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Private Meetings And Good Cause Exceptions: Gulf & Western May Provide The Sec New Tools For Piercing The Corporate Attorney-Client Privilege

PRIVATE MEETINGS AND GOOD CAUSE EXCEPTIONS: *GULF & WESTERN* MAY PROVIDE THE SEC NEW TOOLS FOR PIERCING THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is a common law evidentiary rule that protects from compelled disclosure the confidential communications between client and attorney made for the purpose of securing legal advice.[1] The client, or the attorney on the client's behalf, may assert the privilege in a wide range of legal proceedings to prevent disclosure of written and oral confidential communications.[2] The traditional rationale for the privilege is that it encourages the client to communicate all relevant facts to the attorney without fear of disclosure.[3] Consequently, the client benefits from informed legal advice and society benefits from the more effective administration of justice.[4] Although some commentators have suggested that the privilege may be an unnecessary obstacle to the search for truth in legal proceedings,[5] courts consistently have held that

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[1] *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950); 8 WIGMORE ON EVIDENCE § 2292, at 554 (McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE]; text accompanying note 31 *infra* (definitional elements of the attorney-client privilege).

[2] *See, e.g., In re* Grand Jury Proceedings (Fine), 641 F.2d 199, 203 (5th Cir. 1981) (grand jury investigation); United States v. Davis, 636 F.2d 1028, 1031-32 (5th Cir. 1981) (IRS investigation); United States v. Bartlett, 449 F.2d 700, 702-04 (8th Cir. 1971) (criminal trial), *cert. denied*, 405 U.S. 932 (1972); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 316 (7th Cir. 1963) (pre-trial civil discovery); McMann v. SEC, 87 F.2d 377, 378 (2d Cir. 1937) (SEC investigation); Sagorsky v. Malyon, 12 F.R.D. 486, 487 (S.D.N.Y. 1952) (civil trial).

[3] *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 424-25 (1970) [hereinafter cited as *Control Group Test*]. No empirical study yet has verified the proposition that the attorney-client privilege encourages client communications that would not occur absent the privilege. *See Control Group Test, supra*, at 425. The only empirical study to date that addresses the issue produced equivocal results. *See* Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1262 (1962). In the study, only about half of the 108 laymen interviewed believed that a court could not compel an attorney to disclose confidential communications. *Id.* Also, only about half of the laymen indicated that they would be less likely to make full disclosure to an attorney if the attorney subsequently could testify regarding the disclosures. *Id.* One commentator has suggested that because potential clients cannot predict whether the presence or absence of the privilege would affect their willingness to disclose information to the attorney, the underlying assumption of the privilege is unverifiable empirically. *See Control Group Test, supra* , at 425 & n.7.

[4] *See* United States v. Louisville & N. R.R. Co., 236 U.S. 318, 336 (1915); Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 955 (1956) [hereinafter cited as Simon] (informed legal advice that results from attorney-client privilege benefits society as well as client).

[5] *See* J. BENTHAM, 7 THE WORKS OF JEREMY BENTHAM 473-79 (Bowring ed. 1842); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 87, at 176 (E. Cleary 2d ed. 1972)

the social benefits deriving from the privilege outweigh the social costs.[6]

The Supreme Court recently stressed the important role the privilege plays in encouraging attorney-client communication in the corporate context.[7] The Court rejected the narrow "control group" test that several federal circuit courts had adopted for determining the proper scope of the corporate attorney-client privilege[8] and instead endorsed a

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[hereinafter cited as MCCORMICK]; Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1056 (1975); McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 469-70 (1938) [hereinafter cited as *The Scope of Privilege*]; Nessen, *Rethinking the Lawyer's Duties to Disclose Information: A Critique of Some of Judge Frankel's Proposals*, 24 N.Y.L.S. L. REV. 677, 707-10 (1979); Radin, *The Privilege of Confidential Communications between Lawyer and Client*, 16 CALIF. L. REV. 487, 491 (1928). Probably the hostility toward the privilege stems from the realization that the privilege is a device to cover-up evidence. Most clients are not likely to invoke the privilege unless they have "dirty business" to hide from an adverse party in need of the evidence. *See* Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1062 (1978).

[6] *See, e.g.*, Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 322-24 (7th Cir. 1963); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950). The official comment to Rule 210 of the Model Code of Evidence provides a succinct statement of the position the courts have taken on the costs and benefits of the attorney-client privilege:

> [T]he continued existence of the privilege is justified on grounds of social policy. In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweight the harm that may come from suppression of the evidence in specific cases.

MODEL CODE OF EVIDENCE Rule 210 comment (1942).

[7] *See* Upjohn Co. v. United States, 449 U.S. 383, 389-93 (1981). The *Upjohn* Court noted that corporations, like individuals, need informed advice from counsel when legal problems arise. *Id.* at 392. The *Upjohn* Court added that corporations, unlike most individuals, also need to consult frequently with legal counsel just to comply with the complex laws that regulate every area of corporate activity. *Id.* The Court concluded that a properly defined attorney-client privilege would ensure that corporate clients make full use of legal counsel to resolve legal problems and comply with the law. *Id.* at 389-93. *See also* Note, *The Attorney-Client Privilege: A Look at Its Effect on the Corporate Client and the Corporate Executive*, 55 IND. L.J. 407, 408 n.10 (1980); Comment, *A Securities Lawyer's Dilemma: The SEC's Policy of Disclosure v. The Attorney-Client Privilege*, 15 SAN DIEGO L. REV. 797, 797 (1978) [hereinafter cited as *Lawyer's Dilemma*].

[8] *See* 449 U.S. at 390-93. The *Upjohn* Court noted that the first case to adopt a control group test was City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa.), *mandamus denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1968). *See* 449 U.S. at 391. The *City of Philadelphia* court held that the attorney-client privilege protected only the confidential communications between corporate counsel and members of the corporation's "control group." 210 F. Supp. at 485. The court defined "control group" as comprising the corporate employees who were "in a position to control or even to take substantial part in a decision about any action which the corporation may take upon the advice of the attorney. . . ." *Id.* Subsequent to the *City of Philadelphia* decision, several federal circuit courts adopted the control group test. *See*

broader privilege.[9] In the wake of the Supreme Court's decision to expand the corporate privilege, however, the recent district court decision in *SEC v. Gulf & Western Industries, Inc.*[10] may diminish dramatically the value of the attorney-client privilege to a corporation under investigation by the Securities and Exchange Commission (SEC).[11] In *Gulf & Western*, the United States District Court for the District of Columbia implicitly endorsed a SEC investigatory procedure that in certain instances may reduce the ability of a corporation to protect confidential attorney-client communications from unauthorized disclosure and subse-

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United States v. Upjohn Co., 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd and remanded*, 449 U.S. 383, 402 (1981); *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1235-36 (3d Cir. 1979); Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968).

In *Upjohn* the Supreme Court rejected the control group test because the test did not encourage lower-level employees to give corporate attorneys the information needed to formulate effective legal advice. 449 U.S. at 392. The *Upjohn* Court also observed that the control group test led to unpredictable results and did not provide corporate clients clear guidelines on whether the privilege would protect given disclosures by corporate employees to counsel. *Id.* at 393. The Court stated that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all." *Id.*

[9] *See* 449 U.S. at 394-97. The majority in *Upjohn* refused to fashion or adopt expressly an alternative test to the control group test. *See id.* at 396-97. Rather, the Court pointed to certain facts in *Upjohn* that warranted extending the privilege to protect the communications between corporate counsel and non-control group employees:

(1) Non-control group employees made the communications to corporate counsel at the direction of corporate superiors for the purpose of securing legal advice;
(2) the communications concerned matters within the scope of the employees' corporate duties;
(3) the employees knew that corporate counsel sought their disclosures in order to provide the corporation legal advice;
(4) the corporation considered the communications confidential when made and subsequently had kept the communications confidential.

