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THE ATTORNEY-CLIENT PRIVILEGE—IDENTIFYING THE CORPORATE CLIENT

INTRODUCTION

The attorney-client privilege protects communications between an attorney and his client from disclosure, provided that the communications pertain to the legal advice sought by the client.¹ A corporation qualifies as a client for the purposes of asserting this privilege.² Conflicting views have emerged, however, as to the identity of the corporate client.³ The divergent approaches used by the federal courts to determine whether a specific corporate employee is accorded client status illustrate this controversy.⁴

¹. Wigmore offers the following definition: "(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." 8 J. Wigmore, Evidence § 2292, at 554 (rev. ed. J. McNaughton 1961 & Supp. 1979) (footnote omitted) (emphasis deleted). The attorney-client privilege is the oldest recognized privilege protecting confidential communications. Id. § 2290, at 542; see United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915) (noting the privilege's well established role in the American legal system).


This Note is limited to the corporate client identification issue and does not deal with issues surrounding other elements of the privilege definition, e.g., note 149 infra. It also does not attempt to deal with the difficult question of when shareholder communications with counsel would be privileged, see Simon, supra note 2, at 966-69, or the extent to which a corporation may assert the privilege to deny shareholders access to communications between the corporation and counsel when the shareholders institute a derivative suit. See Garner v. Wolfenbarger, 430 F.2d 1093 (5th Cir. 1970). Finally, no distinction is made between in-house and outside counsel. This
The particular approach adopted reflects the priority attached to one of two competing policies—the maintenance of open communications between the attorney and his client, and the goal of broad discovery advocated by the Federal Rules of Civil Procedure (federal rules). The assurances of confidentiality that necessarily accompany a liberal construction of the privilege effectively foster open communications between the attorney and his client. Nevertheless, such an expansive interpretation of the privilege shields these communications from discovery by an adversary. Advocates of a broad

is generally viewed as irrelevant in determining the applicability of the attorney-client privilege. See, e.g., Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968) (in-house counsel are within the scope of the privilege); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 147 (D. Del. 1977) (determination of privileged nature of communications between attorney and client relating to patent application does not depend on attorney's status as outside or in-house counsel); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 36 (D. Md. 1974) (in-house counsel are "within the purview of the attorney-client privilege under the same circumstances as 'outside' counsel"); Hasso v. Retail Credit Co., 58 F.R.D. 425, 427 (E.D. Pa. 1973) ("house counsel does not stand in any different shoes" than outside counsel in regard to the attorney-client privilege); Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 464 (S.D.N.Y. 1956) (house counsel are not excluded from definition of attorney-client privilege, although they must act as lawyers in connection with the communication); United States v. United Shoe Mach. Corp., 89 F. Supp. 375, 360 (D. Mass. 1950) (there are insufficient differences to distinguish in-house from outside counsel for purposes of the attorney-client privilege), aff'd per curiam, 347 U.S. 521 (1954). But see In re Grand Jury Investigation, 599 F.2d 1224, 1233 n.2 (3d Cir. 1979) (court indicates there may be a reason to distinguish in-house and outside counsel for purposes of the privilege).

5. American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 87 (D. Del. 1962) (policy considerations of privilege clash with broad discovery aims of federal rules); Comerclo E Industria Continental v. Dresser Indus., Inc., 19 F.R.D. 513, 514 (S.D.N.Y. 1956) (court presented with conflict when discovery is opposed by claim of attorney-client privilege); 1979 Wash. U.L.Q. 265, 268 (privilege conflicts with truth seeking goals of pretrial discovery) [hereinafter cited as Alternative Test]. Federal Rule of Civil Procedure 26(b)(1) provides: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1) (emphasis added); see Willis v. Duke Power Co., 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976) (protection accorded attorney-client privilege under Fed. R. Civ. P. 26 is absolute and identical in scope to traditional privilege).


8. See note 5 supra. Privileged communications are not subject to discovery.
scope of privilege acknowledge that this limitation on discovery might result in the suppression of relevant evidence. They contend, however, that this drawback is outweighed by the benefits that result when clients can safely make full disclosure to their attorneys.

Conversely, proponents of broad discovery argue that the adversary system is best served by the disclosure of all relevant facts, and therefore advocate a strict construction of the privilege. The implementation of broad discovery goals at the expense of any privilege, however, contravenes the express wording of federal rule 26(b)(1). To resolve this dispute, it is necessary to determine which corporate employees are entitled to privileged status as clients.

This Note examines the various approaches used to identify the corporate client, within the framework of the open communications-broad discovery


11. See Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 612 (8th Cir. 1978) (en banc) (Henley, J., concurring in part and dissenting in part); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975). See also 8 J. Wigmore, supra note 1, § 2291, at 549-51 (arguments made by Jeremy Bentham and Lord Langdale). Bentham's premise is that only the guilty need fear the truth: "Whence all this dread of the truth? Whence comes it that any one loves darkness better than light, except it be that his deeds are evil?" Id. at 551.


13. See note 5 supra.

14. This is dependent on compliance with any other discovery rules of the particular tribunal.


16. With the exception of D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964) (en banc), all the approaches discussed in this Note were formulated by federal courts. See note 4 supra. One commentator has argued that federal courts should apply state law governing the attorney-client privilege, rather than formulating a federal standard in this area. Kobak, The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts, 6 Ga. L. Rev. 339, 341-52 (1972). Under Erie R.R. v. Tompkins, 304 U.S. 64, 76-78 (1938), state substantive law should be applied by federal courts when the use of the federal forum depends on diversity jurisdiction. See Hanna v. Plummer, 380 U.S. 460, 465-74 (1965). In these situations, federal courts should consider privileges a part of state substantive law. Fed. R. Evid. 501 ("in civil actions and proceedings . . . [in] which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law"); C. Wright, Handbook of the Law of Federal Courts § 81, at 404 (3d ed. 1976) (state privilege law applies when state law controls substantive rule of decision). Application of state privilege law has been infrequent
analysis. Second, attention is given to the existence in the various approaches of the essential characteristic of predictability and the desirable attribute of ease of application. Finally, a suggested alternative is developed, which attempts to combine the goals of the two competing policies in an integrated format.

I. THE VARIOUS APPROACHES AND THEIR UNDERLYING RATIONALES

A. Development of the Controversy

United States v. United Shoe Machinery Corp. was the first case to consider the applicability of the attorney-client privilege to corporations in light of the increasing invocation of the privilege by corporate litigants. Judge Wyzanski proposed a broad set of guidelines to determine the extent of the privilege's coverage; the actual application in United Shoe emphasized because the "noteworthy rulings on the attorney-client privilege" have been in federal question cases, Kobak, supra, at 347, in which federal law provides the rule of decision. C. Wright, supra, § 93, at 462. When there is federal question jurisdiction, courts are split as to whether state law on privilege controls. Kobak, supra, at 344-52, 348 n.39. Compare Baird v. Koerner, 279 F.2d 623, 632 (9th Cir. 1960) (application of forum state privilege law in federal question litigation) with Garner v. Wollnibarger, 430 F.2d 1093, 1098 (5th Cir. 1970) (in federal question cases, "federal courts apply their own rules of privilege where substantial state interests are not infringed"), cert. denied, 401 U.S. 974 (1971). The dearth of state cases and legislation on the subject has necessitated the growth of a federal common law. Only one state court has designed a test to determine the identity of the corporate client. See D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964) (en banc). State statutes that define the attorney-client privilege merely include corporations in the definition of "client." See 8 J. Wigmore, supra note 1, § 2292, at 555 n.2 (citing statutes). Because the bulk of corporate attorney-client privilege cases are litigated in federal courts, these are the more appropriate forums for the refinement of issues and the establishment of precedent. Several state courts have adopted approaches formulated by federal courts. See Golminas v. Fred Teitelbaum Constr. Co., 112 Ill. App. 2d 445, 449, 251 N.E.2d 314, 317 (1969) (control group); Day v. Illinois Power Co., 50 Ill. App. 2d 52, 59, 199 N.E.2d 802, 806 (1964) (control group); Ford Motor Co. v. O.W. Burke Co., 59 Misc. 2d 543, 546, 299 N.Y.S.2d 946, 949 (Sup. Ct. 1969) (broad approach). One article has succinctly stated the problem. "Rule 26(b) exempts privileged matters from discovery. Unfortunately, it fails to specify whether state or federal law determines what matters are privileged." Comment, Evidentiary Privileges in the Federal Courts, 52 Cal. L. Rev. 640, 644 (1964) (footnote omitted). A complete development of this issue is beyond the scope of this Note.


