the answers, they attempted to reconstruct the witnesses' grand-jury testimony. Such peripheral partici-
production because the plaintiffs had proven the "good cause" and "special circumstances" that are necessary in order to require production of the work-product of an attorney under rule 34 of the Federal Rules of Civil Procedure.

Because they failed in an attempt to have the matter certified for interlocutory appeal, the defendants petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandamus to compel the district court to vacate that portion of its production order that permitted the plaintiffs to inspect the debriefing memoranda. The writ was granted in part and denied in part.

The appellate court upheld the lower court's findings that the personal and corporate attorney-client privileges did not apply to the debriefing statements that were obtained from former employees and from employees of other corporations. It further held that the "good cause" required to be proven for production under rule 34 had been sufficiently established. However, the court of appeals reversed the district court on the question whether the corporate attorney-client privilege applied to statements made by persons who were employees of the corporation at the time the statements were made. Although the appellate court conceded that Judge Decker had correctly applied the control group test, it ruled that the privilege

*petition by a lawyer does not convert a factual summary into his work product." 50 F.R.D. at 44 (emphasis added). In support of this conclusion, the court quoted from Bifferato v. States Marine Corp., 11 F.R.D. 44, 46, 47 (S.D.N.Y. 1951), for the proposition that "[t]he rationale underlying ••• [Hickman v. Taylor] was intended to apply only when [an attorney] acts in his true professional capacity." 50 F.R.D. at 44.

14. These statements included the "counsel's 'recollections, observations, comments and impressions about [the witness] report of his appearance before the grand jury.' " 50 F.R.D. at 44.

15. For Judge Decker's lengthy enumeration of the factors that he felt established good cause, see 50 F.R.D. at 45.

16. See note 5 supra.

17. 28 U.S.C. § 1292(b) (1964) allows a district judge in a civil action, when making an order that is otherwise not appealable, to certify in the order that such order involves a controlling question of law "as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The court of appeals then has discretion to permit an appeal to be taken from the order. Judge Decker, however, followed the holding in Atlantic City Elec. Co. v. General Elec. Co., 337 F.2d 844 (2d Cir. 1964), and denied certification on the ground that interlocutory appeal under the circumstances presented would not facilitate the final disposition of the case. Brief for Petitioners at 6, Decker v. Harper & Row Publishers, Inc., 397 U.S. 1073 (1970).


19. The court stated that the attorney-client privileges had not been clearly enough established in this area to justify the issuance of a writ of mandamus. 423 F.2d at 490.

20. But the court did indicate that "[w]here an attorney personally prepares a memorandum of an interview of a witness with an eye toward litigation such memorandum qualifies as work product even though the lawyer functioned primarily as an investigator." 423 F.2d at 492.

21. 423 F.2d at 491.
did apply to these statements. This holding was based on the court's feeling that the control group test was not wholly adequate because it failed to distinguish between employees who are not part of the control group, and who are therefore "virtually indistinguishable from bystander witnesses," and those employees who should properly be deemed corporate agents for purposes of the privilege. Therefore, the production order was held to have been improperly issued to the extent that it relied solely on the control group test. The court then formulated its own test for determining which statements were protected by the corporate attorney-client privilege:

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

Consequently, a writ of mandamus ordering the partial reversal of the production order was issued on the grounds that "maintenance of the attorney-client privilege up to its proper limits has substantial importance in the administration of justice, and [that] an appeal after disclosure of the privileged communication is an inadequate remedy ...."24

The plaintiffs responded to the issuance of the writ of mandamus by filing a petition for a writ of certiorari in the United States Supreme Court, which was subsequently granted.25 Certiorari was granted for consideration of both the question of the efficacy of using a writ of mandamus to reverse a trial court's discovery order to produce documents and the question whether the court of appeals improperly held that the attorney-client privilege "extends to narrative statements solicited by corporate counsel from non-management employees about their grand-jury testimony."26

The wide chasm between the position taken by the district court and that taken by the court of appeals appropriately illustrates the degree of confusion that currently exists concerning which individuals within a corporation may function as the client for purposes of the attorney-client privilege. However, it is submitted that such confusion is not necessary and can be eliminated. This Note will first review the development of the personal attorney-client privilege and

22. 423 F.2d at 491.
23. 423 F.2d at 491-92.
24. 423 F.2d at 492.
the extent to which the term "client" has been expanded for use with that privilege. Then, the development of the corporate attorney-client privilege will be examined with an eye toward isolating the tests that the courts have used to define the extent of the term "client." Finally, with the results of these examinations in mind, an approach will be suggested that, if adopted by the courts, could effectively eliminate the confusion that presently exists with regard to the scope of the attorney-client privilege in the corporate setting.

I. TRADITIONAL APPROACHES

A. The Personal Attorney-Client Privilege

The attorney-client privilege is considered to be the "oldest of the privileges for confidential communications." It dates back to at least 1577, when the privilege was regarded as a point of honor—a consideration for the oath and honor of the attorney. However, the policy underlying the use of the privilege has changed. Today, the privilege embodies a policy that seeks to encourage freedom of consultation with legal advisors by removing apprehension of compelled disclosure by the attorney of client communications. But because the nature of the information that is withheld in particular cases can never be pinpointed, it is difficult—if not impossible—to determine whether the privilege does in fact promote freedom of consultation and encourage full disclosure of material information to one's legal advisor. This speculative nature of the benefits of the privilege serves as the basis for the countervailing policy that, while the privilege should be allowed, it should "be strictly confined within the narrowest possible limits consistent with the logic of its principle."