Id. at 395-97. Commentators have noted that although the *Upjohn* Court refused expressly to adopt a formal alternative test to the control group test, the Court appeared to have applied the subject matter test employed in Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc). *See* Comment, *The Attorney-Client Privilege as Applied to Corporate Clients*, 15 AKRON L. REV. 119, 129-30 (1981); Note, *The Implications of* Upjohn, 56 NOTRE DAME LAW. 887, 892-94 (1981) [hereinafter cited as *Implications*]. Regardless of whether the *Upjohn* Court implicitly endorsed the subject matter test or provided the rough guidelines for a new test, the important fact is that the Court elected to expand the scope of the attorney-client privilege in the corporate context beyond the narrow confines of the control group approach. *See Implications*, *supra*, at 894; *Companies Win Broader Attorney-Client Privilege*, Nat'l L.J., Jan. 26, 1981, at 3.

[10] 502 F. Supp. 343 (D.D.C. 1980), *motion to strike granted*, 518 F. Supp. 675 (D.D.C. 1981).

[11] *See* Pickholz, 'Gulf & Western' *May Shake Attorney-Client Privilege*, Legal Times of Wash., Aug. 24, 1981, at 17 [hereinafter cited as Pickholz]; Vilkin, *Fedders: New Look at the SEC*, Nat'l L.J., Jan. 25, 1982, at 3 [hereinafter cited as Vilkin]. *Gulf & Western* may also provide other governmental agencies a basis for attacking the corporate attorney-client privilege. *See* text accompanying note 115 *infra*.

quent use in legal proceedings.[12] In addition, the court proposed in dicta the creation of a new exception to the attorney-client privilege that would permit the SEC to pierce the privilege whenever the Commission could demonstrate good cause to justify disclosure of confidential information.[13]

In *Gulf & Western*, the SEC brought a civil enforcement action against Gulf & Western Industries, Inc. (Gulf & Western) and two of the corporation's top officers.[14] Alleging that the defendants violated several federal securities laws, the SEC sought a permanent injunction to enjoin future violations.[15] The defendants filed an affirmative defense urging the district court to dismiss the complaint on the ground that SEC investigators had breached Gulf & Western's attorney-client privilege.[16]

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[12] *See* text accompanying notes 19-24, 52-59 *infra*.

[13] *See* text accompanying notes 48-51 *infra*.

[14] *See* 502 F. Supp. at 344. In *Gulf & Western*, the two officers named in the SEC's complaint were Charles Bluhdorn, Gulf & Western's chief executive officer, and Don F. Gaston, an executive vice-president. *Id.*

[15] *See* 518 F. Supp. at 677 n.2. The SEC's complaint in *Gulf & Western* charged the defendants with violating, over a seven year period, § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976), §§ 10(b), 13(a), 13(d) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78m(a), 78m(d), 78n(a) (1976), and various rules, including rule 10b-5, 17 C.F.R. § 240.10b-5 (1980). The district court did not provide background information regarding the specific facts underlying the various charges. The New York Times, however, published a series of articles on the SEC's investigation of Gulf & Western that provide some factual background. *See SEC Pressed Wide Investigation of Gulf and Western Conglomerate*, N.Y. Times, July 24-26, 1977, at p. 1.

[16] *See* 502 F. Supp. at 344-47; text accompanying notes 19-29 *infra* (discussion of Gulf & Western's claim that SEC breached attorney-client privilege). In addition to the affirmative defense alleging breach of the attorney-client privilege, Gulf & Western originally argued that the court should dismiss the complaint for six additional reasons. First, Gulf & Western charged the SEC with deliberately leaking the results of the Gulf & Western investigation to the New York Times. *See* 502 F. Supp. at 346. The defendants maintained that publication of the information did irreparable harm to the defendants' reputation and amounted to summary punishment without the due process guarantees of the fifth amendment. *Id.* at 346-47. Although the district court questioned whether the defendants' claim regarding the press leaks had merit, the court permitted the defendants to pursue limited discovery. *Id.* at 347 & n.7. Subsequently, the district court dismissed the affirmative defense on the ground that the defendants had not proven the press leaks had come from SEC staff members. *See* 518 F. Supp. at 685-86.

Gulf & Western's next three affirmative defenses were related to the attorney-client privilege defense. *See* 502 F. Supp. at 347-48. Gulf & Western claimed that because the SEC had breached the corporation's privilege, the court should dismiss the complaint on the grounds that the balance of equities weighed against any injunction in favor of the SEC, that dismissal would serve to deter similar SEC violations in the future, and that the doctrine of unclean hands barred the SEC from obtaining injunctive relief. *See id.* The district court, however, noted that the three defenses were redundant and added little to the breach of the attorney-client privilege defense. *Id.* at 348. The court, therefore, granted the SEC's motion to strike the three defenses. *Id.*

Gulf & Western also argued that the doctrine of equitable estoppel precluded the SEC from challenging the legality of certain accounting practices since the SEC had failed to object to the practices in the past. *Id.* The district court rejected the equitable estoppel defense on the ground that a party may only raise the doctrine against the government to

Subsequently, the SEC filed a motion to strike the affirmative defense.[17] The district court, however, reserved judgment on the motion to strike until Gulf & Western had an opportunity in discovery to prove a breach of the attorney-client privilege.[18]

The alleged breach of Gulf & Western's attorney-client privilege occurred during a series of meetings between SEC investigators and Gulf & Western's former outside general counsel, Joel Dolkart.[19] Dolkart met with SEC investigators on numerous occasions over a twelve month period to discuss his knowledge of certain illegal corporate activities.[20] Dolkart agreed to the meetings as part of a plea bargain agreement he negotiated with prosecutors after a New York grand jury indicted him for embezzling funds from his law firm.[21] The SEC investigators met with Dolkart in private and, contrary to normal practice, did not record or otherwise formally preserve Dolkart's testimony.[22] The SEC-Dolkart meetings continued even after Gulf & Western's counsel wrote and objected to the meetings.[23] Subsequent to these meetings, the SEC filed the civil enforcement action against the defendants.[24]

Since the SEC made no transcript of Dolkart's interviews, Gulf & Western's discovery consisted of deposing the SEC staff members who

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prevent an "egregious injustice." *Id.* The court concluded that requiring Gulf & Western to change certain accounting practices did not reach the level of injustice necessary for the estoppel doctrine to apply. *Id.*

Finally, Gulf & Western argued the doctrine of laches. *Id.* The district court rejected the laches defense on the ground that the doctrine does not apply when governmental agencies are investigating in the public interest. *Id.* Moreover, the court noted that the complexity of the *Gulf & Western* case required a lengthy investigation. *Id.*

[17] *See* 502 F. Supp. at 345.

[18] *See id.* at 345-47.

[19] *See* 518 F. Supp. at 678-79, 684. The court in *Gulf & Western* noted that, prior to meeting with SEC investigators, Joel Dolkart had served as outside general counsel to Gulf & Western for 16 years. *Id.* at 678. In addition, Dolkart had served as a director, secretary, and member of the corporation's pension advisory committee during the period of time covered by the SEC investigation. *Id.* Dolkart had resigned as general counsel to Gulf & Western two years before meeting with SEC investigators. *See* 502 F. Supp. at 347 n.6; 518 F. Supp. at 678.

[20] *See* 518 F. Supp. at 678.

[21] *See id.* The *Gulf & Western* court noted that a New York grand jury had indicted Dolkart for embezzling more than $2.5 million in fees that Gulf & Western had paid Dolkart's law firm for his legal services. *Id.* In addition, the grand jury charged Dolkart with embezzling a half million dollars directly from Gulf & Western. *Id.* To avoid imprisonment, Dolkart entered a written plea agreement to provide New York prosecutors and the SEC information he possessed on corporate misconduct. *Id.* A New York court provisionally sentenced Dolkart to an indeterminate sentence carrying a maximum penalty of three years. *Id.* Final sentencing was to occur after Dolkart cooperated with investigators. *Id.* Dolkart ultimately received a five year term of probation. *Id.* at 679.

[22] *See id.* at 682, 684; text accompanying note 42 *infra* (discussion of reasons for SEC's failure to transcribe interviews with Gulf & Western's outside counsel).