21. "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
both the role of the attorney and the subject matter of the communication in question, but did not elaborate on the identity of the employee communicating. It appeared, therefore, that the "holder of the privilege . . . [who was] or sought to become a client" encompassed any or all corporate employees. One court that followed the broad approach of United Shoe similarly overlooked client identification by concentrating its discussion on the formulation of a comprehensive test to determine when attorneys in a patent department act as lawyers. The corporate client was simply characterized as those persons who were not " [s]trangers " to the corporation. Consequently, the broad approach enables an attorney to provide a sweeping guarantee of confidentiality to many people, and engenders the fullest and most open discussions between the employees of the corporate entity and the attorney.

committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." 89 F. Supp. at 358-59. This definition, unlike the actual approach, has received widespread recognition by courts similarly confronted with disputes over the status of communications between the corporate attorney and the corporate employee. Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 144 (D. Del. 1977); see, e.g., In re Grand Jury Investigation, 599 F.2d 1224, 1233 (3d Cir. 1979); In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 383 (D.C.D. 1978); Handgards, Inc. v. Johnson & Johnson, 69 F.R.D. 451, 453 (N.D. Cal. 1975); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 32-33 (D. Md. 1974); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1159-60 (D.S.C. 1974). The manner of application of the privilege definition, however, has not always resembled the method of application used in United Shoe to resolve the privilege issue. See, e.g., In re Grand Jury Investigation, 599 F.2d at 1237 (adopting control group test); In re Ampicillin Antitrust Litigation, 81 F.R.D. at 385 (formulating own test), Burlington Indus. v. Exxon Corp., 65 F.R.D. at 35-36 (adopting control group test), Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. at 1165 (adopting both control group test and subject matter test).

22. 89 F. Supp. at 359-61.
23. Id. at 358.
24. Corporate Setting, supra note 6, at 367; New Rules, supra note 4, at 312, 23 Vand. L. Rev. 847, 850 n.18 (1970) [hereinafter cited as Direction of Corporation]
27. Id. at 795. The court distinguished between persons affiliated with the corporation—the officers, directors, employees, and outside counsel—and " [s]trangers " who were not affiliated with the corporation. Id. This all-inclusive description of the corporate client amounts to an express acceptance of the implicit assumption in United Shoe that all corporate employees are clients. 2 J. Weinstein & M. Berger, supra note 4, ¶ 503(b)(04), at 503-41 & n 17: Simon, supra note 2, at 960.
28. Under United Shoe, confidential status is extended to communications between the
The viability of the broad approach was first questioned in Radiant Burners, Inc. v. American Gas Association, in which the district court denied the availability of the attorney-client privilege to corporations. Despite the Seventh Circuit's reversal on this issue, the district court's advocacy of a strict construction of the corporate attorney-client privilege exercised a "restraining influence" on subsequent decisions.

Accordingly, after recognizing the sound logic of the district court's approach in Radiant Burners, the district court in City of Philadelphia v. Westinghouse Electric Corp. rejected the broad approach of United Shoe and formulated the more restrictive "control group" test. Essentially, the control group test designates as clients only those employees with authority to act on the attorney's legal advice. This classification, although not dependent on the employee's position in the corporation, frequently encompasses only upper echelon corporate officials and members of the board of directors, who generally comprise a small proportion of the total corporate population.

corporation's attorney and any employee. Confidentiality is thought to be a prerequisite to open communications between attorney and client. See notes 6-7 supra and accompanying text. Whether the United Shoe court was in fact firmly committed to open communications, however, is a policy consideration conspicuously absent from the text of the opinion. The absence becomes less conspicuous when one considers the novelty of the standard formulated. See Burnham, The Attorney Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 901 (1969); Simon, supra note 2, at 953; Corporate Setting, supra note 6, at 366-67; New Rules, supra note 4, at 312 n.37. The corporate attorney-client privilege has been termed "a field that lacks markers, paths, or even a solitary footprint to show there were travelers before [the lawyer]." Simon, supra note 2, at 953.

30. 207 F. Supp. at 773.
32. Kobak, supra note 16, at 352. Furthermore, Radiant Burners was the first opinion to question whether all employees or only a select group should be accorded client status. See 207 F. Supp. at 774. This inquiry instilled a new awareness in courts faced with corporate privilege motions. Id. at 352 & n.60. The simple equating of the multi-faceted corporate client with the individual client, whom the traditional rules on privilege referred to, was inappropriate. See 207 F. Supp. at 775; Simon, supra note 2, at 990; notes 70; 169 infra and accompanying text.
34. 210 F. Supp. at 485.
35. Id. The Court stated: "[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 . . . enabl[ing] the latter to advise those in the corporation having the authority to act or refrain from acting on the advice." Id.
36. Id.
37. Id.
38. Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 608 (8th Cir. 1978) (en banc); Comment, The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation, 39 Fordham L. Rev. 281, 291 (1970); Control Group Test, supra note 17, at 430.
39. Kobak, supra note 16, at 372; Corporate Setting, supra note 6, at 369.
The control group test was structured to comply with the Supreme Court's holding in *Hickman v. Taylor*\(^4^0\) that communications between an attorney and a witness are outside the confines of the attorney-client privilege.\(^4^1\) Noncontrol group personnel are necessarily unprivileged witnesses, and their communications with counsel are never confidential.\(^4^2\) The guidelines announced in *Hickman* for distinguishing between the client and the witness were designed primarily to facilitate the broad discovery provided for in the then recently enacted federal rules.\(^4^3\) Although the *City of Philadelphia* court did not expressly recognize broad discovery as a goal, it is a natural consequence of the control group approach, and several other courts have based their adoption of the control group test on this rationale.\(^4^4\)

The control group test was first rejected, eight years after its formulation, in *Harper & Row Publishers, Inc. v. Decker*.\(^4^5\) After stating that the privilege should protect communications of some employees outside the control group,\(^4^6\) the Seventh Circuit set forth a new standard for delineating the scope of the privilege. The court held that an employee has client status if the subject matter of the communication is within the scope of his duties and if the communication is made at the direction of his superior.\(^4^7\) This "subject matter" test,\(^4^8\) in accordance with the court's criticism of *City of Philadelphia*,\(^4^9\) encompasses both members of the control group and certain other employees not within the group,\(^5^0\) thereby curtailing the broad discovery that results from the application of the control group test.

The Seventh Circuit laid no foundation for its new approach, other than characterizing the control group test as inadequate.\(^5^1\) A detailed explanation for this repudiation of the control group test was provided, however, by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*.\(^5^2\) First, the Eighth

\(^{40}\) 329 U.S. 495 (1947).
\(^{41}\) Id. at 508; see 210 F. Supp. at 485 ("Now how are we going to determine whether the person making the communication is the client or is a witness? . . . I think . . . the most satisfactory solution . . . is [the control group test]").
\(^{42}\) 210 F. Supp. at 485.
\(^{45}\) 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971).
\(^{46}\) Id. at 491-92.
\(^{47}\) Id. The court stated: "[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." *Id*.
\(^{49}\) 423 F.2d at 491.
\(^{50}\) Id.
\(^{51}\) Id.
\(^{52}\) 572 F.2d 596 (8th Cir. 1977), aff'd in part and rev'd in part, 572 F.2d 606 (8th Cir. 1978) (en banc).
Circuit modified the subject matter test by requiring that the communications made by the employee be for the purpose of securing legal advice, and that the purpose of superior's request of the employee to communicate with counsel be to assist the corporation in securing legal advice. Additionally, the Diversified court accompanied its rejection of the control group test with a thorough analysis of the test's negative impact on communication channels between the attorney and the client. Specifically, the court noted that the emphasis on open communications enabled counsel to be well informed and encouraged corporations to comply voluntarily with the complex laws governing corporate activity. The Eighth Circuit endorsed the Seventh Circuit's emphasis on "why an attorney was consulted," as opposed to the control group's emphasis on "with whom the attorney communicated." The modifications of the Seventh Circuit's subject matter test, however, were designed to prevent the potential for "funneling," whereby employers direct employees to communicate to corporate counsel everything they know concerning ongoing or potential litigation. Funneling allows all relevant evidence communicated to the attorney to be shielded from discovery under the auspices of the privilege. The Eighth Circuit's proposed resolution of the funneling problem requires that privileged communications be germane to the legal advice sought by the corporation. Accordingly, the superior is prevented from directing employee communications to the attorney purely to preclude discovery. Because funneling is never related to the procurement of legal advice, it falls outside the scope of the subject matter test.