The inherent conflict between these two countervailing policies does not appear in the usual case involving the application of the personal privilege. But when the attorney-client privilege is applied in a corporate setting, in which the client is an artificial entity operating through agents, the conflicting policies collide and frequently lead to judicial confusion.

In the usual case involving the personal privilege the courts rely on and apply Wigmore's famous eight-element test:

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

Of these elements, the fifth is of primary concern in defining the corporate privilege. In light of the first two elements, it is clear that the term "client" should include any person who seeks legal advice from a professional legal advisor. But over the years the courts have expanded this definition, and thereby held that a communication will be considered to be from the client when it is from or through an agent, employee, or interpreter; or when, if the client is incapable of communicating correct and sufficient information, it is a report by a specialist or expert employed by the client or by the attorney. More specifically, the privilege has been extended to protect a physician's report prepared to aid the attorney in preparation for litigation, reports by experts or special agents employed by the client, and a statement obtained by the client's insurance company.

33. See id. §§ 2300-04.
34. See id. §§ 2306-10. "Communication" includes, among other things, "documents delivered or shown to the attorney at a consultation . . . ." Id. § 2307, at 591.
35. See id. §§ 2311-16.
36. See id. §§ 2317-20.
37. See id. §§ 2321-23.
38. See id. §§ 2324-26.
39. See id. §§ 2327-29.
40. Id. § 2317.
41. See, e.g., City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951), discussed in note 42 infra. See also note 43 infra.
42. In City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951), the sole purpose of a medical examination was to aid the attorney in preparation for litigation. In writing the opinion, Justice Traynor relied heavily on § 2317 of 8 J. WIGMORE, supra note 27 (3d ed. 1940). He concluded:
Thus, when communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed.
57 Cal. 2d at 237, 231 P.2d at 51. This case was relied on by the Michigan supreme court when a similar situation arose in Michigan:
Had [the plaintiff] possessed the requisite training and skill to make an accurate appraisal of her physical condition and to draw reasonable conclusions therefrom . . . . any communication by her to her attorney of such appraisal and diagnosis would without question have been privileged . . . . To accomplish the desired result the attorney representing her deemed it necessary to employ a medical expert to act for him and his client and to convey to him on behalf of his client the information he needed . . . .
Lindsay v. Lipson, 367 Mich. 1, 5-6, 116 N.W.2d 60, 62 (1962).
43. A report was held to be privileged when it was prepared by a party sent by an insurer, at the suggestion of his solicitors, to a foreign country for the express purpose of collecting evidence on behalf of the insured in support of his litigation. Steele v. Stewart, 41 Eng. Rep. 711 (Ch. 1846).
that was later transmitted to the attorney defending the client in a related criminal action. 44

Bearing in mind the conflicting policies underlying the attorney-client privilege and the extent to which the term "client" has been expanded in the context of the individual privilege, the question of determining who may be regarded as representing the client in the corporate context may be examined.

B. Historical Development of the Corporate Attorney-Client Privilege

Prior to the decision by the United States District Court for the Northern District of Illinois in Radiant Burners, Incorporated v. American Gas Association, 45 it was widely assumed that the attorney-client privilege applied to corporations as well as to individuals. 46 While the district court's decision in Radiant Burners, which held that the privilege did not apply to corporations, 47 was reversed, 48 it still gave rise to speculation and concern about the extent to which the privilege should apply to corporations. In its opinion reversing the lower court, the Court of Appeals for the Seventh Circuit addressed itself to this speculation when it stated that the privilege "is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 49 Thus, while it appears to be settled, at least

44. After a discussion of both sides of the issue, the Illinois supreme court concluded that "[u]nder such circumstances we believe that the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured." People v. Ryan, 30 Ill. 2d 456, 461, 197 N.E.2d 15, 17 (1964).


46. See notes 47 & 48 infra. MODEL CODE OF EVIDENCE rule 209 (1942) states: "As used in Rules 210 to 213 . . . 'client' means a person or corporation . . . ." UNIFORM RULE OF EVIDENCE 26(3)(2) (1953) states that "'client' means a person or corporation . . . ."

47. The district judge stated that his research led him "to conclude that a corporation's right to assert the privilege has somewhat generally been taken for granted by the judiciary . . . ." 207 F. Supp. at 772. He then went on to hold that the privilege did not apply to corporations because (1) historically the privilege was "fundamentally personal in nature" and thus could "be claimed only by natural individuals and not by mere corporate entities" (207 F. Supp. at 773); and (2) the element of secrecy required for the privilege would be impossible within the modern corporate structure (207 F. Supp. at 773-74).

48. Radiant Burners, Inc. v. American Gas Assn., 320 F.2d 314 (7th Cir.), cert. denied, 376 U.S. 118, 98 S.Ct. 586 (1968). The court of appeals stated that "based on history, principle, precedent and public policy the attorney-client privilege in its broad sense is available to corporations . . . ." 320 F.2d at 322. In its opinion, the court listed cases that had recognized the privilege as applicable to corporations. 320 F.2d at 319 n.7.

49. 320 F.2d at 323, quoting 8 J. WIGMORE, supra note 27, § 2291, at 554. See note 30 supra and accompanying text.
in the federal courts, that the privilege does apply to corporations, it is not clear which persons within a corporation can communicate with an attorney and be reasonably assured that the communication will be privileged.

Before the decision in Radiant Burners, two approaches were used by the courts to resolve that issue: the privilege was either extended to communications by any employee of the corporation, or only to those made by selected agents of the corporation. The former, "broad" approach was applied by Judge Wyzanski in United States v. United Shoe Machinery Corporation. He held that when letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged as contain, or have opinions based on, information furnished by an officer or employee of the corporation in confidence and without the presence of third persons.