[23] *See* 518 F. Supp. at 684. In response to Gulf & Western's letter protesting the Dolkart interviews, the SEC invited Gulf & Western to supply additional evidence relevant to the investigation. *Id.* Gulf & Western did not respond to the request. *Id.*

[24] *See id.* at 677; note 15 *supra* (discussion of SEC complaint).

had participated in the investigation and analyzing their notes.[25] From these sources, Gulf & Western identified and submitted to the court numerous instances where Dolkart purportedly disclosed privileged information to the SEC.[26] In addition, Gulf & Western charged the SEC with deliberately adopting an investigatory procedure that prevented the corporation from protecting its rights under the attorney-client privilege.[27] The corporation proposed that under the circumstances the court should shift the burden of proof to the SEC to show that the Commission did not violate Gulf & Western's attorney-client privilege.[28] Finally, Gulf & Western argued that if the court allowed the suit to continue, the court in effect would be encouraging other corporate attorneys to bargain away their client's confidences in secret meetings with the SEC when the disclosure served the attorneys' self-interest.[29]

The district court preceded the analysis of Gulf & Western's claims with a brief review of the federal common law on the attorney-client privilege.[30] The court noted that the privilege only protects confidential attorney-client communications made for the express purpose of receiving legal advice.[31] The court added that under common law Gulf & Western had the burden of proving that the privilege protected any

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[25] *See* 518 F. Supp. at 682, 684.

[26] *See id.* at 682-84. The *Gulf & Western* court observed that of the nine purported instances of breach that Gulf & Western submitted to the court only one instance directly related to the SEC's complaint. *Id.*

[27] *See id.* at 684. The defendants in *Gulf & Western* claimed that the SEC intentionally met with Dolkart in private, unrecorded meetings so that the defendants would be unable to prove whether or not Dolkart disclosed privileged information. *Id.* To support the claim that the SEC intended to breach the privilege, the defendants pointed to Dolkart's deposition testimony. *Id.* Dolkart had stated in his deposition that he personally never had a discussion with SEC staff members regarding the privilege nor did he ever refuse to answer a question because of the privilege. *Id.* The defendants also emphasized that the failure to transcribe the Dolkart interviews was not a routine practice. *Id.*

[28] *See id.* at 683, 684 n.11, 686.

[29] *See id.* at 686.

[30] *See id.* at 680-82. Federal Rule of Evidence 501 governs the application of the attorney-client privilege in federal courts. *See* FED. R. EVID. 501. Rule 501 instructs federal courts hearing cases involving federal law to apply the privilege according to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.*

[31] *See* 518 F. Supp. at 681. In reviewing the federal common law, the *Gulf & Western* court cited the test for determining when the privilege protects an attorney-client communication provided in United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950):

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

disclosure Dolkart made to the SEC.[32] In reviewing several of the purported instances of breach, the *Gulf & Western* court held that Dolkart did not violate the privilege in disclosing information he had received while acting in his non-lawyer roles of director, member of the corporation's pension committee, or executive assistant to the corporation's chief executive officer.[33] The court also held that Dolkart legitimately could disclose information he had received while acting as a "mere scrivener"[34] or while giving a corporate officer "business advice."[35] Finally,

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Id.; *see also* WIGMORE, *supra* note 1, § 2292, at 554 (alternative definition of attorney-client privilege).

[32] *See* 518 F. Supp. at 682. The federal courts consistently place the burden of proof on the party claiming the attorney-client privilege. *See, e.g.*, FTC v. TRW, Inc., 628 F.2d 207, 213 (D.C. Cir. 1980); FTC v. Shaffner, 626 F.2d 32, 37 (7th Cir. 1980); *In re* Grand Jury Subpoena (Horowitz), 482 F.2d 72, 82 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973); Osterneck v. E.T. Barwick Indus., Inc., 82 F.R.D. 81, 85 (N.D. Ga. 1979); United States v. Lipshy, 492 F. Supp. 35, 41 (N.D. Tex. 1979). The party claiming the privilege has the burden of proof for two reasons. First, the party claiming the privilege possesses the underlying facts necessary to prove the essential elements of the privilege. *See* FTC v. Shaffner, 626 F.2d 32, 37 (7th Cir. 1980). Second, by placing the burden of proof on the party claiming the privilege, the courts prevent abuse of the privilege. *See* Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 340 (1972).

[33] *See* 518 F. Supp. at 683. The court in *Gulf & Western* noted that the attorney-client privilege only protects communications between attorney and client when the attorney is acting in his professional capacity as the client's attorney. *Id.* The "acting in a professional capacity" requirement is a basic element of the attorney-client privilege. *See* WIGMORE, *supra* note 1, § 2292, at 554. When an attorney for a corporation not only acts as a legal advisor, but also plays a managerial role, the courts have looked closely to see which role the attorney was playing when he received the confidential communication. *See, e.g.*, Young v. Taylor, 466 F.2d 1329, 1332 (10th Cir. 1972) (attorney-business associate not acting as attorney); United States v. Lipshy, 492 F. Supp. 35, 40-41 (N.D. Tex. 1979) (attorney-corporate executive acting as attorney); R.C.A. v. Rauland Corp., 18 F.R.D. 440, 443 (N.D. Ill. 1955) (attorney-negotiator not acting as attorney); United States v. Vehicular Parking Ltd., 52 F. Supp. 751, 753 (D. Del. 1943) (attorney-director not acting as attorney). Commentators have observed that courts respond skeptically to assertions of the privilege when the attorney serves the corporation in multiple roles. *See* O'Neal & Thompson, *Vulnerability of Professional-Client Privilege in Shareholder Litigation*, 31 BUS. LAW. 1775, 1794 (1976) [hereinafter cited as O'Neal]; Schaefer, *The Attorney-Client Privilege in the Modern Business Corporation*, 20 BUS. LAW. 989, 995 (1965); Simon, *supra* note 4, at 969. One court recently expressed the skepticism in unusually graphic language: "When the attorney and the client get in bed together as business partners, their relationship is a business relationship, not a professional one, and their confidences are business confidences unprotected by a professional privilege." Federal Savings & Loan Ins. Corp. v. Fielding, 343 F. Supp. 537, 546 (D. Nev. 1972).

[34] *See* 518 F. Supp. at 683. The court in *Gulf & Western* noted that Dolkart received information regarding a proposed tender offer while his law firm was acting as a "scrivener" and another law firm was providing the legal advice. *Id.* Where an attorney is performing a task that does not require legal analysis, such as merely drafting a deed without also giving legal advice, the attorney-client privilege does not protect the client's disclosures. *See* Osterneck v. E.T. Barwick Indus., Inc., 82 F.R.D. 81, 86 (N.D. Ga. 1979); WIGMORE, *supra* note 1, § 2296, at 567 (collecting cases); MCCORMICK, *supra* note 5, § 88, at 179-80. The *Gulf & Western* court did not indicate precisely the task Dolkart was performing as "scrivener" during the tender offer transaction. *See* 518 F. Supp. at 683.

[35] *See* 518 F. Supp. at 683. The *Gulf & Western* court observed that advice Dolkart

the court in *Gulf & Western* held that Dolkart did not breach the privilege in disclosing certain information that the corporation also had disclosed to third parties[36] or in public documents.[37] The district court, therefore, concluded that Gulf & Western had not proved breach of the attorney-client privilege.[38]

The *Gulf & Western* court found no basis for the defendants' claim that the SEC had conducted an improper investigation.[39] The court noted approvingly that the SEC investigators had informed Dolkart's attorney at the outset that the SEC would rely on Dolkart to preserve the confidentiality of privileged communications.[40] Moreover, the district court referred to Dolkart's testimony in which he claimed to have avoided disclosing many privileged matters during the SEC interviews.[41] Finally, the *Gulf & Western* court refused to place much weight on the SEC's

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gave a Gulf & Western manager about the advisability of purchasing certain securities was of a business and not legal nature. *Id.* The attorney-client privilege does not protect communications between an attorney and client that deal predominately with business matters. *See* Liew v. Breen, 640 F.2d 1046, 1050 (9th Cir. 1981); *In re* LTV Securities Litigation, 89 F.R.D. 595, 601 (N.D. Tex. 1981); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 147 (D. Del. 1977); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 517 (D. Conn. 1976); Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 39 (E.D.N.Y. 1973); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950). Commentators have suggested that the distinction between business and legal advice is vague and subject to sematic manipulation by the courts. *See* Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899, 918 n.83 (1980) [hereinafter cited as Weissenberger]; Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV., 464, 471 (1977) [hereinafter cited as *Fixed Rules*].