In In re Ampicillin Antitrust Litigation, the district court proposed a

53. 572 F.2d at 609. Compare Harper & Row Publishers, Inc. v. Decker, 423 F.2d at 491-92 (subject matter test) with Diversified Indus., Inc. v. Meredith, 572 F.2d at 609 (modified subject matter test). The Eighth Circuit held that "the attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents." 572 F.2d at 609. This modified subject matter test was based on Judge Weinstein's suggestions in his evidence treatise. Id.; see 2 J. Weinstein & M. Berger, supra note 4, ¶ 503(b)(4), at 503-45 to -48. The Eighth Circuit's modified subject matter test was the first corporate attorney-client privilege test to be a self-contained approach, not dependent on a separate definition for the remaining requirements needed to invoke the privilege. Other courts had relied on separate privilege definitions to deal with the requirements of confidentiality, waiver, and legal advice. See notes 35, 47 supra. The consolidation of the privilege requirements and the corporate-client identification scheme in the Diversified approach is a desirable simplification in a complex field.

54. See 572 F.2d at 608-09. The court's conclusion that its "modified Harper & Row test will better protect the purpose underlying the attorney-client privilege," is illustrative of this concern with communication channels. Id. at 609.

55. Id.; see note 94 infra and accompanying text.

56. Id.

57. Id.

58. See Inroads, supra note 17, at 766-77; Direction of Corporation, supra note 24, at 853.

59. Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 609 (8th Cir. 1978) (en banc).

60. Id.

more restrictive subject matter test, which requires "a close relationship between the communication and a decision on the legal problem . . . rather than a request by a superior to an employee that the communication be made." This test is also intended to prevent funneling; nevertheless, the value of an additional approach offering only cosmetic differences, in an already murky field, is questionable. Instead, the noteworthy aspect of *Ampicillin* is the court's recognition that an approach achieves a proper balance by accommodating the goals of broad discovery and open communications between attorney and client. Close scrutiny of the major approaches reveals that this balance has yet to be attained.

**B. Analysis of the Various Approaches**

1. **Isolation of the Corporate Client**

The modern multidivisional corporate structure often requires the participation of many individuals to ensure the effectiveness of decisions. The broad approach accommodates this structure by providing an attorney with confidential access to employees at all corporate levels. Consequently, a corporation need not reorganize an inherently efficient structure to maximize its use of the privilege. Furthermore, full disclosure to the attorney of all

63. *Id.* at 385 n.8. The court established a four-part test: "1) The particular employee or representative of the corporation 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; 2) The communication must have been made for the purpose of securing legal advice; 3) The subject matter of the communication to or from an employee must have been related to the performance by the employee of the duties of his employment; and 4) The communication must have been a confidential one. . . ." *Id.* at 385 (footnote omitted). The necessity of incorporating the legal advice requirement into the corporate-client identification process, however, is questionable. The two privilege definitions referred to by the court as controlling already encompassed the legal advice requirement. *Id.* at 383-84. Furthermore, the legal advice component stressed in distinguishing this new approach, *id.* at 385 & n.8, is arguably not a distinction at all. *Alternative Test, supra* note 5, at 280 n.89. The *Diversified* court had already incorporated a legal advice requirement into its modified subject matter test. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 606, 609-11 (8th Cir. 1978) (en banc). *But see id.* at 613-16 (Henley, J., concurring in part and dissenting in part); *Subject Matter, supra* note 4, at 425; *Alternative Test, supra* note 5, at 277-78.

64. 2 J. Weinstein & M. Berger, *supra* note 4, ¶ 503(b)(04), at 503-44; see *New Rules*, supra note 4, at 310.


67. Several commentators have suggested specific modifications of corporate operations to avoid the pitfalls of the stricter tests. *See Brown & Hyman, The Scope of the Attorney-Client Privilege in Corporate Decision Making*, 26 Bus. Law. 1145, 1156-58 (1971); *Pye, Fundamentals of the Attorney-Client Privilege*, 15 Pract. Law. 15 (Nov. 1969); *Schaefer I, supra* note 20, at 992-93; *Withrow, How to Preserve the Privilege*, 15 Pract. Law. 30 (Nov. 1969). Presumably, reorganization of the corporate structure, solely to accommodate restrictions on the corporate attorney-client privilege, will increase operating costs; inefficiencies are spawned by any organi-
relevant facts, precipitated by the broad availability of confidentiality, 68 engenders the most thorough trial preparation on the corporation's behalf. 69

Nevertheless, the inclusion of all corporate employees within the penumbra of the attorney-client privilege clashes with the recognized need to differentiate employee-clients from employee-witnesses. 70 Because the broad approach denies the adversary access to communications made by employees who merely witness an event, 71 it is contrary to the Supreme Court's holding in Hickman v. Taylor, 72 which did not extend "the protective cloak of this privilege . . . to information which an attorney secures from a witness." 73 The diagram below graphically illustrates this flaw in the broad approach. It will be employed for subsequent analysis of the alternative approaches.

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**CORPORATE ENTITY**

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zational changes that are not motivated by profit maximization goals. See generally Arrow, supra note 65, at 230-33.

68. See note 28 supra and accompanying text.

69. See Hunt v. Blackburn, 128 U.S. 464, 470 (1888); United States v. Hodge & Zweig, 548 F.2d 1347, 1355 (9th Cir. 1977); American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 87 (D. Del. 1962); ABA Amicus Curiae Memorandum for Certiorari at 3-4, United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3594 (U.S. Mar. 17, 1980) (No. 79-886); ABA Code of Professional Responsibility, EC 4-1 (1976) ("A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system."); C. McCormick, supra note 3, § 87, at 175; McKinney, Privileges, 32 Okla. L. Rev. 307, 311 (1979).

70. See, e.g., United States v. Upjohn Co., 600 F.2d 1223, 1226 (6th Cir. 1979) (difficulty with corporate assertion of privilege arises when communications to counsel are made by corporate agents and employees), cert. granted, 48 U.S.L.W. 3594 (U.S. Mar. 17, 1980) (No. 79-886); In re Grand Jury Investigation, 599 F.2d 1224, 1234 (3d Cir. 1979) (confronts issue of extent to which privilege attaches to communications to counsel by employees at different levels of corporate hierarchy); Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 608 (8th Cir. 1978) (en banc) (need to determine circumstances in which a given employee's communications to counsel are privileged); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (formulation of test that extends privilege to only certain employee communications with counsel), aff'd by an equally divided court, 400 U.S. 348 (1971).


73. Id. at 508; see note 71 supra.
By definition, employees who only observe an event qualify as witnesses. A client informs the attorney of his problem and subsequently decides whether to implement the legal advice. Disregarding employees who have no connection with the pending or prospective litigation, corporate employees may be divided into three categories for designation as witnesses or clients.

The first category consists of employee-witnesses (Ws), who would not be entitled to confidentiality under the Hickman rule, and are therefore placed outside the corporate client box. The second and third categories within the client box reflect the recognition that when the client is a corporation, the client function will most likely be apportioned among numerous employees. This distribution is portrayed in the diagram by designating as As those employees whose activities incur liability on behalf of the corporation. Because these people may have personally contributed to the events that triggered the litigation, the attorney will want to interview them, as reflected by the arrows indicating information flowing from the As to counsel. The third group, labeled CGs, represent “control group” members—those persons who decide whether to implement the attorney’s advice. This is illustrated by arrows pointing from the lawyer at the CGs and arrows directed from the CGs at the action taken by the corporation. Because both the As and the CGs perform the functions of a client, they are grouped in the box designated as the corporate client.

a. The Control Group Test

i. Client Identification

Because the broad approach overextends corporate client status by including Ws, As, and CGs in the client box, it facilitates the suppression of all

74. A witness is “one who testifies to what he has seen, heard, or otherwise observed.” Black’s Law Dictionary 1778 (4th rev. ed. 1968).
75. “A client is one who applies to a lawyer or counselor for advice and direction ... one who communicates facts to an attorney expecting professional advice.” 7 C.J.S. Attorney & Client § 2, at 796 (1980) (emphasis in original) (footnote omitted).
76. See notes 72-73 supra and accompanying text.
77. In re Grand Jury Investigation, 599 F.2d 1224, 1236 (3d Cir. 1979); Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 608 (8th Cir. 1978) (en banc); In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 385-86 (D.D.C. 1978); Corporate Setting, supra note 6, at 372; New Rules, supra note 4, at 311.
79. See Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 608-09 (8th Cir. 1978) (en banc).
80. See note 36 supra and accompanying text.
81. See note 77 supra and accompanying text.
82. When the CGs and As are coincidentally the same persons, the major argument against the control group test, see notes 87-88 infra and accompanying text, loses its validity. This situation, however, would be unusual. See note 87 infra and accompanying text.
83. Arguably, Hickman v. Taylor, 329 U.S. 495 (1947), sets the boundaries within which the broad approach may operate. The context in which United Shoe refers to the Hickman holding, however, would seem to discredit this inference. United States v. United Shoe Mach. Corp., 89
relevant evidence under the guise of privilege. In sharp contrast, little relevant evidence is suppressed under the control group test. This standard affords maximum discovery by including only the CGs in the client box.