A subsequent decision that adhered to this line of reasoning implied that the corporate client, for purposes of the attorney-client privilege, included "employees, officers, directors." However, none of the courts that have adopted this approach appear to have explained in detail why such a broad range of protection should be granted to corporations.

The second traditional approach, which applies the privilege only to communications from certain employees or agents, was developed in D. I. Chadbourne, Incorporated v. Superior Court. In that case an insurance corporation's attorneys had employed a firm to investigate accidents and to transmit the reports to them. The California supreme court held that the reports would have been privileged if under all the circumstances of the case, he [the employee making the communication] is the natural person to be speaking for the corporation; that is to say, that the privilege will not attach in such case unless the communication constitutes information which emanates

52. 89 F. Supp. at 359 (emphasis added).
55. 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964).
from the corporation (as distinct from the nonlitigant employee), and the communicating employee is such a person who would ordinarily be utilized for communication to the corporation's attorney.\textsuperscript{56}

The courts that applied this approach appear to have relied on the well-established rule that a client may communicate to his attorney through an agent,\textsuperscript{57} or on the ground that the reports were created as a necessary means of making a confidential communication with the attorney.\textsuperscript{58}

Thus, at the time Radiant Burners was decided some courts—including most federal courts—were taking a broad approach by holding that a communication from any employee was privileged, and others were taking a more selective approach by holding that a communication was privileged only when the employee making the communication would be the "natural" or appropriate person to be speaking for the corporation.

After Radiant Burners the courts continued to employ both of these tests.\textsuperscript{59} However, a third approach was also developed. This theory, which was first enunciated by Judge Kirkpatrick in City of Philadelphia v. Westinghouse Electric Corporation,\textsuperscript{60} has become known as the "control group" test. Under this test a communication will be held to be privileged

if the employee making the communication, of whatever rank he


\textsuperscript{57} Apparently, none of the federal courts have explicitly adopted this approach.

\textsuperscript{58} 8 J. WIGMORE,\textsuperscript{supra} note 27, § 2317, at 618. This principle was applied in the corporate setting in Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942). The privileged statement in that case was taken by the claims agent "after consultation with and by direction of the company's attorneys and immediately turned . . . over to them for use in anticipation of litigation . . . ." 211 Minn. at 550, 2 N.W.2d at 415.

\textsuperscript{59} In some situations the courts have applied the privilege to agents without any discussion as to the rationale for this application. See, e.g., Fire Assn. of Philadelphia v. Flemming, 76 Ga. 735, 3 S.E. 420 (1887).

\textsuperscript{59} In Holm v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1025 (1954), certain reports and photographs were prepared by agents of the defendant's employer and were given in confidence to the attorneys for the defendant and his employer for use in possible litigation. The California supreme court stated that "[i]t follows that where the communication is between corporate employees and is embodied in reports . . . for the purpose of redelivery to a corporate attorney the privilege attaches if the reports . . . were created as a means of communicating confidential information . . . ." 42 Cal. 2d at 508, 267 P.2d at 1029.

\textsuperscript{59} See notes 53 & 55 supra.

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, [because] then, in effect,
he is (or personifies) the corporation when he makes his disclosure
to the lawyer . . . .61

Several courts have adopted this approach and have held that the
control group is limited to upper-echelon management personnel.62
As a result, the protection afforded by the privilege is restricted to
communications made by or to a very small group of individuals
within any given corporation.

C. Evaluation of the Traditional Tests

Thus, the spectrum of views that are presently voiced by the
courts consists of a broad (any employee) approach, a selective
(natural person) approach, and a narrow (control group) approach.
Each of these approaches has its own strong and weak points.

1. Broad Approach63

Those who favor the broad approach argue that the diffuse struc­
ture of a corporation requires proportionally broad coverage in
order to carry out the privilege's underlying purpose of assuring the
client that his full and frank communications concerning legal mat­
ters will not be subject to compulsory disclosure.64 This argument is
buttressed by a feeling on the part of the judges who adhere to this
approach that the harm caused by a restriction of the attorney-client
privilege would greatly outweigh any resulting positive effects. As
stated by one federal district court judge, "I am, frankly, hesitant to
do anything which would contribute to the undermining of the pro­
tection afforded by the time-honored rule which excludes from evi­


district court held that the control group included only directors, officers, department
heads, division managers and their first assistants, and division chief engineers. In
Hogan v. Zletz, 48 F.R.D. 308, 315 (N.D. Okla. 1967), modified on other grounds sub
nom. Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968), division managers and their assistants
were considered to be members of the control group. In Congoleum Indus., Inc. v.
GAF Corp., 49 F.R.D. 82, 85 (E.D. Pa. 1969), corporate vice presidents and a division
vice president and general manager were considered to be part of the corporation's
control group. See also Honeywell, Inc. v. Piper Aircraft Corp., 5 TRADE Rec.
Rev. (1970 Trade Cas.) ¶ 73,122 (M.D. Pa. March 27, 1970); Goliminas v. Fred Teitel­

63. See notes 51-54 supra and accompanying text.

64. See, e.g., Hammond Ford, Inc. v. Ford Motor Co., 1962 Trade Cas. ¶ 70,192,
at 75,686 (S.D.N.Y. 1961), quoting United States v. Aluminum Co. of America, 193
dence such confidential communications.” Further, this approach’s ease of application creates a measure of predictability on which attorneys and corporations can rely. Thus, the broad approach encourages the disclosure of all relevant information and thereby fosters the underlying purpose of the privilege.