[36] *See* 518 F. Supp. at 683. The *Gulf & Western* court noted that any voluntary disclosure by the corporation to a third party outside the corporation destroys the confidentiality necessary for an attorney-client privilege claim. *Id. Accord* Permian Corp. v. United States, 665 F.2d 1214, 1221-22 (D.C. Cir. 1981) (disclosure to SEC destroys confidentiality); *In re* Grand Jury Subpoena (Horowitz), 482 F.2d 72, 77 (2d Cir. 1973) (disclosure to accountant destroys confidentiality); SEC v. Texas Int'l Airlines, Inc., [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,945 (D.D.C. 1979) (disclosure to investment banker destroys confidentiality).

[37] *See* 518 F. Supp. at 683. The court in *Gulf & Western* observed that information which Gulf & Western had disclosed or intended to disclose in public documents was not privileged. *Id. Accord* United States v. Silverman, 430 F.2d 106, 121-22 (2d Cir. 1970); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 515 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (1976); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950). *But cf.* SEC v. Texas Int'l Airlines, Inc., [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,945 (D.D.C. 1979) (preliminary drafts of documents corporate attorney intends to release only after further review are privileged).

[38] *See* 518 F. Supp. at 684.

[39] *See id.* at 686; text accompanying note 27 *supra.*

[40] *See* 518 F. Supp. at 684.

[41] *See id.* Dolkart testified in *Gulf & Western* that he avoided breaching the privilege by holding back privileged information during the interviews and by excluding from discussion certain privileged topics prior to the interviews. *Id.* As a further indication that no breach occurred, the *Gulf & Western* court pointed out that after Gulf & Western protested against the interviews, SEC staff members met to consider whether Dolkart had disclosed privileged information. *Id.* The SEC staff members concluded that no breach had occurred. *Id.*

failure to record the Dolkart interviews, even though the omission was a departure from normal investigatory procedures.[42]

Since the district court concluded that the defendants had failed to prove either a breach of the attorney-client privilege or an improperly conducted SEC investigation, the court granted the SEC's motion to strike Gulf & Western's affirmative defense.[43] In addition, the court rejected Gulf & Western's request to shift the burden of proof to the SEC.[44] The district court emphasized that the Commission had cooperated in good faith during Gulf & Western's extensive discovery.[45] The *Gulf & Western* court indicated, however, that the court's decision in favor of the SEC represented only approval of the SEC's investigation and not approval of Dolkart's plea agreement.[46] The district court expressly rejected Gulf & Western's argument that a decision in favor of the SEC would have a chilling effect on future attorney-client communications.[47]

Finally, the court added in dicta that even if Dolkart had disclosed privileged information to the SEC, the Commission still might demonstrate good cause to justify the disclosure.[48] The *Gulf & Western* court noted that the SEC's mission is to protect the public interest and the interest of shareholders.[49] The district court suggested that when the SEC's need for evidence clashes with a corporation's attorney-client privilege, a court should employ a balance test to determine whether the

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[42] *See id.* To support the conclusion that the SEC had not departed intentionally from standard procedure in not recording the Dolkart interviews, the *Gulf & Western* court referred to the testimony of several SEC investigators. *Id.* One investigator testified that the normal procedure of recording investigatory interviews was not an ironclad rule. *Id.* The investigator admitted having conducted several such unrecorded interviews during the Gulf & Western investigation. *Id.* The court also observed that several other staff members had conducted similar informal interviews without perserving the witnesses' statements. *Id.* The *Gulf & Western* court apparently concluded that since SEC staff members may depart from normal procedure on occasion when certain unspecified conditions exist, the SEC did not act in bad faith in failing to record the numerous Dolkart interviews. *See id.* The court did not specify anywhere in the opinion any reasons why the SEC investigators elected to conduct numerous interviews with an important informant like Dolkart without recording the sessions. Nor does the court explain why the SEC after receiving a protest from Gulf & Western regarding the meetings, *see supra* note 41, did not decide to record the remaining interviews in the event that the privilege issue arose in subsequent litigation. *See* 518 F. Supp. 678-86.

[43] *See* 518 F. Supp. at 684.

[44] *See id.*

[45] *See id.* at 686. The court in *Gulf & Western* pointed out that the defendants had failed to prove their case despite more than 4000 pages of testimony and 200 exhibits. *Id.* The court concluded that the defendants had failed to prove their case solely because the SEC had not breached Gulf & Western's attorney-client privilege. *Id.*

[46] *See id.*

[47] *See id.*; text accompanying notes 52-75 *infra* (discussion of problems with SEC investigation and adverse effect on attorney-client privilege).

[48] *See* 518 F. Supp. at 686.

[49] *See id.*

SEC's need to know outweighs the corporation's need to protect its confidences.[50] Since the court found no breach of Gulf & Western's privilege, however, the court refused to decide whether the SEC could show good cause for piercing the corporation's privilege.[51]

Contrary to the court's conclusion in *Gulf & Western*, judicial approval of the SEC's method of investigating Gulf & Western could have a chilling effect on the corporate attorney-client privilege.[52] The purpose of the attorney-client privilege is to encourage attorney-client communication.[53] The privilege encourages communication by assuring the client that the attorney will not disclose the client's confidential communications without the client's authorization.[54] The attorney normally has strong incentives to preserve the client's confidences.[55] When the attorney, however, faces imprisonment if he fails to comply fully with zealous government investigators who desire insider information on corporate wrongdoing, the incentives to disclose may be stronger than the incentives to protect the client's confidences.[56] Under these conditions, most corporate clients would place little faith in either the attorney or government investigators to preserve the client's privileged communications. Judicial approval of an investigatory practice that encourages the unauthorized disclosure of privileged attorney-client communications introduces an element of distrust into the corporate attorney-client relationship and may discourage corporate clients in the future from divulging all relevant matters to their corporate counsel. At the least, therefore, the *Gulf & Western* court should have criticized the SEC for meeting with Dolkart in private without a representative of Gulf & Western present to defend the corporation's rights.[57]

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[50] *See id.* The *Gulf & Western* court cited no authority to support the proposition that courts should employ a balance test when the SEC seeks to obtain a corporation's privileged communications. *See id.*; text accompanying notes 76-118 *infra* (discussion of the balance test approach to attorney-client privilege).

[51] *See* 518 F. Supp. at 584.

[52] *See* Pickholz, *supra* note 11, at 17.

[53] *See* text accompanying notes 1-3 *supra.*

[54] *See* Upjohn Co. v. United States, 449 U.S. 383, 391 (1981); Hunt v. Blackburn, 128 U.S. 464, 470 (1888); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967); Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956); Robinson v. United States, 144 F.2d 392, 405 (6th Cir. 1944); WIGMORE, *supra* note 1, §§ 2324-2325, at 632.

[55] *See* Comment, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 NW. U. L. REV. 235, 249-52 (1961) [hereinafter cited as *Lawyer-Client Privilege*]. Personal integrity, loyalty to the client, and professional ethics normally motivate an attorney to maintain a client's confidences. *Id.* In addition, the possibility of a civil suit for damages and disbarment are negative sanctions that compel an attorney to observe the attorney-client privilege. *Id. See also* R. WEINBERG, CONFIDENTIAL AND OTHER COMMUNICATIONS 16 (1967); Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 340 n.40 (1976).

[56] *See* Pickholz, *supra* note 11, at 17.