This classification is intended to prevent Hickman witnesses from attaining client status because witnesses merely relate their observations to the attorney, rather than act on his advice. The control group test's attempt to construct a mirror image of Hickman in the corporate context, however, is problematic. By excluding As from the client box, "the control group test . . . fail[s] to recognize that many of the employees [As] who have the business information that an attorney needs to know before he can render legal advice are not [members of the control group]." The resulting lack of confidentiality between the As and the attorney can so severely restrict open communications that the attorney is effectively left with only a partial client—the CGs who implement legal advice.

Despite this inflexibility, however, there are desirable attributes of the control group test's client identification procedure. First, the broad discovery that results from restricting the scope of the privilege is consonant with the aim of the federal rules. This facilitates evidentiary presentation in civil cases. F. Supp. 357, 359 (D. Mass. 1950); Simon, supra note 2, at 959 ("Judge Wyzanski cited Hickman for the classic rule as to 'witnesses,' but did not explain whether he meant that the 'employees' here were different, or if so, which employees might be considered 'inside' the organization and which 'outside'" (footnote omitted)); see Inroads, supra note 17, at 764.

84. 2 J. Weinstein & M. Berger, supra note 4, ¶ 503(b)(04), at 503-41.

85. In re Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979) ("bare minimum of protection"); Control Group Test, supra note 17, at 430; Corporate Setting, supra note 6, at 369. Arguably, because the adversary's attorney can always question As and Ws as to their activities, the same communications supposedly freed for discovery by the control group test are never immunized. This argument is tenuous because "the original source of the information—the client himself—may always be questioned as to matters within his own knowledge . . . in many instances the privilege merely means that an attorney may not be called to impeach his own client." Simon, supra note 2, at 955. This consideration becomes particularly acute in antitrust and patent litigation, see notes 95, 131-32 infra and accompanying text, in which it would be burdensome for the adversary's attorney to examine the noncontrol group personnel to amass the same information the corporation's attorney possesses.

86. See note 74 supra.

87. In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 385 (D.D.C. 1978) (footnotes omitted). See also ABA Amicus Curiae Memorandum for Certiorari at 4-5, United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3594 (U.S. Mar. 17, 1980) (No. 79-886). The legal advice rendered by the attorney may also be given directly to the middle or low level management employee. Id. at 5; see Maurer, Privileged Communications and the Corporate Counsel, 28 Ala. Law. 352, 375 (1967) (middle level management often have substantial input into corporate decisionmaking although they are not within the control group).

88. See Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 609 (8th Cir. 1978) (en banc) ("control group test inhibits the free flow of information to a legal advisor and defeats the purpose of the attorney-client privilege"); ABA Amicus Curiae Memorandum for Certiorari at 7, United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3594 (U.S. Mar. 17, 1980) (No. 79-886); Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 Yale L.J. 1226, 1243 (1962).

89. United States v. Procter & Gamble Co., 356 U.S. 677, 682-83 (1958); Hickman v. Taylor,
antitrust litigation, in which the corporate attorney-client privilege issue frequently arises,\textsuperscript{90} and in which there is a liberal attitude favoring enforcement.\textsuperscript{91} Second, covert funneling of damaging information to the attorney is minimized because upper level management personnel (CGs) are precluded from directing noncontrol group personnel (As and Ws) to reveal everything they know to the attorney.\textsuperscript{92} This result is buttressed by prohibiting the CGs from including the As and the Ws in legally-connected decisionmaking processes in an attempt to immunize from discovery those A and W communications with the corporate counsel.\textsuperscript{93}

\textit{ii. Collateral Consequences}

Despite these advantages, the control group test has a detrimental effect on voluntary corporate compliance with government regulations. For example, complex statutes often compel corporations to obtain legal advice in determining

\footnotesize{\begin{enumerate}
\item \textsuperscript{92} See notes 35-36, 85 supra and accompanying text.
\item \textsuperscript{93} See Congoleum Indus., Inc. v. GAF Corp., 49 F.R.D. 82, 85 (E.D. Pa. 1969), \textit{aff'd}, 478 F.2d 1398 (3d Cir. 1973). The district court noted: "Similarly, the mere fact that Erb [a technical advisor] was a designated member of the study group does not, in and of itself, establish that he was within the legally defined control group... Such limitations must be placed upon the designation of the control group [or] that group itself would be vested with authority to determine those to whom the privilege would apply, thus, extending the concept beyond the purposes for which it was adopted." 49 F.R.D. at 85; see Garrison v. General Motors Corp., 213 F. Supp. 515, 518 (S.D. Cal. 1963); Simon supra note 2, at 956. \textit{But see} Hercules Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977). In \textit{Hercules}, chemists operating at the implied direction of control group members were granted control group status because control group members did not have personal access to the required technical information. \textit{Id.} at 146.
\end{enumerate}}
ing whether their behavior comports with the law. In order for the corporation to make this determination, it may be necessary for the attorney to interview employees at many different levels. If internal corporate investigation, undertaken for the purposes of compliance, would jeopardize the confidentiality of noncontrol group communications, a corporation might be more reluctant to undertake such self-investigation when it merely suspects illegal activity. Internal misdeeds may remain unchecked until they attract the attention of law enforcement officials or government regulatory agencies, thereby causing greater detriment to all parties involved.

Of equal concern is the ethical dilemma that arises if the noncontrol group member who contributed to corporate liability is also subject to personal liability for his actions. For example, during preparation for antitrust

96. Brodsky, Attorney-Client Privilege, N.Y.L.J., Sept. 5, 1979, at 1, col. 1, at 2, cols. 1-2; see ABA Amicus Curiae Memorandum for Certiorari at 6-7, United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3594 (U.S. Mar. 17, 1980) (No. 79-886) (attorney can be used as a discovery tool and lose lawsuit). But see In re Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979) (suggesting that although the control group standard may discourage corporations from conducting internal investigations, "they have little choice"). The In re Grand Jury court overlooked the benefits accrued by encouraging voluntary disclosure programs, see note 97 infra and accompanying text, as well as the costs incurred when corporate officials are compelled to restructure communication channels with counsel to preserve confidentiality. 599 F.2d at 1237; see notes 66-67 supra and accompanying text.
97. ABA Amicus Curiae Memorandum for Certiorari at 4, United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3594 (U.S. Mar. 17, 1980) (No. 79-886); Burnham, supra note 28, at 914 ("[s]ecurities law (both federal and state) . . . [and] antitrust laws of all kinds . . . are areas of corporate law where there would seem to be an immense social benefit deriving from free interchange between corporations and their attorneys about how the law should be complied with. Without this level of primary enforcement by lawyers, these areas of the law in the modern context would be virtually unmanageable."); cf. Note, Voluntary Disclosure Programs, 47 Fordham L. Rev. 1057, 1057, 1063-68 (1979) (discussing benefits accruing from voluntary disclosure programs).
litigation, the corporation's attorney may discover that one or more of the corporation's employees may be personally subject to conviction. Although this same employee may be outside the control group, a desire to cooperate with upper level management may prompt him to divulge all the information he possesses to the corporation's attorney. The attorney must then choose between allowing the employee to relate the information and advising him to obtain his own counsel. If he allows the employee to confide in him, the attorney may be called to testify against him at trial, or he may be forced to disclose damaging communications during discovery or grand jury proceedings. If the attorney advises the employee to secure his own counsel, however, the newly acquired counsel may suggest that the employee cooperate with government officials to secure immunity from prosecution. The employee's subsequent testimony or assistance would then be contrary to the interests of the corporation, the first attorney's client. Because of the aggregate effect of

and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." (emphasis added)); Clayton Act, ch. 323, §§ 12a, 13, 13a, 38 Stat. 730, 736 (1914) (current version at 15 U.S.C. §§ 12-14, 19-21, 22-27; 29 U.S.C. §§ 52-53 (1976)). Although criminal prosecution of antitrust offenses in the past has been infrequent, see 2 P. Areeda & D. Turner, Antitrust Law § 309b (1978), it is anticipated that there will be increased use of criminal penalties in the future. Coombe, supra note 91, at 1; Steinhouse, Dramatization: Presentation of an Antitrust Compliance Program to Management, 48 Antitrust L.J. 5, 20-21 (1979); Wall St. J., Nov. 22, 1976, at 25, cols. 1-2; see United States v. Wise, 370 U.S. 405 (1962). Criminal antitrust violations, however, require a showing of intent. United States v. United States Gypsum Co., 438 U.S. 422, 443 (1978).