However, because of the approach’s broad coverage, it is susceptible of abuse and tends to create a wide “zone of silence” around corporate affairs. For example, because a communication to an attorney from any employee will be privileged, a corporation could funnel masses of information through its attorney and thus bring communications that would not normally be privileged under the umbrella of protection. As one author has stated, “[w]here corporations are involved, with their large numbers of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large. Few judges . . . would long tolerate any common-law privilege that allowed corporations to insulate all their activities by discussing them with legal advisers.”

It is also argued that the approach is in direct conflict with the dictum of the case of Hickman v. Taylor, which involved memoranda prepared by a corporation’s attorney that summarized his interviews with some of the corporation’s employees. The Supreme Court held that although the memoranda were part of the attorney’s “work product,” they were not covered by the attorney-client privilege. In reaching this conclusion, the Court asserted that “the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.” Since the witnesses in Hickman were employees of the corporation, it is clear that the Supreme Court did not regard the privilege as extending to communications from all corporate employees. One district court that has followed the Hickman line of reasoning has suggested that when an employee gives information to his corporate employer’s attorney, the key question in determining whether the privilege applies is “was he at the time, in contemplation of law, the corporation seeking advice?” If the question may be answered affirmatively, the communication should be privileged. But when an employee gives information in order that someone other than himself can receive advice, the employee is

66. The phrase “zone of silence” was apparently coined by David Simon in 1956. Simon, supra note 54, at 955.
67. Id. at 955-56.
68. 329 U.S. 495 (1947).
69. 329 U.S. at 508.
merely a witness. Therefore, a holding that his communication is privileged—as would be the conclusion under the broad approach—would violate the spirit and intent of *Hickman.*

In response to this argument it can be asserted that the Court in *Hickman* made no effort to define the situations in which an employee will be considered a witness rather than the corporate client. It merely held that in the particular fact situation before it, the communications were made by witness-employees. Hence, it might be argued that the broad approach presents no necessary conflict with *Hickman.* But because the broad approach protects communications to attorneys made by all employees, including those who are merely witnesses, it frequently violates the *Hickman* dictum.

In summary, then, it can be said that courts that have utilized the broad approach have failed to examine each of the two policies that underlie the attorney-client privilege: by concerning itself solely with the promotion of the freedom of attorney consultation, the broad approach overlooks the need to prevent corporations from abusing the privilege. Thus, it is submitted that the broad approach's appeal as an easy-to-apply formula is greatly outweighed by its dangerous tendency to stimulate the formation of unnecessarily broad zones of silence.

2. **Selective Approach**

Those who favor the selective approach argue that it extends the privilege to corporations only to the degree necessary in order to foster the basic purposes of the privilege. This approach is based on the premise that “[a] corporation is entitled to the same treatment as any other ‘client’—no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought, it [should be protected] from disclosure . . . .” But this approach also recognizes that “reason dictates that the corporation not be given greater privileges than are enjoyed by a natural person merely because it must utilize a [natural] person in order to speak.” Proponents of the selective approach feel that it fosters the policies underlying the attorney-client privilege because it recognizes that many people within a corporation may function as the corporate client, yet restricts the

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71. 210 F. Supp. at 485.

72. See notes 55-58 supra and accompanying text.

73. Radiant Burners, Inc. v. American Gas Assn., 320 F.2d 314, 324 (7th Cir.) cert. denied, 375 U.S. 929 (1963). See also D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 739, 388 P.2d 700, 709, 36 Cal. Rptr. 468, 477 (1964), in which the California supreme court stated: “Certainly the public policy behind the attorney-client privilege requires that an artificial person be given equal opportunity with a natural person to communicate with its attorney . . . .”

The privilege’s coverage to only those persons who are identified with the interests of the corporation. These proponents, therefore, urge that the selective approach reduces the likelihood that a zone of silence will be created around a corporation.

However, this approach has the decided disadvantage of failing to produce predictable results. This lack of predictability stems from the fact that the courts that have used the test have made no attempt to define what attributes an employee must possess in order to be considered the natural person to be speaking for the corporation. These courts have subjectively viewed situations after communications have been made, and have then retrospectively determined whether the privilege should apply. In so doing, they have failed to provide objective guides for determining future conduct. As a result, an attorney and his client have little to rely on when attempting to predict whether a particular communication will be privileged. Therefore, a client may feel inhibited about what he can tell his attorney, thereby impairing the effectiveness of his attorney's representation.

Thus, although the selective approach represents an effort by the courts to mold what was originally an individual privilege into a privilege that fits the structure of the modern corporation, its usefulness is severely limited by its failure to provide objective guidelines that an attorney can use to aid his initial appraisal of which employees will or will not be covered. Because of this uncertainty, the selective or natural-person approach provides an undesirable standard for determining the scope of the corporate attorney-client privilege.

3. Narrow Approach

The narrow or control group approach appears to be based on the premise expressed in Radiant Burners that the privilege is “fundamentally personal,” coupled with the general policy that the attorney-client privilege should not be unduly extended. Under this approach, the control group of a corporation—normally consisting of its board of directors and chief officers—is regarded as that group of people in the corporation that is most analogous to an individual client, because it is the responsibility of the officers and directors “to fear for the well-being of the corporation just as an individual fears for his own well-being.” Thus, the narrow ap-
proach limits the extent of the privilege to communications by those who control, take a substantial part in, or influence a corporate decision.\textsuperscript{81} It is this tight restriction on the class of individuals who can make privileged communications and the resulting prevention of zones of silence that comprise the greatest advantages of the narrow or control group approach.