[57] *See id.*

Similarly, the *Gulf & Western* court should have criticized the SEC's failure to record or transcribe the Dolkart interviews. Gulf & Western faced an unreasonably burdensome task in trying to prove a breach of the privilege without a formal transcript of the Dolkart interviews.[58] Dolkart's testimony and the SEC investigators' testimony and notes could not provide Gulf & Western a precise and reliable evidentiary base from which to prove that Dolkart disclosed privileged information. Arguably, Gulf & Western's failure to prove a breach resulted from the SEC's failure to provide an adequate record of the interviews and not because Dolkart and the SEC had respected the corporation's privilege.[59]

Since the potential for abuse of the privilege is so great, the courts should consider, if confronted with a case similar to *Gulf & Western* in the future, imposing some restrictions on the SEC. One commentator in discussing *Gulf & Western* has suggested that the corporate client should have the opportunity to send a legal representative to the SEC's investigatory interviews with the client's attorney in every case where the attorney faces adverse legal consequences upon failure to cooperate fully with the SEC.[60] Other alternative safeguards would include requiring SEC investigators to record the interviews or requiring the attorney to convey evidence only by written affidavit.[61] In those cases where the SEC failed to employ any safeguards, and the corporate client could show that the attorney faced adverse legal consequences if he failed to cooperate fully with the SEC, the courts should shift the burden to the SEC to prove that no breach of the attorney-client privilege actually occurred.[62] The SEC could meet the burden of proof by demonstrating that the attorney had received the information he later disclosed while not

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[58] *See* text accompanying notes 27 & 42 *supra*. The *Gulf & Western* court failed to note that the normal policy considerations that have led courts to place the burden of proof on the party claiming the privilege did not apply to the facts in *Gulf & Western*. *See* note 32 *supra*. Normally, when a party claims the privilege, the court has no way to determine the validity of the claim unless the claiming party provides some proof to substantiate the claim. Since the claiming party possesses all the underlying facts to support the claim of privilege, the court acts reasonably in placing the proof burden on the claiming party. In *Gulf & Western*, however, the defendants were not asserting the privilege from behind a corporate wall of secrecy. Rather, the defendants were asserting a breach of the privilege by others. Furthermore, the defendants lacked adequate proof of the underlying facts to support the claim of breach. On fairness grounds alone, therefore, the *Gulf & Western* court should have modified the normal proof requirements.

[59] *Contra* 518 F. Supp. at 686.

[60] *See* Pickholz, *supra* note 11, at 17.

[61] *See* Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190, 1192-95 (2d Cir. 1974), *cert. denied*, 419 U.S. 998 (1975). In *Meyerhofer*, an attorney filed a written affidavit with the SEC after becoming concerned that his client's registration statement failed to disclose essential information. *Id.* at 1192-93. A judicially imposed rule requiring the SEC to preserve the testimony of attorney-witnesses by recordings, transcripts, or affidavits, would be no great burden since the SEC's normal procedure is to transcribe such interviews anyway. *See* text accompanying note 42 *supra*.

[62] *See* 518 F. Supp. at 684 n.11; text accompanying notes 27-28, 44-45 *supra*.

acting in a confidential legal relationship with the client.[63] In addition, the SEC might justify receiving confidential information under either the crime-fraud[64] or self-defense[65] exceptions to the attorney-client privilege. Finally, the SEC could produce for *in camera* review proof that the Commission had received certain insider information from an independent source unrelated to any breach of the attorney-client privilege.[66]

A difficult issue to resolve is what remedies should apply if the SEC could not prove the absence of breach or the SEC acknowledged that the attorney had disclosed privileged information. The *Gulf & Western* court, by finding that Dolkart had not breached the corporation's privilege, did not reach the issue of appropriate remedies for breach of

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[63] *See* text accompanying notes 30-37 *supra* (discussion of essential elements of attorney-client privilege).

[64] *See* Clark v. United States, 289 U.S. 1, 15 (1933). If the client consults an attorney for advice to use in the furtherance of crime or fraud, the attorney-client privilege will not protect the communications. *Id.* The party seeking the communication, however, must make a prima facie showing that the criminal or fraudulent activity occurred subsequent to the legal consultation to justify piercing the privilege. *Id.*; *In re* Grand Jury (Fine), 641 F.2d 199, 203 (5th Cir. 1981); United States v. Hodge and Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977); United States v. Bartlett, 449 F.2d 700, 704 (8th Cir. 1971); United States v. Bob, 106 F.2d 37, 39-40 (2d Cir. 1939); United States v. Boffa, 513 F. Supp. 517, 527 (D. Del. 1981); SEC v. Harrison, 80 F. Supp. 226, 230 (D.D.C. 1948), *modified in part*, 184 F.2d 691 (D.C. Cir. 1950), *vacated as moot and remanded for dismissal*, 340 U.S. 908 (1951). Commentators have suggested that the SEC can use the crime-fraud exception to pierce a corporation's privilege in most cases involving a past violation of the securities laws, since the failure to disclose past violations in current or future disclosure documents may be an on-going fraudulent act. *See* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503-68 n.6 (1981); Hoffman, *On Learning of a Corporate Client's Crime or Fraud—The Lawyer's Dilemma*, 33 BUS. LAW. 1389, 1390-1420 (1978); Myers, *The Attorney-Client Relationship and the Code of Professional Responsibility: Suggested Attorney Liability for Breach of Duty to Disclose Fraud to the Securities and Exchange Commission*, 44 FORDHAM L. REV. 1113, 1113-1144 [hereinafter cited as Myers]; *Lawyer's Dilemma*, *supra* note 7, at 797-814; Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 S. CAL. L. REV. 303, 326-31 (1977) [hereinafter cited as *Shareholder Litigation*].

[65] *See* Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974), *cert. denied*, 419 U.S. 1125 (1975). Under the self defense exception, if the client or a third party brings civil or criminal charges against the attorney for wrongdoing in connection with the attorney's attempt to serve the client, the attorney can disclose privileged communication in his own defense. *See id.*; Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190, 1192-95 (2d Cir. 1974), *cert. denied*, 419 U.S. 998 (1975); United States v. Amrep Corp., 418 F. Supp. 473, 474 (S.D.N.Y. 1976). *See generally*, Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV., 783 (1977) [hereinafter cited as Levine]; *Lawyer's Dilemma*, *supra* note 7, at 808; Note, 29 U. MIAMI L. REV. 376, 383 (1975). If, for example, in *Gulf & Western* the SEC's complaint named Dolkart as an aider and abettor in the securities violations, Dolkart could disclose confidential information that demonstrated his innocence.

[66] *See* 518 F. Supp. at 684 n.11. The *Gulf & Western* court rejected the defendants' argument that the court should require the SEC to prove insider information came from an independent source. *Id.* The district court, however, may have followed the suggestion if the court had decided that the SEC breached Gulf & Western's attorney-client privilege.

the privilege.[67] If the court, however, had found Dolkart provided confidential information that the SEC subsequently used in the investigation, the court would have had to consider what evidence if any the SEC could submit at trial.[68] Clearly, under the common law attorney-client privilege, Gulf & Western could prevent Dolkart from testifying at trial regarding privileged matters he earlier had disclosed to the SEC.[69] If the SEC's complaint rested solely on Dolkart's privileged testimony, then the court presumably would dismiss the complaint.

While the corporation could prevent the attorney from testifying at trial concerning privileged matters, uncertainty exists over whether the corporation could prevent other evidence from being admitted that the SEC acquired as a result of the attorney's unauthorized disclosure of privileged communications. The federal courts have not resolved the issue of whether a court should exclude evidence from an independent source that the government would not have discovered but for the breach of the attorney-client privilege.[70] In the criminal area, the courts use the fruit of the poisonous tree doctrine to prohibit the government from using unconstitutionally seized evidence as the basis for discovering admissible evidence.[71] The attorney-client privilege, however, does not protect a constitutional right,[72] and no federal court yet has applied the fruit of the poisonous tree doctrine in a case involving a violation of the privilege.[73]

Although the attorney-client privilege does not protect a constitutional right, courts consistently have emphasized the crucial role the privilege plays in the overall administration of justice.[74] Without some type of exclusionary rule, nothing would deter the SEC and other governmental agencies from soliciting privileged information from an attorney willing to breach the client's confidences and then using the privileged information to obtain admissible evidence. The SEC would benefit from information that the attorney only obtained because the

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[67] *See* text accompanying notes 33-43 *supra.*

[68] *See* 502 F. Supp. at 346-47.

[69] *See In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979); WIGMORE, *supra* note 1, § 2325 at 632-33.