99. See notes 78, 87 supra and accompanying text.

100. The person may be a "loyal" employee who wants to cooperate with corporate management. See Control Group Test, supra note 17, at 428-29, 430 (lower level employees may communicate with counsel even if privilege is unavailable).

101. See Brodsky, supra note 96, at 2, col. 2 (information from noncontrol group member may result in preparation of a "case for a minority shareholder's lawyer or for a government investigator").


103. Concededly, even if the employee was entitled to privileged status with the corporation's attorney, another ethical problem arises. When the corporation and the employee are both being prosecuted, multiple representation by the corporation's attorney may give rise to a conflict of interest. ABA Code of Professional Responsibility, ECs 5-14 to -20 (1976); id., DR 5-105 (1976); see In re Investigation Before April 1975 Grand Jury, 403 F. Supp. 1176, 1179 (D.D.C. 1975), vacated, 531 F.2d 600 (D.C. Cir. 1976); Pirillo v. Takiff, 462 Pa. 511, 518, 341 A.2d 896, 899, aff'd, 466 Pa. 187, 352 A.2d 11 (1975) (per curiam), cert. denied, 423 U.S. 1083 (1976). It may be in the corporation's best interest for its attorney to advise the employee to assert his fifth amendment privilege against self-incrimination. If there is a possibility of immunity for the employee, however, it would be more beneficial to the employee if the attorney advised him to cooperate with the authorities. Id. at 518, 341 A.2d at 899. A suggested resolution would be to allow the attorney to interview the employee (A in diagram at p. 1290 supra) fully and then
these numerous considerations, many attorneys feel that the adverse communication consequences of the control group test severely hamper their representation of a corporate client.\textsuperscript{104}

b. The Subject Matter Tests

The subject matter tests attempt to resolve the issue of corporate client identification\textsuperscript{105} in a less arbitrary fashion than the control group test.\textsuperscript{106} The subject matter approaches are designed to ameliorate the negative communication consequences of the control group test, while simultaneously preserving broad discovery.\textsuperscript{107} Analytically, the corporate client definition contained in the subject matter tests\textsuperscript{108} is intended to encompass both the As and the CGs in the diagram on page 1290. This is purportedly accomplished by shielding employee discussions with counsel from disclosure when the subject matter of the communication is within the scope of the employee's duties.\textsuperscript{109} As a result, the subject matter tests encourage open communications between the attorney and the persons who would be most helpful to him in the preparation of the case.\textsuperscript{110} Furthermore, these tests better accommodate the modern corporate structure than the control group approach because they recognize that the persons most directly connected with any controversy are not necessarily drawn from top level management.\textsuperscript{111} Concurrently, the subject matter tests require him to tell the A to secure separate counsel. The corporation's attorney is more fully apprised of the events that transpired, but cannot harm the A because the conversations were privileged. The A then gets the benefit of uninterested counsel, who can advise him to secure immunity without a conflict of interest. A more extended discussion of this problem is beyond the scope of this Note.

\textsuperscript{104} Schaefer I, supra note 20, at 993, 995; see Brodsky, supra note 96, at 2, cols. 1-3; N.Y. Times, Mar. 18, 1980, § D, at 1, col. 6, at 13, col. 4.

\textsuperscript{105} See note 48 supra.


\textsuperscript{107} See Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 609 (8th Cir. 1978) (en banc) (encourages free flow of information while preventing funneling and attachment of privilege to witnesses); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (formulates test to remedy restrictive control group approach but indicates privilege must be limited in some respects), aff'd by an equally divided court, 400 U.S. 348 (1971); In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 387 (D.D.C. 1978) (recognizes need to achieve a balance between disclosure of all relevant information and the encouragement of free and open discussions by clients in the course of legal representation).

\textsuperscript{108} See notes 47, 53 supra.

\textsuperscript{109} Id.

\textsuperscript{110} See Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 609 (8th Cir. 1978) (en banc) (approving of subject matter-type test because it encourages the free flow of information to the corporation's counsel); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970) (rejecting control group test because some employees with supervisory or policymaking responsibilities should be covered by the privilege), aff'd by an equally divided court, 400 U.S. 348 (1971); In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 387 (D.D.C. 1978) (approach aimed at encompassing noncontrol group employees with whom the attorney may have to communicate to render proper legal advice; notes 78-79 supra and accompanying text.

\textsuperscript{111} In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 385-86 (D.D.C. 1978); Maurer, supra note 87, at 375 (middle level management personnel who are considered to be outside of control group are often real decisionmakers because their recommendations are merely ratified by upper level management personnel); Schaefer, How Can a Modern Business Corporation Preserve
attempt to remedy the possibility of abuse inherent in the broad approach.112 "By confining the subject matter of the communication to an employee's corporate duties, we remove from the scope of the privilege any communication in which the employee functions merely as a fortuitous witness."113

Despite any advantages of the subject matter tests developed by the Seventh and Eighth Circuits,114 neither standard has been widely adopted.115 In fact, both the Third and Sixth Circuits, when recently confronted with the corporate attorney-client privilege issue, adopted the control group test.116 Both In re Grand Jury Investigation117 and United States v. Upjohn Co.118 involved illegal foreign payments made by corporations with worldwide offices.119 The difficulty of conducting discovery when an adversary has offices in many different countries may have contributed to the courts' rejection of the subject matter approaches,120 which were formulated in different factual settings.121 The control group of an American multinational


112. Corporate Communications, supra note 4, at 826. But see notes 58-59 supra and accompanying text. Arguably, however, by expressly refusing to comment on employee witnesses, the Seventh Circuit impliedly excluded these people from the operation of its test, in accordance with Hickman. See Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971); notes 40-41 supra and accompanying text.

113. Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 609 (8th Cir. 1978) (en banc) (footnote omitted).

114. See notes 47, 53 supra.


117. 599 F.2d 1224 (3d Cir. 1979).


120. 600 F.2d at 1227; see 599 F.2d at 1226-28, 1237.

121. Diversified arose out of litigation between a manufacturing company and a company engaged in selling scrap copper, both of which concentrated their operations in midwestern states. 572 F.2d 596, 599 (8th Cir. 1977), aff'd in part and rev'd in part, 572 F.2d 606 (8th Cir. 1978) (en banc). Harper & Row stemmed from antitrust actions against publishers and wholesalers of children's books. 423 F.2d 487, 489 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971).
corporation generally consists of executives located at corporate headquarters in the United States, and communications between the attorney and employees abroad would generally not be privileged. The shortcoming of these two cases, however, is the courts' adoption of a standard that obtained the best result for the particular factual situations. A general rule should not be adopted because it meets the narrow needs of one factual setting; rather, it should be selected for its ability to deal effectively with the variety of situations that may arise.

2. Predictability

Predictability of result is an essential component of any approach because the attorney must be able to apprise the client of the status of their communications. If the attorney is unsure of the status, he must convey this uncertainty to the client, who may naturally become reticent. The broad approach renders maximum predictability because the attorney need not classify the corporate employees. The control group test achieves predictability because the attorney is usually able to advise his clients whether the communications will be confidential. Furthermore, the control group test was adopted in Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35 (E.D.N.Y. 1973), because no structured test was adopted, the court appeared to advocate a case by case resolution. This is a somewhat surprising result when one notes the recognition the Eutectic court gave to D. I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964) (en banc). See 61 F.R.D. at 39. In Chadbourne, the California Supreme Court proposed an 11 part test whose rigid structure would seem to conflict with the weighing process advocated by Eutectic. 60 Cal. 2d at 736-38, 388 P.2d at 709-10, 36 Cal. Rptr. at 477-78. The Eutectic approach is in accord, however, with the Advisory Comm. Notes to Federal Rule of Evidence 503, 56 F.R.D. 183, 237 (1972). The Eutectic court broadened the privilege by advocating a comprehensive factual inquiry to determine whether the "employees concerned may be thought to have acted as representatives of the client." 61 F.R.D. at 40. This approach is clearly the least desirable solution because predictability is unattainable. See pt. I(B)(2) infra.