However, it has been argued that this approach is too artificial and too narrow, because “[t]oo often middle management executives who probably do not qualify for inclusion in the control group . . . have responsibilities for making recommendations which are ratified verbatim by the higher echelon management which [would] be a part of the so-called ‘control.’ ”\textsuperscript{82} In fact, middle management may include the parties whose statements most need protection because these men frequently are the real decision makers. Another disadvantage of this approach is that it has failed to produce any objective guides that can be used to predict who the courts will consider to be members of the control group. The problems caused by this lack of objective standards are best illustrated by Congoleum Industries, Incorporated v. GAF Corporation.\textsuperscript{83} In that case, a corporation had appointed a special group to investigate possible patent litigation and to furnish information to the attorney to be used as a basis for corporate decisions. The court concluded that the vice president for operation and a division vice president and general manager were the only members of the investigative group who were properly members of the control group. Three other officers were found not to be members of the control group on the ground that within the special group they “held advisory as opposed to decision-making positions.”\textsuperscript{84} Thus, the subjective nature of the control group test concept that the board of directors is responsible for the management and affairs of a corporation is contained in the corporation statutes of most states. See, e.g., Del. Code Ann. tit. 8, § 141(a) (Supp. 1965); N.Y. Bus. Corp. Law § 701 (McKinney 1963). The authority of officers and other corporate agents is usually derived from the articles of incorporation, bylaws, or resolutions of the board of directors. W. Cary, Cases and Materials on Corporations 150-53, 190-91 (4th ed. 1969). Since the officers and directors are directly responsible to the owners of the corporation—the shareholders—for the corporation’s day-to-day well-being, they are as analogous as possible to the individual client for purposes of determining which persons fear for the well-being of the corporate client.


\textsuperscript{82} Maurer, Privileged Communications and the Corporate Counsel, 28 Ala. Law. 352, 375 (1967).

\textsuperscript{83} 49 F.R.D. 82 (E.D. Pa. 1969).

\textsuperscript{84} 49 F.R.D. at 85.
prevented the corporation from successfully structuring its investigation procedure to comply with the control group test and thereby fully to avail itself of the privilege. As a result of decisions such as that reached in Congoleum, corporations may hesitate fully to disclose to their attorney information pertinent to litigation.

Further, the courts that have utilized this approach appear to have overlooked the fact that the individuals in a corporation can be divided into two functional groups for purposes of the attorney-client privilege: decision makers and givers of information. In the context of the personal attorney-client privilege, the individual client acts in both capacities—he gives information and then, based on the attorney's advice, he makes a decision—and any communication either to or from his attorney is privileged. The control group approach concentrates on only those employees in the corporation who are decision makers and completely ignores the fact that information must be given to the attorney before he can render legal advice. To that extent, then, the narrow approach provides an incomplete analogy to the individual privilege.

Thus, by concentrating on only one aspect of the total problem, the control group approach fails to deal with all of the considerations that underlie the privilege. As a result, the approach is not only unworkable for purposes of legal analysis, but may also be destructive of the client's confidence in his attorney.

4. Balancing Approach

Because of the difficulties encountered by the broad, selective, and narrow approaches, one commentator has suggested a case-by-case balancing approach. In essence this approach asks "whether the good that the privilege seeks to accomplish—candor between client and attorney—would be defeated unless the particular agent were permitted to speak for the corporation." If the "good" would be defeated, then this approach would privilege the communication. In theory, this inquiry would promote full disclosure by corporate clients to their attorneys, yet would not protect communications that were not relevant to the promotion of such disclosure.

But while the balancing approach would do away with some of the difficulties associated with the other approaches, it would be unworkably unpredictable and hence incompatible with the purpose of the privilege—promoting full disclosure to attorneys. Its unpredictability is a result of the fact that it incorporates a subjective determination of what is privileged without providing objective guidelines. Thus, the balancing approach fails to correct the defect that hampers the selective and narrow approaches—uncertainty.

86. Simon, supra note 54, at 956.
II. SUGGESTED APPROACH

A. Basic Precepts of a Sound Approach

The difficulties associated with all of these approaches suggest that a viable corporate attorney-client privilege should satisfy at least the following three precepts.

First, the corporate privilege should be as analogous as possible to the privilege afforded individuals. Clearly, the fact that a corporation must utilize many persons to speak for it is not a valid reason for granting it a greater privilege than that granted an individual. For example, assume that a secretary, while looking out her office window, saw one of her corporate employer's trucks collide with an automobile driven by a private individual. A statement by that secretary to the private individual's attorney— or to the truck driver's attorney— would not be privileged since she clearly was neither the client nor a representative of the client. Consistency and fairness would indicate that the corporation also should not be able to assert the privilege in this situation. Moreover, since the privilege developed as an individual privilege and since most judicial precedents in this area relate to individuals, a corporate privilege analogous to the individual privilege would enable the courts to work within an established and familiar framework. The courts would thus be in a position to insure that the corporations would not receive greater benefit from the privilege than would individuals.

A second precept should require the corporate privilege to be structured so that it will foster the accomplishment of the purposes underlying the privilege without unduly restraining the use of the privilege by making it unpredictable and difficult to utilize. A vague or unworkable standard is undesirable from both the attorney's and the court's points of view. From the lawyer's viewpoint, the underlying policy of assuring a client that his communications will remain confidential will be served only if the lawyer is able to predict, with reasonable reliability, that a particular communication will be held by a court to be privileged. A court, on the other hand, needs a workable approach in order to curb a corporation's attempt to establish an overly broad zone of silence. Without clear guidelines, corporations might be tempted to create improperly broad zones of silence in the hope that the courts would be unable or unwilling, because of the difficulty in applying uncertain rules, to police the privilege effectively.