[70] *See, e.g.*, United States v. Fanning, 477 F.2d 45, 47-48 (5th Cir. 1973); United States v. Boffa, 513 F. Supp. 517, 519-32 (D. Del. 1981); United States v. Bonnell, 483 F. Supp. 1070, 1073-84 (D. Minn. 1979); SEC v. OKC Corp., 474 F. Supp. 1031, 1039-40 (N.D. Tex. 1979); *In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 869-70 (D. Minn. 1979); OKC Corp. v. Williams, 461 F. Supp. 540, 546 (N.D. Tex. 1978).

[71] *See* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); Nardone v. United States, 308 U.S. 338, 339 (1939). The purpose of judicially created exclusionary rules of evidence, such as the fruit of the poisonous tree doctrine, is to deter the government from violating basic constitutional rights. *See* United States v. Janis, 428 U.S. 433, 446, 454-55 (1976).

[72] *See* OKC Corp. v. Williams, 461 F. Supp. 540, 546 (N.D. Tex. 1978).

[73] *See* cases in note 70 *supra.*

[74] *See* text accompanying notes 1-7 *supra.*

client believed the privilege prevented subsequent unauthorized disclosure. Clearly, an attorney-client privilege that does not bar the derivative use of improperly disclosed privileged information is a weak privilege indeed and would not provide the protection necessary to encourage attorney-client communications. Therefore, the courts should consider exercising their supervisory powers in cases similar to *Gulf & Western* to suppress any evidence that derives from a breach of the attorney-client privilege.[75] Applying an exclusionary rule, such as the fruit of the poisonous tree doctrine, in a *Gulf & Western*-type case would protect the corporation's attorney-client privilege and deter the SEC from encouraging corporate counsel to disclose the corporation's confidential communications.

While the *Gulf & Western* court's decision may have a chilling effect on corporate attorney-client communications, the court's discussion of a good cause exception to the attorney-client privilege in favor of the SEC could destroy completely the value of the privilege for corporate clients.[76] In essence, the good cause exception would permit the courts to employ a balance test in specific cases to determine whether the benefits of disclosure outweighed the benefits of preserving the privilege. The balance test approach to the attorney-client privilege differs considerably from the traditional common law approach.[77] Under the common law, the courts consider whether particular communications between a corporate client and attorney fall within the narrowly constructed definition of the attorney-client privilege[78] or within one of the numerous exceptions.[79] Under the common law, once a court determines that the privilege protects a given communication, the protection is absolute no matter how great the evidentiary needs of the party seeking

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[75] *Cf.* SEC v. ESM Gov't Sec., Inc., 645 F.2d 310, 312-318 (5th Cir. 1981) (federal courts should use supervisory power to prevent government agencies from using evidence obtained by fraud, deceit, or trickery); Knoll Associates, Inc. v. FTC, 397 F.2d 530, 533-34 (7th Cir. 1968) (federal courts should suppress evidence government knowingly receives from a thief). Although neither *ESM* nor *Knoll Associates* involved violations of the attorney-client privilege, in both cases the court held that a government agency may not introduce evidence in civil proceedings that the agency obtained by improper means. *See ESM*, 645 F.2d at 312-18; *Knoll Associates*, 397 F.2d at 533-34. Similar logic should apply when a government agency solicits privileged information from an attorney.

[76] *See* 518 F. Supp. at 686; Pickholz, *supra* note 11, at 17.

[77] *See generally Fixed Rules*, *supra* note 35, at 464-77.

[78] *See, e.g.*, Fisher v. United States, 425 U.S. 391, 403 (1976); Osterneck v. E.T. Barwick Indus., Inc., 82 F.R.D. 81, 85 (N.D. Ga. 1979); Federal Savings and Loan Ins. Corp. v. Fielding, 343 F. Supp. 537, 545-46 (D. Nev. 1972); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950); text accompanying note 31 *supra* (definitional elements of attorney-client privilege).

[79] *See* Note, *The Attorney-Client Privilege—Identifying the Corporate Client*, 48 FORDHAM L. REV. 1281, 1302 (1980) [hereinafter cited as *Identifying the Client*]; Note, *The Corporation Attorney-Client Privilege: Culpable Employees, Attorney Ethics, and the Joint Defense Doctrine*, 58 TEX. L. REV. 809, 823 (1980); text accompanying notes 33-37, 64-65 *supra* (discussion of exceptions to attorney-client privilege).

disclosure of the communication.[80] Proponents of the common law approach claim that the traditional privilege provides the attorney and client a necessary degree of certainty regarding the communications that the privilege will protect.[81] The proponents warn that the alternative balance test approach would give the courts too much unguided discretion and would deprive corporations of fixed standards for determining prospectively whether the privilege will protect the corporation's confidential communications with legal counsel.[82] Consequently, the common law proponents predict that the balance test approach, by creating the possibility of forced disclosure upon a showing of good cause, would chill significantly attorney-client communication.[83]

Opponents of the common law approach, on the other hand, argue that the traditional approach unduly neglects any good cause reasons the discovering party may have to justify disclosure of the adverse party's attorney-client communications.[84] One opponent has argued that the traditional privilege is an outdated evidentiary rule which is contrary to the liberal policies of discovery that now exist.[85] Another opponent of the traditional privilege has argued that the common law approach in reality does not provide corporations the clear guidelines necessary to justify a fixed rule approach.[86] Therefore, the opponents assert that any chilling of the attorney-client relationship that results from the adoption of the

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[80] *See* Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, 35 BUS. LAW. 5, 17 (1979); *Control Group Test*, *supra* note 3, at 425-26.

[81] *See* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981). In *Upjohn*, the Supreme Court emphasized that an effective attorney-client privilege must possess clear and predictable guidelines. *Id.*; *supra* note 8 (control group test rejected for not providing clear and predictable guidelines).

[82] *See* Pickholz, *supra* note 11, at 17; Weissenberger, *supra* note 35, at 918; *Control Group Test*, *supra* note 3, at 426; *Shareholder Litigation*, *supra* note 64, at 313.

[83] *See* Pickholz, *supra* note 11, at 17; Weissenberger, *supra* note 35, at 918; *Shareholder Litigation*, *supra* note 64, at 313 & n.53, 321-22.

[84] *See* MCCORMICK, *supra* note 5, § 87, at 176-77; *Fixed Rules*, *supra* note 35, at 464-77; *Identifying the Client*, *supra* note 79, at 1305-07; *Lawyer-Client Privilege*, *supra* note 55, at 257-59.

[85] *See The Scope of the Privilege*, *supra* note 5, at 469-70.

[86] *See Fixed Rules*, *supra* note 35, at 470-71, 473-75. The student commentator in *Fixed Rules* pointed to six sources of ambiguity that preclude a corporation from ever knowing with certainty whether a court will find that the attorney-client privilege protects particular communications with counsel. *Id.* The commentator noted that:

(1) the distinction between legal and business advice is vague and a court may manipulate the distinction in a given case to reach a desired result;
(2) the distinction between an on-going crime and a past crime similarly is vague and subject to manipulation;
(3) a court may find that the corporation did not intend the communication with counsel to be confidential;
(4) a court may find that the corporation lost the privilege by disclosing the confidential communications to too many corporate employees or to outsiders;
(5) neither the control group nor the subject matter test contain clear guidelines

balance test alternative will be outweighed by the benefits that accrue from a freer discovery process.[87]

Although a few state courts have adopted the balance test approach as a general rule to apply in privilege cases,[88] the federal courts have treated the balance test as an exception to the traditional approach that should be employed only in certain narrow situations.[89] The landmark case in this area is *Garner v. Wolfinbarger*.[90] In *Garner*, the Fifth Circuit held that shareholders in a combined derivative-class action suit against their corporation may pierce the corporation's attorney-client privilege for good cause.[91] The *Garner* court reasoned that corporate management owes a fiduciary duty to the shareholders to manage the corporation for

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for determining when the privilege will protect given corporate employee-attorney communications; and

(6) since a corporation may do business in multiple jurisdictions with different privilege rules, the corporation cannot predict which privilege rules will apply in a given civil suit.

Id.

[87] *See* MCCORMICK, *supra* note 5, § 87, at 176-77; Levine, *supra* note 65, at 817; *Fixed Rules*, *supra* note 35, at 464-77; *Identifying the Client*, *supra* note 79, at 1305-07; *Lawyer-Client Privilege*, *supra* note 55, at 257-59.