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test remains the most widely adopted test, even though the majority of the cases applying it arise out of antitrust or patent litigation, in which it is often necessary for the attorney to communicate with numerous employees at different levels. This frequent application intensifies the "bright line" drawn between control group members and noncontrol group members, because attorneys and judges can refer to illustrative cases for guidance when determining client status. Hence, this delimiting feature of the control group approach engenders predictability. The subject matter tests, however, present obstacles to predictability of client status. First, factual disputes can arise as to the definition of the terms "scope of employment" and "direction of a

& Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975); Control Group Test, supra note 17, at 426. It should be noted, however, that many courts adopting the control group test have not applied the test to the communications in question. The attributes of ease of application and predictability are therefore not displayed. See, e.g., In re Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979) (concession by party asserting privilege that its employees were not within the control group renders application of test to facts of case needless); Natta v. Hogan, 392 F.2d 686, 692-93 (10th Cir. 1968) (no information supplied regarding the positions held by the control group members, nor why they were deemed control group members); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 32-41 (D. Md. 1974) (adopts control group test but gives no application of the rule to the facts).

130. In re Grand Jury Investigation, 599 F.2d 1224, 1234 & n.3 (3d Cir. 1979). See also United States v. Upjohn Co., 600 F.2d 1223, 1226 & n.8 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3974 (U.S. Mar. 17, 1980) (No. 79-886).


133. See Control Group Test, supra note 17, at 426-27.

134. But see In re Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979) (no need to apply control group test because corporation conceded that none of interviewed employees were control group members); Natta v. Hogan, 392 F.2d 686, 692-93 (10th Cir. 1968) (no indication as to why certain employees are designated control group members); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 35-46 (D. Md. 1974) (adopts control group test but does not identify members).

135. See, e.g., Triplett v. Western Pub. Serv. Co., 128 Neb. 835, 260 N.W. 387 (employee who struck match to light cigarette and started a fire while working on electric transmission line was acting within scope of employment), rev'd on other grounds, 129 Neb. 799, 263 N.W. 229 (1935); Palmer v. Keene Forestry Ass'n, 80 N.H. 68, 112 A. 798 (1921) (employee whose lit cigarette started a fire while working in field was acting within scope of employment); Herr v. Simplex Paper Box Corp., 330 Pa. 129, 198 A. 309 (1938) (employee was acting outside scope of employment when, while signing receipt, his lit match set plaintiff's clothes on fire); Kelly v. Louisiana Oil Ref. Co., 167 Tenn. 101, 66 S.W.2d 997 (1934) (gasoline deliveryman who was
superior." The attorney has difficulty in predicting client status. The ideal approach must possess both predictability and a proper, realistic classification of corporate employees as clients and nonclients. None of the presently employed approaches possesses these two characteristics concurrently.

II. A SUGGESTED APPROACH

The proposed approach attempts to isolate the appropriate employee clients in a format that ensures predictability of result. The realization of these two objectives distinguishes the suggested approach from the approaches presently employed, which tend to attain one objective at the expense of another. Furthermore, the approach incorporates procedures designed to preserve a sufficient breadth of discovery for the corporation's adversary. The proposal relies on *Hickman v. Taylor* to formulate a modified broad approach.

In *Hickman v. Taylor*, the Supreme Court held that witnesses were not included within the scope of the attorney-client privilege. The Court further held that materials classified as work product are not discoverable by the adversary in the absence of "necessity [or] justification" as to why production should be ordered. Separate from the attorney-client privilege, *Hickman v. Taylor* establishes the scope of employment and direction of a superior. The ambiguities surrounding terms such as "scope of employment," see F. Mechem, Outlines of the Law of Agency § 373, at 250 (4th ed. 1952), and "direction of a superior," see note 136 infra, create a further problem. One major aim of the subject matter tests is to separate employee-clients from employee-witnesses. See notes 112-13 supra and accompanying text. When the line of demarcation between the two groups of employees becomes indistinct, employee-witnesses may be encompassed within the penumbra of the attorney-client privilege, contrary to the *Hickman* witness exception rule. See notes 70-73 supra and accompanying text.

136. Although one recent case states that a written request from the chairman of the board and the chief executive officer constitutes a direction from a superior, *In re Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368, 372 (E.D. Wis. 1979)*, the Seventh Circuit, in *Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970)*, aff'd by an equally divided court, 400 U.S. 348 (1971), merely characterized the superior as the corporate employer. In *Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 610 (8th Cir. 1978) (en banc)*, the Eighth Circuit held that a corporate resolution instructing employees to cooperate with the corporation's law firm constituted a direction from a superior. Furthermore, superior is a relative term because any employee ranked above another employee in the corporate hierarchy is the other's superior. See note 115 supra and accompanying text.

137. *See note 115 supra and accompanying text.*


139. 329 U.S. 495 (1947).

140. Id. at 508; Simon, *supra* note 2, at 958-59.

141. 329 U.S. at 509-10; 8 C. Wright & A. Miller, *supra* note 89, § 2025, at 213 (1970). *See also id.* at 211-28 (general discussion of the showing required to achieve discovery of work product); Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 494 (1970) ("a party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." (emphasis deleted)).
the work product doctrine exempts most trial preparation material from discovery.\textsuperscript{142} Consequently, because the work product rule exists independent of the corporate attorney-client privilege issue,\textsuperscript{143} determination of work product status does not hinge on the identity of the corporate client.

A. Preliminary Inquiries

Frequently, a motion to preclude discovery under the attorney-client privilege is accompanied by a concurrent assertion of the attorney work product exception.\textsuperscript{144} A court faced with this situation should first determine whether the work product doctrine protects the communications in question.\textsuperscript{145} Although the privilege issue may not be avoided completely, inquiry into the coverage of the work product doctrine may simplify the client identification task if the work product doctrine is found applicable. The rationale for this approach is the “work product privilege[s] . . . develop[ment] and codification] into a set form.”\textsuperscript{146} Because it is not similarly embroiled in a controversial dispute,\textsuperscript{147} the inquiry into the applicability of the work product

\begin{footnotesize}
\textsuperscript{142} C. McCormick, supra note 3, § 96, at 204; C. Wright, supra note 16, § 81, at 403; 8 C. Wright & A. Miller, supra note 89, § 2025, at 211-12.
\textsuperscript{143} 8 C. Wright & A. Miller, supra note 89, § 2017, at 132-33.
\textsuperscript{144} E.g., Hickman v. Taylor, 329 U.S. 495, 499 (1947); In re Grand Jury Investigation, 599 F.2d 1224, 1228 (3d Cir. 1979); In re Grand Jury Subpoena, 599 F.2d 504, 508 (2d Cir. 1979); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 599 (8th Cir. 1977), aff’d in part and rev’d in part, 572 F.2d 606 (8th Cir. 1978) (en banc); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 399-400 (E.D. Va. 1975); Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 793 (D. Del. 1954).
\textsuperscript{145} See, e.g., In re Grand Jury Investigation, 599 F.2d 1224, 1228-33 (3d Cir. 1979) (considers work product claim first because it is more inclusive than the attorney-client privilege); In re Grand Jury Subpoena, 599 F.2d 504, 510 (2d Cir. 1979) (appeal can be adequately decided on basis of work product without reaching attorney-client privilege issue). When the work product doctrine is not differentiated from the attorney-client privilege, and priority is not assigned to one of the two, confusion may result. See Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 598-604 (8th Cir. 1977) (refers to work product doctrine as a privilege and does not clearly isolate the application of work product from the attorney-client privilege), aff’d in part and rev’d in part, 572 F.2d 606 (8th Cir. 1978) (en banc).
\textsuperscript{146} Self Evaluative Report, supra note 4, at 722 (footnote omitted). Although application of the work product rule has been characterized as “difficult” and “troublesome,” C. Wright, supra note 16, § 81, at 404; 8 C. Wright & A. Miller, supra note 89, § 2021, at 178, many of the problems encountered by the courts were remedied by the 1970 codification of the doctrine in Federal Rule of Civil Procedure 26(b)(3). C. Wright, supra note 16, § 82, at 407-12; 8 C. Wright & A. Miller, supra note 89, § 2023-25, at 190-228; see Advisory Comm. Note to Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery. 48 F.R.D. 487, 497-502 (1970).
\textsuperscript{147} See N.Y. Times, Mar. 18, 1980, § D, at 1, col. 6 (in accepting the appeal in United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3594 (U.S. Mar. 17, 1980) (No. 79-886), the Supreme Court agreed to resolve the intensely disputed issue of the extent to which the attorney-client privilege attaches to communications between the corporation’s attorney and lower and middle echelon management employees). But cf. ABA Amicus Curiae Memorandum for Certiorari at 1-2, 8-10, United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3594 (U.S. Mar. 17, 1980) (No. 79-886) (administrative discovery of work product).
doctrine should proceed more smoothly\textsuperscript{148} than the inquiry into the privilege issue. If the work product doctrine is not simultaneously asserted, or if it is asserted but found inapplicable, the court may then rule on the attorney-client privilege issue.