In order to avoid any conflict with the holdings of the Supreme Court, a third precept should require that a viable approach be consistent with the dictum of Hickman v. Taylor. The Court in

Hickman stated that the privilege does not cover communications from employees who are merely witnesses. Therefore, a suggested approach should, as far as possible, draw a distinction between communications by witnesses who are also employees and communications by employees who are considered to be corporate clients.

Since each of the previously discussed approaches satisfies some of these requirements, it would seem that a viable approach could be constructed by combining the more desirable elements of each.

B. The Elements of the Suggested Approach

It is proposed that in determining whether the attorney-client privilege exists in a particular case, the courts should ascertain whether: (1) legal advice was being sought, (2) the advice was being sought from a professional legal advisor in his capacity as such, (3) the communication was related to the situation about which the advice was sought, (4) the communication was made in a manner such that it can be said that it was intended to be confidential, and (5) the employee making the communication is within the definition of “corporate client.”

These elements are essentially the first five of the eight elements delineated in Wigmore’s formulation of the attorney-client privilege. Because steps two and three concern the status of the attorney and the nature of the communication, they are independent of the nature of the client. Hence, the determination under those two elements will be the same whether the client is an individual or a corporation, and the rules and precedents established by the courts for these elements in connection with the personal attorney-client privilege can be applied unaltered to the corporate privilege. It is only in conjunction with the other three steps that a slightly different analysis is called for in order better to adapt the privilege to the structure of the corporation.

1. Was Legal Advice Being Sought?

The court must first determine whether the corporation was seeking legal advice as that term has been defined for application to the personal attorney-client privilege. In order to answer this question, it is submitted that the court should ascertain whether someone with the proper authority to commit the corporation to take

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88. The selective, narrow, and balancing approaches all attempt to make the corporate privilege parallel to that afforded individuals, and also to exclude employees who are more than witnesses from the privilege’s coverage. However, the broad approach, which grants the privilege to communications by any corporate employees, provides for more certainty. See the discussion of these approaches in pt. I. C. supra.

89. 8 J. WIGMORE, supra note 27, § 2292, at 554. See text accompanying notes 82-86 supra.

90. See 8 J. WIGMORE, supra note 27, §§ 2294-99.
legal action has taken the **initial** step of seeking legal advice. As was previously pointed out, an individual consulting an attorney performs two functions: he seeks advice upon which to make a decision, and he provides information to the attorney so that the advice can be given. At this point in the corporate-privilege inquiry the court should be concerned only with examining those people in the corporation whose functions are analogous to the decision-making function in the individual dichotomy. Thus, if someone in the corporation who is authorized to make a decision about legal action has determined that the corporation should seek legal advice and the corporation has acted on that determination, then this first step has been satisfied. The precedents created in the determination of who comprises the control group would be useful to courts in determining whether an authorized person has committed the corporation to some form of legal action. As used in this particular context, the control group would be limited to those persons who have actual corporate authority to commit the corporation to legal action; thus step one would involve primarily a factual determination.

2. *Was the Communication in Confidence?*

Once a court has concluded that the corporation has sought legal advice from an attorney and has made or received a communication pertinent to such advice, it should consider whether the communication to the attorney was made in confidence. The basic difficulty encountered with this determination stems from the fact that a corporation functions only through its agents. In order to understand this difficulty, one must delineate the two situations in which it can arise. The first situation can best be described by illustration. Assume that a factual report of an incident giving rise to litigation involving C corporation is prepared by E, an employee of the corporation. Assume further that this report would be privileged if transferred directly from E to the corporation's attorney. However, C's policy and the necessity of insuring that E has made a full and accurate disclosure require that the information be approved by S, E's supervisor, before its submission to the attorney. At this point, because the information was communicated to a third person before reaching the attorney, the issue arises whether it was intended to be confidential.

It may be recalled that when an individual client is incapable of communicating complete information, communications by his agents or experts that fill in the gaps are privileged. That situation is similar to the problem confronted by corporate clients when a full

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92. *See* text following note 84 *supra.*
93. *See* notes 40-44 *supra* and accompanying text.
and accurate disclosure to an attorney requires a combination of the talents of two or more employees working under one or more supervisors. Thus, in order to foster the policy of encouraging full and accurate disclosure by clients and to maintain the analogy to the individual-client situation, communications within the corporation that are necessary for completeness and accuracy of information given the attorney should be considered confidential even though they have been communicated to third persons. However, holding them confidential, without any restrictions, would facilitate the creation of zones of silence. This danger would be substantially eliminated if the class of persons to whom the communication can be disclosed without losing the protection of the privilege was limited to those persons who, because of the structure of the corporation, must know of the communication in order to insure that the attorney is obtaining both full and accurate information. Thus, it is submitted that such a communication should be considered confidential if all the employees with knowledge of it obtained that knowledge as a direct result of having performed their assigned jobs, and if the pertinent information was associated directly with their work.

The difficulty with ascertaining whether a communication by a corporate employee is confidential can also arise in a second situation. An attorney may obtain confidential information that he must pass on to the corporation's executives so that they will have all of the facts necessary for making a decision. In order to make an informed decision, these decision makers must have not only the advice of the attorney but also knowledge of the facts upon which that advice is based. 94 Thus, in order properly to perform his function, the attorney must be able to reveal fully to decision makers the substance of what he has learned from corporate employees and the ramifications thereof without fearing that he would thereby remove the privilege from information that would otherwise be protected. 95 Therefore, it would be appropriate and consistent with the underlying policies of the privilege to hold that information that is communicated in confidence by a corporate employee—an information giver—to an attorney remains confidential when that information is subsequently related by the attorney to the corporation's decision-makers in order to advise them fully concerning possible litigation.