[88] *See In re* Kozlov, 79 N.J. 232, 243-44, 398 A.2d 882, 886-87 (1979); Jackson v. Pillsbury, 380 Ill. 554, 576, 44 N.E.2d 537, 547 (1942).

[89] *See* Garner v. Wolfinbarger, 430 F.2d 1093, 1100-04 (5th Cir. 1970), *cert. denied sub nom.* Garner v. First Am. Life Ins. Co., 401 U.S. 974 (1971) (shareholders in derivative and class action against corporation); Donovan v. Fitzsimmons, 90 F.R.D. 583, 585-87 (N.D. Ill. 1981) (Secretary of Labor in civil enforcement action against managers of employee pension funds); *In re* LTV Securities Litigation, 89 F.R.D. 595, 606-08 (N.D. Tex. 1981) (buyers and sellers of corporation's stock in class action against corporation); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 31 (N.D. Ill. 1980) (minority shareholders in derivative, class, and antitrust action against corporation and directors); Panter v. Marshall Field & Co., 80 F.R.D. 718, 722-24 (N.D. Ill. 1978) (shareholders in class action against corporation, directors, and officers); Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 483 (E.D. Pa. 1978) (purchasers of stock in class action against corporation); *In re* Transocean Tender Offer Securities Litigation, 78 F.R.D. 692, 694-98 (N.D. Ill. 1978) (minority shareholders in class action against majority shareholder); Broad v. Rockwell Int'l Corp., [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,894 (N.D. Tex. 1977) (debenture holders in class action against corporation); Valente v. Pepsico, Inc., 68 F.R.D. 361, 366-70 (D. Del. 1975) (minority shareholders in class action against majority shareholder); Bailey v. Meister Brau, Inc., 55 F.R.D. 211, 212-15 (N.D. Ill. 1972) (minority shareholder in purchased company in breach of contract action against purchaser).

[90] 430 F.2d 1093 (5th Cir. 1970), *cert. denied sub nom.* Garner v. First Am. Life Ins. Co., 401 U.S. 974 (1971).

[91] *See id.* at 1100-04. In *Garner*, minority shareholders of a life insurance company brought a class action alleging violations of various federal and state securities laws and common law fraud. *Id.* at 1095. The plaintiff shareholders sought to recover the price they had paid for stock in the company, naming as defendants various directors, officers, and controlling persons in the company. *Id.* In addition, the stockholders brought a derivative action on behalf of the company against the various defendants. *Id.* The company asserted the attorney-client privilege during the plaintiffs' deposition of the attorney who handled the allegedly fraudulent stock issuance for the company. *Id.* at 1095-96. The district court held that a corporation has no right to assert the privilege against stockholders when the

the benefit of the shareholders.[92] Therefore, the *Garner* court concluded that when shareholders bring suit alleging that the corporation has acted adversely to the shareholders' interests, the courts should balance the corporation's right to assert the attorney-client privilege against the shareholders' good cause reasons for piercing the corporation's privilege.[93]

Subsequent to *Garner*, courts have extended the availability of the balance test to other situations where a discovering party could claim breach of a fiduciary duty by the corporation resisting discovery.[94] Thus, a federal court has allowed stock purchasers[95] and debenture holders[96] to

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shareholders bring an action alleging that the corporation and its officers and directors have engaged in wrongdoing. *See* Garner v. Wolfinbarger, 280 F. Supp. 1018, 1019 (N.D. Ala. 1968), *vacated and remanded*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). The Fifth Circuit disagreed with the district court and held that the corporation had a qualified right to assert the privilege, subject to the capacity of the plaintiff shareholders to show good cause. *See* 430 F.2d at 1103-04.

[92] *See* 430 F.2d at 1101-04.

[93] *See id.* In *Garner*, the Fifth Circuit provided a list of nine guidelines that a court should consider in weighing whether the shareholders have shown good cause in a particular case. *Id.* at 1104. The nine indicia of good cause are as follows:

(1) the number of shareholders and the percentage of stock they represent;
(2) the bona fides of the shareholders;
(3) the nature of the shareholders' claim and whether it is obviously colorable;
(4) the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;
(5) whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality;
(6) whether the communication related to past or to prospective actions;
(7) whether the communication is of advice concerning the litigation itself;
(8) the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing;
(9) the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id. Commentators have criticized the *Garner* court for not indicating how the courts are to weigh the nine factors in a given case. *See* Herzel & Hagan, *Do Corporations Really Have An Attorney-Client Privilege?*, 59 CHI. B. REC. 296, 297 (1978); O'Neal, *supra* note 33, at 1782; *Shareholder Litigation*, *supra* note 64, at 316, 322-23. One commentator has predicted that in the future courts employing the *Garner* good cause test will require shareholders merely to show "substantial need" for the evidence. *See Shareholder Litigation*, *supra* note 64, at 322-24. At least to date, however, some courts have denied shareholders privileged information based on one or more of the nine good cause indicia proposed in *Garner*. *See In re* LTV Securities Litigation, 89 F.R.D. 595, 608 (N.D. Tex. 1981) (communication concerned the litigation itself and could be obtained from other sources); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 31 (N.D. Ill. 1980) (communication concerned the litigation itself, plaintiff shareholders held small percentage of stock, and plaintiff shareholders could use information obtained in derivative action in subsequent individual suits); Panter v. Marshall Field & Co., 80 F.R.D. 718, 724 (N.D. Ill. 1978) (communication concerned the litigation itself).

[94] *See* note 89 *supra* (case list).

[95] *See* Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 483 (E.D. Pa. 1978).

[96] *See* Broad v. Rockwell Int'l Corp., [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,894 (N.D. Tex. 1977).

prove good cause in class actions against corporations. In addition, courts have permitted minority shareholders to pierce for good cause the attorney-client privilege of a corporation's majority shareholder.[97] One court, however, has refused to apply the balance test where several participants in a contractual joint venture sought to pierce the privilege of one of the co-participants.[98] The court reasoned that the participants only shared a contractual and not a fiduciary relationship.[99]

The recent case of *Donovan v. Fitzsimmons*[100] represents the most expansive reading of *Garner* to date and may provide analogous support for the good cause dicta in *Gulf & Western*.[101] In *Donovan*, the Secretary of Labor (Secretary) during pre-trial discovery sought the records of the Central States, Southeast, and Southwest Areas Pension Funds (Pension Fund).[102] The Secretary was seeking evidence that certain Pension Fund officials had violated their fiduciary obligations to Pension Fund beneficiaries by engaging in questionable investment transactions.[103] The Secretary brought the action under a provision in the Employees Retirement Income Security Act of 1975 (ERISA) that permits the Secretary to seek appropriate civil relief when pension fund fiduciaries violate their duties.[104] In response to the Pension Fund's assertion of the attorney-client privilege, the Secretary argued that under the *Garner* rationale the Court should allow the Secretary to demonstrate good cause reasons for piercing the Pension Fund's privilege.[105]

The *Donovan* court held that the *Garner* good cause exception should apply when a beneficiary brings charges of fiduciary misconduct against pension fund trustees.[106] Moreover, the court held that the

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[97] *See In re* Transocean Tender Offer Securities Litigation, 78 F.R.D. 692, 695-97 (N.D. Ill. 1978); Valente v. Pepsico, Inc., 68 F.R.D. 361, 366-70 (D. Del. 1975); Bailey v. Meister Brau, Inc., 55 F.R.D. 211, 212-15 (N.D. Ill. 1972).

[98] *See In re* Colocotronis Tanker Securities Litigation, 449 F. Supp. 828, 832-34 (S.D.N.Y. 1978).

[99] *See id.* at 833.

[100] 90 F.R.D. 583 (N.D. Ill. 1981).

[101] *See* text accompanying notes 48-51 *supra*.

[102] *See* 90 F.R.D. at 584.

[103] *See id.* The *Donovan* court did not specify the nature of the investment transactions giving rise to the civil action. *See id.* 584-88.