Courts frequently use a similar elimination process as that employed for work product rulings in determining compliance with other requirements of the attorney-client privilege that are independent of the client's identity.\textsuperscript{149} For example, if the assertion of the privilege will fail due to waiver, the client identification issue can be avoided.\textsuperscript{150} Avoidance of the privilege issue may also be achieved if the attorney was acting as a business adviser, rather than a legal adviser.\textsuperscript{151} Courts should continue this preliminary examination of the other privilege elements because similarly to the work product doctrine, these other elements are more clearly defined, thereby providing a more established basis for a judge's ruling than the client identity issue.\textsuperscript{152}

If it is established that the work product privilege does not attach and that all other requirements of the attorney-client privilege are satisfied, the court can then examine the complex question of corporate client identity. The

\textsuperscript{148} See In re Grand Jury Investigation, 599 F.2d 1224, 1228-38 (3d Cir. 1979); In re Grand Jury Subpoena, 599 F.2d 504, 510-13 (2d Cir. 1979).

\textsuperscript{149} The following cases demonstrate this process, with the indicated privilege elements taken from the definition in note 1 supra.

Waiver: In re Horowitz, 482 F.2d 72, 81 (2d Cir.) (waiver due to unrestricted access by third party to privileged documents), cert. denied, 414 U.S. 867 (1973); IBM v. United States, 480 F.2d 293, 299 (2d Cir. 1973) (en banc) (no waiver when massive amounts of materials caused inadvertent surrender of the privilege), cert. denied, 416 U.S. 979 (1974).

Advice: SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 522 (D Conn.) (only advice that reveals a fact communicated in confidence by the client to the attorney is protected), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976) (per curiam); Natta v. Hogan, 392 F.2d 686, 692-93 (10th Cir. 1968) (any communication from attorney to client is protected).


\textsuperscript{150} See Gorzegno v Maguire, 62 F.R.D. 617, 620-21 (S.D.N.Y. 1973) ("the premises underlying the privilege that the communication consist of legal advice . . . and that it be regarded and in fact be treated as confidential still pertain . . . Thus, without ever defining the 'control group' membership, we can only conclude either that the documents were never confidential and the privilege never attached. . . ." (citations omitted)).


\textsuperscript{152} Compare C. McCormick, supra note 3, §§ 88-93, at 179-97 (discussing other considerations governing assertions of the privilege) and 8 J. Wigmore, supra note 1, §§ 2292-2329, at 554-641 (delineating elements of privilege definition) with C. McCormick, supra note 3, § 87, at 178-79 (limited discussion of corporate client) and 8 J. Wigmore, supra note 1, § 2291, at 76-77 (two cases noted on corporate client privilege).
proposal synthesizes elements of the broad approach, the work product doctrine, and the witness exception rule. First, the witness exception rule is expressly incorporated to exclude as clients those employees who are merely fortuitous witnesses. Second, to avoid situations in which discovery is virtually precluded by the assertion of the privilege, relief is provided for the party desiring discovery on a showing that production is justified due to exigent circumstances.

B. The Proposal

Under the proposal, when all other requirements for invoking the privilege are satisfied, the assertion by a party that the communication sought by an adversary is between the corporation’s attorney and a corporate employee establishes a prima facie showing of privilege. This is qualified by a requirement that the party assert the privilege in good faith. For example, the assertion of the privilege may effectively prevent discovery of all evidence possessed by the asserting party. Assume that one party requests production of one thousand documents and the adversary claims the attorney-client privilege for nine hundred and ninety documents. If the ten documents voluntarily produced prove to be only peripherally related to the litigation, the likelihood of a bad faith assertion may be high. In such cases, after an allegation of bad faith by the adversary, the judge should order an in camera inspection of all questioned attorney-client communications. When there

153. See notes 71-73 supra and accompanying text.
154. See Hickman v. Taylor, 329 U.S. at 511-12. Prior to the codification of the work product doctrine in Federal Rule of Civil Procedure 26(b)(3), see note 146 supra, some courts referred to the Hickman required showing as “necessity or justification.” 8 C. Wright & A. Miller, supra note 89, § 2025, at 213. Other courts have referred to it as “good cause,” id. at 214, a phrase that has been deleted from the Federal Rules of Civil Procedure to avoid confusion. Id. § 2205, at 594-606.
155. This approach, advocated in 8 J. Wigmore, supra note 1, § 2296 at 566-67, was adopted in Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 610 (8th Cir. 1978) (en banc).
156. Good faith assertion is particularly desirable in complex litigation in which a countless number of documents may be involved. The National Commission for the Review of Antitrust Laws and Procedures stated that “delayary and abusive conduct occurs far too frequently in complex litigation. . . . [and] may take the form of . . . bad faith claims of privilege or confidentiality.” National Comm’n for the Review of Antitrust Laws and Procedures, Report to the President & the Attorney General 82 (1979) (footnote omitted).
157. Courts employ in camera inspection of allegedly privileged documents when military and diplomatic secrets are not in issue. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 792 (D.C. Cir. 1971); Freeman v. Seligson, 405 F.2d 1326, 1339 n.65 (D.C. Cir. 1968); see, e.g., Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 599 (8th Cir. 1977), aff’d in part and rev’d in part, 572 F.2d 606 (8th Cir. 1978) (en banc); Natta v. Zletz, 418 F.2d 633, 635-36 (7th Cir. 1969); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 142 (D. Del. 1977); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 32 (D. Md. 1974). If the communication requested during discovery emanates from foreign office employees of a multinational corporation, a problem may arise in amassing widely dispersed documents for in camera inspection. This issue can be resolved, however, by recognizing that an attorney for a multinational corporation must initially centralize all relevant communications to represent the corporation effectively. The production order for in camera review may be directed at the attorney, thereby alleviating this potential problem.
are voluminous documents for which the privilege is claimed, the judge can appoint a special master to alleviate any burden imposed on the court. If the suspected bad faith assertion of the privilege is confirmed, the proposed sanction is the complete retraction of the privilege. The severity of this sanction will deter a corporation from attempting to funnel evidence.

If there is no evidence of a bad faith assertion, the adversary may assert two other claims to rebut a prima facie showing of privilege—the Hickman witness exception and the necessity or justification showing. Under the witness exception, the adversary can attempt to show that the employee whose communication was designated privileged was only a fortuitous witness. Witness status can be determined by a deposition of the employee, whereby the adversary's attorney inquires into the circumstances by which the employee gleaned the knowledge he subsequently communicated to the corpo-

158. Federal Rule of Civil Procedure 53 governs the appointment of masters in federal courts. Although the rule provides that "reference to a master shall be the exception and not the rule," see C. Wright, supra note 16, § 97, at 485, there are numerous cases in which courts faced with privilege motions have employed special masters. See, e.g., Natta v. Zletz, 418 F.2d 633, 635 (7th Cir. 1969) (court approved of master reviewing documents in camera); In re Ampicillin Antitrust Litigation, 61 F.R.D. 377, 380 (D.D.C. 1978) ("Because these motions involved complicated issues and over 700 documents, the Court appointed a Special Master for the purpose of ruling on these privilege claims." (footnote omitted)); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 32 (D. Md. 1974) (master appointed to "appraise the applicability of . . . privilege" to approximately 720 documents); Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 793 (D. Del. 1954) (master appointed to rule on documents, but if any documents are not governed by privilege guidelines of opinion, they should be referred back to presiding judge).

159. Improper assertions of privilege can cause the imposition of sanctions under Federal Rule of Civil Procedure 37(b). Note, Discovery of Government Documents and the Official Information Privilege, 76 Colum. L. Rev. 142, 172 (1976). Sanctions are beginning to assume a more important role in contemporary litigation. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam) (most severe spectrum of sanctions must be available to court in appropriate instances); Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2d Cir. 1979) ("in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where . . . they are clearly warranted"); National Comm'n for the Review of Antitrust Laws and Procedures, supra note 156, at 81-92. The Commission stated that "[d]ilatory behavior has often gone unchecked because lawyers have been reluctant to request, and judges hesitant to impose, sanctions. Both judges and lawyers should become more aware of the sanctions available and more willing to turn to them in appropriate circumstances." Id. at 83 (footnote omitted). Furthermore, because the client is a corporation, the fears of an unfair assumption by the client of the burden for the attorney's action are not as warranted as when an individual defendant is charged with a crime. The National Commission has recommended that the "reluctance to punish a client for the wrongful acts of its counsel should not deter a judge from imposing sanctions." Id. at 85.

160. This initial determination is not an attempt to foster a "case by case" approach. Instead, it is merely a safeguard designed to check any funneling abuse made possible by the broad basis of this approach. See notes 83-84 supra and accompanying text.