In conclusion, then, it can be seen that in order for the corporate privilege to be analogous to the individual privilege, information must be regarded as confidential when it is communicated by information givers to the attorney and when the attorney passes the

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95. Wigmore states, "[t]hat the attorney's communications to the client are also within the privilege was always assumed in the earlier cases and has seldom been brought into question." 8 J. Wigmore, supra note 27, § 2320.
communication on to the decision makers. The danger of permitting the creation of zones of silence can be ameliorated by restricting the group of individuals who may communicate privileged information—that is, by restricting the group of persons who may be regarded as the corporate client.

3. **Was the Employee a Corporate Client?**

If a particular communication survives the barriers erected by the first four steps of the suggested analysis, a court must then determine whether the employee or employees making the communication fit within the definition of “corporate client.” Here the natural-person concept as formulated in the selective approach\(^\text{96}\) provides a viable analytic base.

Since the individual client functions in the capacity of both information giver and decision maker, a corporate attorney-client privilege that is analogous to that afforded an individual should cover communications from both the corporation's decision makers and its information givers. But the corporate privilege should also reflect the countervailing policy of preventing corporations from placing unnecessarily large amounts of material in the privileged category. It is submitted that both of these policies can be effectuated if only employees who are the natural or appropriate persons to be speaking or listening for the corporation are considered to be the corporate client, and if the term “natural person” is clearly and concisely defined. Under the proposed approach an employee would qualify as such a natural person if (1) he is the highest-ranking individual within the corporate structure to have access to the information, and he either (a) obtained the information as a direct result of performing the job assigned to him by his employer and such information is associated directly with his work, or (b) obtained knowledge of the information because the communication was passed to him—as a supervisor of another corporate client—for approval of changes in the normal company flow for that type of communication within the corporation; or (2) he obtained the information from the attorney as a member of the corporation's control group.

C. **Evaluation of the Suggested Approach**

If followed, the suggested approach should eliminate the difficulties associated with the other approaches because it meets the three prerequisites of a viable approach. First, it is analogous to the privilege afforded individuals. Clearly, the individual privilege has been extended to cover communications that are from or through agents or interpreters, or that constitute reports of specialists or experts employed by the client or by the attorney when the client is incap-

\(^{96}\) See pt. I. C. 2. supra.
able of communicating correct and sufficient information to the attorney. 97 It is equally clear that communications by the attorney to the client or his agent are privileged. 98 These principles are consistent with the fact that an individual client, acting for himself or through agents, both provides information to his attorney and makes decisions based on that advice. By defining the "corporate client" as that person in the corporation who can either provide correct and sufficient information to the attorney or obtain the information from the attorney so that a decision can be made, the suggested definition of "client" is analogous to that presently used in the individual situation.

Second, the proposed approach fosters the privilege without unduly restricting it. Because this approach would provide a court with a set of objective standards for determining whether an employee functions as a corporate client, an attorney should be able to predict with a reasonable degree of certainty whether a contemplated communication would be privileged. The unpredictability that would remain would be little more than that which presently faces an attorney with an individual client, since the suggested approach would be analogous to the personal privilege. The increased predictability would thus promote the major purpose of the privilege—fostering the freedom to seek legal advice—by removing fears that the attorney might subsequently be compelled to disclose the communication.

Moreover, the proposed approach would not encourage the creation of zones of silence by corporations. In applying this approach a court would look at any given situation and determine whether someone in the control group was seeking legal advice, whether the communication was made in confidence, and whether it was made by an individual who functioned as a corporate client. Any attempt by a corporation to funnel all of its records through an attorney, and thus create a zone of silence around its entire operation, would be discovered by the courts at one or more of the steps in the analysis. For example, funneling everyday business records—such as sales contracts, interoffice memoranda, letters to and from persons outside the corporation, or minutes of meetings—to an attorney would not automatically make those records privileged. In most cases a member of the control group would not have actively sought legal advice about matters involved in a particular business record. Further, when legal advice is sought, the privilege would apply only to those documents that were related to the subject on which the advice was sought. Finally, the records that could successfully clear the first two hurdles would probably not have been made and treated in a confidential manner.

97. See notes 40-44 supra and accompanying text.
98. See note 95 supra.
Finally, the approach satisfies the third precept necessary for an effective corporate attorney-client privilege since it avoids any conflict with the dictum of *Hickman v. Taylor.* The information that an employee obtains as a mere witness to an event will not be privileged because he did not obtain the information while acting as a supervisor of the employees who did prepare the information, or because—when such information was associated directly with his work—he did not obtain the information as a direct result of performing the job assigned to him. This latter situation can best be explained through illustration. A communication from a truck driver employed by a corporation who negligently hits someone would be covered by the privilege because the information would be a direct result of the performance of his job and would be associated directly with the nature of his work. On the other hand, a dock hand who witnessed the accident could not make a privileged communication. Although the information may have been a direct result of the performance of his job—being at his place of duty at the time he witnessed the accident—the information was not associated directly with his work—the loading of trucks. Thus, under both the *Hickman* dictum and the suggested approach, any communication by the dock hand to the corporation's attorney would not be protected.

In addition to satisfying the three precepts that are essential to an effective corporate privilege, the suggested approach provides a relatively simple analysis. Under the traditional approaches the courts have attempted to apply a definition of the term "client," which developed primarily from precedents involving individuals, to an artificial entity. The suggested approach, however, would enable a court to solve problems by applying familiar principles that are not concerned with the nature of the client. Then, when the court reaches the conceptually difficult area—if it does at all—it will have already collected sufficient information about the corporation, the communication, the employee who made the communication, and the attorney to be able to determine whether the definition of "corporate client" covers the employee. By thus separating and narrowing the factual issues, the ultimate inquiry will become less difficult.