[104] *See id.* at 583-85. In *Donovan*, the Secretary of Labor brought suit under § 1132(a) of the Employees Retirement Income Security Act of 1975 (ERISA). 29 U.S.C. § 1132(a) (1976). Section 1132(a) allows the Secretary of Labor to bring a civil action for appropriate relief for violations of § 1109. *See* 29 U.S.C. § 1132(a). Under § 1109, a pension fund trustee personally is liable for any breach of a fiduciary duty defined in the Act. *See* 29 U.S.C. § 1109 (1976).

[105] *See* 90 F.R.D. at 585. In *Donovan*, the Pension Fund argued, without citing supporting authority, that *Garner* was a poorly reasoned opinion that the *Donovan* court should reject. *Id.* at 585-86. The Pension Fund also argued that under the *Garner* rationale, only the beneficiaries, and not the Secretary of Labor, may invoke the good cause exception. *Id.*

[106] *See id.* at 586. The *Donovan* court reasoned that pension fund trustees, like corporate managers, exercise authority for the benefit of their beneficiaries. *Id.* Similarly, pension fund beneficiaries, like corporate stockholders, may need privileged information to

Secretary of Labor may invoke the good cause exception in his own capacity when bringing a civil suit under ERISA specifically on behalf of the pension fund's beneficiaries.[107] Applying the *Garner* good cause indicia to the facts in *Donovan*, the court rejected the Pension Fund's privilege claim.[108]

Significantly, *Donovan* is the first case in the *Garner* tradition that has permitted a government agency to stand in the shoes of private beneficiaries and assert the good cause exception against managerial fiduciaries. Given *Donovan*, the other good cause cases, and the *Gulf & Western* dicta, the SEC conceivably will argue for the good cause exception in the near future.[109] The courts, however, should reject the SEC's arguments. The SEC is unable to demonstrate either directly or indirectly the fiduciary-beneficiary link that the good cause cases have required. No court, for example, yet has held that a fiduciary-beneficiary relationship exists between corporations and the SEC.[110] Furthermore, Congress never has granted the SEC special rights to sue on behalf of corporate stockholders to enforce fiduciary duties owed by the corporation to the stockholders.[111]

Since the SEC cannot demonstrate a fiduciary link, the Commission may attempt to justify a right to invoke the good cause exception on alternative grounds. The SEC could argue that the courts should allow the Commission to invoke the good cause exception whenever the Commission can demonstrate an "affinity of interest" with the shareholders of the corporate defendant. As precedent, the SEC could refer to

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determine if the trustees are fulfilling their fiduciary duties. *Id.* Therefore, the court concluded that the *Garner* rule applies to the pension fund setting. *Id.*

[107] *See id.* at 586. The *Donovan* court noted that Congress gave the Secretary of Labor specific authority to sue on behalf of pension fund beneficiaries in ERISA. *See id.*; *supra* note 104 (discussion of 29 U.S.C. §§ 1109, 1132(a)). The *Donovan* court held that as long as the Secretary was pursuing the specific interests of the pension fund beneficiaries, and not broader public interests, sufficient identity of interest existed for the Secretary to invoke the *Garner* exception. 90 F.R.D. at 586-87.

[108] *See* 90 F.R.D. at 587. In reviewing the *Garner* good cause criteria, the *Donovan* court noted that the following facts contributed to a finding of good cause:

(1) The Secretary of Labor sought restitution of benefits for all potential Pension Fund beneficiaries;
(2) The Secretary sought records not pertaining to the Pension Fund's litigation strategy;
(3) The Secretary made the discovery request in good faith and was not engaged in a fishing expedition;
(4) The Secretary's claim was colorable;
(5) The Secretary's request was limited in scope and directly related to the issues in the suit.

Id.; *supra* note 93 (discussion of *Garner* good cause test).

[109] *See* Vilkin, *supra* note 11, at 3. John Fedders, the current enforcement chief at the SEC, has stated that he is considering judicially testing the *Gulf & Western* dicta in the near future. *Id.*

[110] *See* Myers, *supra* note 64, at 1125.

[111] *Cf.* Donovan v. Fitzsimmons, 90 F.R.D. 583, 583-85 (N.D. Ill. 1981); *supra* note 104.

Donovan, where the court stressed that the Secretary of Labor may invoke the good cause exception only when pursuing the particular interests of the pension fund's beneficiaries and not broader public interests.[112] If the courts accept the "affinity of interest" test as a substitute for the traditional fiduciary link requirement, then the courts will face the problematic task of determining when the SEC is suing a corporation to protect the particular interests of the corporation's shareholders rather than suing to enforce the federal securities laws in general. Alternatively, the courts could abandon the narrow limits imposed by *Garner*, *Donovan*, and the other good cause cases and adopt the broad public interest rationale suggested in *Gulf & Western*.[113] If the courts adopt the public interest rationale, then in every case where the SEC could show a good faith need for confidential attorney-client communications, presumably the corporation's privilege would yield.[114]

If, however, the courts permit the SEC to invoke a good cause exception to the traditional attorney-client privilege, under either the affinity of interest or the public interest rationale, troublesome new issues will arise. For example, other federal agencies may claim the same right to the exception that the SEC would possess. Arguably, the courts either will have to extend the good cause exception to all government agencies or will have to develop a justification for discriminating among public agencies.[115] If the courts were to limit the good cause exception to particular agencies, then the courts additionally must decide whether

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[112] *See* note 107 *supra*.

[113] *See* text accompanying notes 48-51 *supra*.

[114] *See* Pickholz, *supra* note 11, at 17.

[115] *See* Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). An issue in *Permian* was whether public policy reasons existed for allowing the SEC to receive privileged information that would not be available to other government agencies. *See id.* at 1221-22. Although *Permian* deals with waiver of the attorney-client privilege, rather than possible exceptions to the privilege, the court's public policy observations are relevant to the issue of whether a basis exists for discriminating among government agencies.

In *Permian*, a corporation disclosed privileged information to the SEC for the purpose of expediting approval of a registration statement that the corporation needed for a proposed stock exchange with another corporation. *Id.* at 1216. When the SEC decided to share some of the information with the Department of Energy, the corporation sought a court order to prevent the disclosure. *Id.* at 1217. The corporation claimed that under the limited waiver theory of Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977), a voluntary disclosure of privileged information to the SEC did not preclude the corporation from asserting the privilege against other government agencies. 665 F.2d at 1219-21. The *Permian* court rejected the corporation's argument and held that a voluntary disclosure to one government agency is a waiver of the privilege as against all other agencies. *Id.* at 1221-22. The *Permian* court observed that neither Congress nor the courts had established a priority system that placed greater value on cooperation with the SEC than on cooperation with other regulatory agencies. *Id.* Therefore, no basis existed for allowing corporations to release privileged information to the SEC while refusing to release the information to other agencies. *Id.* By similar logic, if the courts permit the SEC a good cause exception to the attorney-client privilege, then the courts should permit other government agencies the exception as well.

government agencies that obtain confidential communications under the exception may share the communications with government agencies or private parties that do not qualify for the exception and cannot obtain the communications under the traditional attorney-client privilege.

The *Gulf & Western* dicta may be a significant judicial step toward a general abandonment of the traditional approach to the attorney-client privilege in favor of the alternative balance test approach.[116] Whether the courts adopt an affinity of interest or a broad public interest justification for permitting some or all government agencies to invoke the good cause exception, the effect will be to increase dramatically the uncertainty corporations face in determining whether the attorney-client privilege protects confidential communications. Moreover, if other courts demonstrate *Gulf & Western*'s tolerance for questionable SEC investigatory practices, the privilege will be weakened further.[117] The better course is to retain the traditional privilege where a fiduciary relationship does not exist and to react critically to the type of investigation the SEC conducted in *Gulf & Western*. Otherwise, the courts may as well abandon the attorney-client privilege entirely in the corporate context since, as the Supreme Court recently stated: "An uncertain privilege . . . is little better than no privilege at all."[118]

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[116] *See* text accompanying notes 76-87 *supra* (discussion of traditional and balance test approaches to attorney-client privilege).

[117] *See* text accompanying notes 19-24, 52-59 *supra* (discussion of SEC's investigatory practices).

[118] *See* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).