161. For example, filing clerks who merely view material that documents illegal activity are witnesses. As Ws, see diagram on p. 1290 supra, they are outside the client box, and therefore, the privilege does not attach to communications the Ws have with counsel. The adversary would be able to depose these employee-witnesses to uncover the information they possess.
ration's attorney. This procedure is always available because any corporate employee may be deposed to elicit the information he possesses.\textsuperscript{162}

When the employee was obviously only a witness, counsel may be invoking the attorney-client privilege to delay the litigation.\textsuperscript{163} Use of the privilege as a delaying tactic is usually not evident when only one attorney-client communication is involved. Rather, the concern is with a recurring pattern of bad faith assertion that results in an appreciable time loss. In such a case, discovery of witness communications should be ordered. Because delaying litigation is less serious than an attempt to funnel all evidence to create a "zone of silence,"\textsuperscript{164} however, discovery should be limited to the communications in question.

The second option left to the adversary is the showing of necessity or justification that would defeat the assertion of the privilege. This relief is appropriate only when the absoluteness of the privilege that attaches to individual clients is a discordant feature of the corporate attorney-client privilege.\textsuperscript{165} Historically, the attorney-client privilege was structured around the individual,\textsuperscript{166} partially because of the overlap of the privilege against self-incrimination.\textsuperscript{167} Corporations are not able to assert this latter privilege.\textsuperscript{168} Accordingly, it is appropriate that the extension of the attorney-client privilege to corporations be accompanied by suitable modifications that account for the differences between the corporate and the individual client.\textsuperscript{169} Production of otherwise privileged matter, however, should be a "rare" occurrence, to preserve the predictability of the suggested approach.

A party claiming necessity or justification must prove that it is realistically impossible for him to prepare his case without access to data contained in privileged communications. For example, assume that the key corporate employee in an illegal price fixing scheme flees the jurisdiction after telling the corporate attorney where he has hidden the records, and that the other participants were not informed as to major portions of the scheme. A request by opposing counsel for the location of the hidden files, even though this

\textsuperscript{162} See note 180 infra.

\textsuperscript{163} See note 156 supra. This would contravene the ABA Code of Professional Responsibility, DR 7-102 (1976).

\textsuperscript{164} See Simon, supra note 2, at 955.

\textsuperscript{165} See D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 736, 388 P.2d 700, 709, 36 Cal. Rptr. 468, 477 (1964) (en banc).


\textsuperscript{167} See C. McCormick, supra note 3, § 87, at 176.


\textsuperscript{169} See Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. at 774-75. See also City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 484-85 (E.D. Pa.), mandamus and prohibition denied sub nom. General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963); Simon, supra note 2, at 990 ("traditionally the attorney-client relationship has been a highly personal one . . . difficulties will be experienced in protecting the confidences granted lawyers who serve the highly impersonal and complex corporate organizations of our time").
information is privileged, should be allowed because the attorney is the only available person with knowledge of the location. It is realistically impossible for the party requesting discovery to prepare his case without access to this information.

The burden of proof for the necessity or justification showing should be on the party desiring discovery. In the highly unusual situation when the court grants this relief, the judge should order an in camera review to limit the production of documents to those portions of the communications that the adversary needs. For instance, in the preceding hypothetical, the attorney would be obliged to disclose only the location of the hidden files and not the substance of other conversations with the employee. A further example of a necessity or justification situation arises when a corporation has worldwide field offices. The time and money needed to utilize avenues of discovery, such as depositions and interrogatories, may necessitate some intrusion into the data amassed by the adversary's attorney. In this situation, the judge can again order an in camera review of the communications so that production is confined to information that is otherwise inaccessible because of the multinational nature of the corporation.

The infrequency with which a necessity or justification claim would be granted results in an emphasis on preservation of the privilege. This is necessary to ensure predictability and thereby preserve the policy of encouraging open communications between the attorney and the client. Frequent allowance of necessity or justification showings could instill deep apprehension in corporate employees. They may become fearful of communicating with attorneys when counsel can be ordered to disclose incriminating evidence to the adversary. Therefore, the attorney must be able to assure the employee that the privilege does attach. The only time this assurance will be misplaced is in the unusual case in which the necessity or justification showing is properly set forth by the adversary. Furthermore, the attorney will generally be cognizant of the unusual circumstance in which the adversary will attempt to prove that sufficient necessity or justification exists to compel production of the privileged information.

Additionally, because a ruling on a privilege issue should be separate from the litigation of the issues, a judge who has ruled affirmatively on a necessity or justification showing should only order production of factual information that the attorney could have obtained from the adversary's

170. Characterization of this situation as unusual is specifically intended to ensure predictability. This showing should be analogous to the original work product exception set forth in Hickman v. Taylor, 329 U.S. 495, 513 (1947), that it "should be [the] rare situation justifying production of these matters."


172. For a discussion of widely dispersed communications, see note 157 supra. For a discussion of the use of a special master, see note 158 supra and accompanying text.

173. See notes 10, 88 supra and accompanying text.

174. 2 D. Louisell & C. Mueller, Federal Evidence § 201, at 416 (1978) ("only those who are short of vision and memory would insist still that the litigational impact of a successful claim of privilege is the factor of overriding importance") (footnote omitted).
employees if discovery had been feasible.\textsuperscript{175} He should not be influenced by policy considerations that underlie the litigation.\textsuperscript{176} For example, any difficulties encountered by the adversary in amassing data because of the diversified nature of the corporation's structure may be overcome by selective discovery orders.

When the parties in the action are not widely dispersed corporations, the necessity or justification showing should be more difficult to satisfy. Often, a need arises to amass a large amount of preparatory information,\textsuperscript{177} which may manifest itself in the frequent assertion of the privilege by both sides. Discovery is often in the parties' mutual self-interest,\textsuperscript{178} however, and, at the pretrial conference, the judge should encourage the parties to exchange factual data.\textsuperscript{179} Furthermore, it must be remembered that the assertion of the privilege "does not foreclose opposing parties from pursuing all conventional avenues of discovery made available under the federal rules, including questioning [any or all] corporate personnel."\textsuperscript{180}

This proposal may appear somewhat complex. Ease of application, however, although a desirable characteristic of any evidentiary rule, cannot be granted priority over the goals of proper corporate client designation and predictability of result. The complexity is also necessitated to allow for the contemporary goal of broad discovery. Therefore, although the path taken is somewhat circuitous and indirect,\textsuperscript{181} it has the advantage of leading to the desired destination. Finally, the freedom afforded the attorney under this approach should benefit voluntary disclosure programs and prevent the previously mentioned ethical dilemma\textsuperscript{182} from arising.

**Conclusion**

In the midst of the confusion resulting from the divergent approaches presently applied, predictability has fallen by the wayside. Not only may an attorney be unsure of which approach a court will adopt, he must also contend with the unpredictable application of an adopted approach. Because of the integral role of attorneys in the daily functioning of corporations,\textsuperscript{183} it is essential to characterize the corporate client in a manner that assures the

\textsuperscript{175} For example, this ruling should not be influenced by the attitude of a court or of a legislative body that favors liberal enforcement of the statute that has allegedly been violated. This further aids the attainment of predictability.

\textsuperscript{176} See notes 90-91, 175 \textit{supra} and accompanying text.

\textsuperscript{177} See note 132 \textit{supra} and accompanying text; cases cited note 131 \textit{supra}.


\textsuperscript{179} Federal Rule of Civil Procedure 16 provides: "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider... (6) Such other matters as may aid in the disposition of the action."

\textsuperscript{180} ABA \textit{Amicus Curiae} Memorandum for Certiorari at 8, United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3594 (U.S. Mar. 17, 1980) (No. 79-886).

\textsuperscript{181} See Withrow, \textit{supra} note 67, at 38 (the arena of the corporate attorney-client privilege "does not appear to be one that lends itself to scholarly treatment.")

\textsuperscript{182} See notes 94-103 \textit{supra} and accompanying text.

\textsuperscript{183} See Maddock, \textit{The Corporate Law Department}, 1952 Harv. Bus. Rev. 119, 119 ("[M]ore and more industrial corporations have found a need for the day-to-day counsel of attorneys in connection with all aspects of their activities."). See \textit{generally} J.D. Donnell, \textit{The Corporate Counsel: A Role Study} (1970).
effectiveness of the attorney's role. Corporate reliance on legal expertise, indispensable for compliance with expansive business regulation, requires a "flexible and generous protection [of the privilege]. No doubt this is obvious, but as the story of the Emperor's new clothes illustrates, sometimes even a statement of the obvious is useful."\textsuperscript{184}

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\textsuperscript{184} Simon, \textit{supra} note 2, at 990.