D. A Hypothetical Case

The over-all application of this suggested approach is best understood by examining a hypothetical case, the facts of which are similar to those presented in *Harper & Row.* Assume that BQF Corpor-
ration is being investigated by a federal grand jury for alleged price-fixing activities, and that the grand jury has subpoenaed several employees of the corporation to testify before it. Because of their concern about possible future litigation involving the alleged activities, BQF's board of directors has authorized the corporation's president to consult an attorney.

The attorney informs the president that in order to advise the corporation properly on what action to take to avoid or to defend against any future litigation, he must, among other things, learn as much as possible about what BQF's employees have told the grand jury. Because of the secrecy of the proceedings, it is decided that this can best be accomplished by the attorney debriefing each employee after he testifies. Each employee is accordingly debriefed, and after each debriefing the attorney writes a short memorandum concerning the substance of the witness' testimony. A private plaintiff subsequently sues BQF in federal court for damages resulting from the alleged price-fixing activities, and moves the court to order BQF to produce the debriefing memoranda. The issue therefore arises whether these memoranda are protected by the attorney-client privilege.

The hypothetical has been set up so that the first four steps of the approach have been satisfied: legal advice was sought by a member of the control group, the advice was sought from a professional legal advisor, the communications were clearly related to the potential litigation about which advice was being sought, and the communication was made with an intent that it be confidential—no one was present at the time of the debriefing other than the attorney and the specific employee involved, and the attorney revealed the communications only to members of the corporation's control group. Whether or not each communication will be privileged will therefore depend on whether each employee was a corporate client with reference to the particular information that he gave to the attorney.

Employee A, who is a district sales manager for the corporation, related the details of a meeting that he attended at which the corporation's various district sales managers discussed the prices that BQF would charge during the coming year. Under the suggested approach, A's communication will be privileged only if, at the time he attended the meeting, part of his job was to attend such meetings. If so, the information was obtained as a direct result of his performing his job as a sales manager, and the information is associated with his job duties. 

court and by the court of appeals in Harper & Row are very similar to the facts of this hypothetical case. Because the courts did not apply the suggested approach, they did not collect all of the information necessary for its application. Therefore, certain facts have been assumed in the hypothetical case so that the proposed approach could be applied to a situation that reflects the problems presented in Harper & Row.
directly with an aspect of his work—that of being informed of the corporation's pricing policies so that he can set the prices for his district.

Employee B, another district sales manager, not only talked about the same meeting, but he also told the attorney about a cocktail party he had attended with the sales managers of the corporation's closest competitors. He testified that at this party, general pricing information was exchanged and price brackets for each corporation were informally established. After applying the suggested test, it becomes clear that only a portion of the communication about the cocktail party will be covered by the attorney-client privilege. Assuming that the information was obtained as a direct result of B performing his job as a sales manager, some of the information may nevertheless not be associated directly with that job. As a sales manager his job may include establishing the prices for his own district, learning from the corporation what prices he must charge, and generally overseeing the sales activities in his area. However, his job is directly associated only with his corporation's prices and his own district, and not with overhearing conversations in which the corporation's competitors discuss their prices. In regard to the conversations in which B's competitors discussed their prices, B is merely a witness. While attendance at such a party may be part of his job, listening to competitors discuss their prices is probably not associated directly with his duties as a sales manager. This determination would ultimately rest on how broadly the courts would allow any given employee's job to be defined. If the courts would allow the job definition to include the performance of illegal activities—including price-fixing—then a corporation could, in part, expand the scope of the privilege and defeat attempts to limit it reasonably. However, a discussion of the policies that should be applied to and the limits that should be placed on the definition of an employee's job is beyond the scope of this Note.102

III. Conclusion

At the present time, courts are uncertain which persons within a corporation may be considered as the client for purposes of applying

102. The decisions and articles dealing with the vicarious liability of employers for the acts of employees may be useful in attempting to determine the scope of an employee's job for purposes of the suggested approach. See A. Conard & R. Knais, Cases and Materials on the Law of Business Organization 91-134 (3d ed. 1969); F. Mecham, Outlines of the Law of Agency §§ 864-411 (4th ed. 1952); W. Seavey, Handbook of the Law of Agency §§ 83-89 (1966); Restatement (Second) of Agency §§ 223-27 (1959); Laski, The Basis of Vicarious Liability, 26 Yale L.J. 105, 115-26 (1916); Smith, Frolic and Detour, 23 Colum. L. Rev. 444 (1923). It also might be helpful to examine the concepts that have developed in determining the extent of the fiduciary responsibility of an agent to account for gains to his principal. See A. Conard & R. Knais, supra, at 497-528.
the attorney-client privilege. All of the tests that are presently being used by the courts and that have previously been proposed have some significant shortcoming. Either they leave the attorney-client privilege open to abuse by allowing the creation of broad zones of silence around corporations, or they leave the attorney in a perplexed state, so that he cannot confidently predict which communications will be privileged. The former problem leads to an impermissible degree of corporate secrecy that gives the corporation a major advantage over its individual adversary and that unduly interferes with the truth-finding process. The latter problem discourages corporations from fully disclosing pertinent information to attorneys, and consequently prevents the attorneys from adequately representing their clients.

The proposed approach should substantially solve these problems. The system is conceptually easy to apply; therefore, an attorney should be able to predict with reasonable certainty what information will be protected by the corporate attorney-client privilege. This certainty should encourage corporations to disclose fully important information to their attorneys. Further, because the suggested approach restricts the scope of the corporate privilege and is easy for courts to apply, it will enable the courts to control attempts by corporations to build broad zones of silence around their corporate affairs.