

CORPORATIONS AND THE ATTORNEY-CLIENT PRIVILEGE:

GARNER v. WOLFINBARGER

Twice in recent years federal court decisions¹ have denied defendant corporations the right to invoke the attorney-client privilege. Severely criticized,² the first of these decisions was reversed³ with the appellate court noting, however, that the availability of the privilege in the corporate context must be strictly construed.⁴ The second decision, *Garner v. Wolfinbarger*,⁵ also reversed on appeal, has again raised the question of limitations on the availability of the attorney-client privilege to corporations.

In *Garner*, the stockholder of First American Life Insurance Co. of Alabama brought a class action against the corporation, alleging common law fraud and violations of federal and state securities laws.⁶ During the pre-trial deposition stage, the corporation objected to certain questions posed to the corporation's former attorney concerning corporate communications made to him. The corporation argued that the attorney-client privilege barred the plaintiff from obtaining disclosure of communications, either oral or written, between the corporate client and its attorney.⁷ The district court ruled the privilege unavailable to the corporation as against the plaintiff stockholders,⁸ holding that the common law did not extend the privilege to corporations. The Court of Appeals for the Fifth Circuit reversed the decision of the district court and remanded the case because the lower court had not applied the proper test for resolution of the privilege issue. The court of appeals held that, in shareholder suits alleging corporate activity adverse to stockholder interests, the protection of both stockholder and corporate interests requires that the availability of the privilege be subject to the right of stockholders to

¹ *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill. 1962) and *Garner v. Wolfinbarger*, 280 F. Supp. 1018 (N.D. Ala. 1968). For general recognition of the privilege, see *United States v. Louisville & N.R.R.*, 236 U.S. 318 (1915); *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956), cert. denied, 352 U.S. 833 (1956).

² See Note, 76 Harv. L. Rev. 655 (1963); Note, 4 B.C. Ind. & Com. L. Rev. 416 (1963).

³ *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963).

⁴ *Id.* at 323.

⁵ *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).

⁶ The stockholders brought suit against the directors, officers and controlling persons, as well as against the corporation itself, seeking recovery of the purchase price of their stock. The plaintiffs also claimed that the corporation was damaged by the alleged fraud in the purchase and sale of securities, and, on behalf of the corporation, asserted a derivative action against the various individual defendants. *Id.* at 1095.

⁷ Since the privilege is for the benefit of the client, it is the client and not the attorney who must object to the disclosure of the communication. 8 J. Wigmore, *Evidence* § 2321, at 629 (McNaughton rev. 1961).

⁸ 280 F. Supp. at 1019. For thorough analyses of this decision see Comment, *The Attorney-Client Privilege in Shareholders' Suits*, 69 Colum. L. Rev. 309 (1969), and Note, 29 Ohio St. L.J. 1046 (1968).

show cause why the privilege should not be invoked in the particular instance.⁹

This comment initially will consider the historical basis of the attorney-client privilege and its present application to the corporate client. The analysis will then focus upon the soundness of the *Garner* court's rationale, as well as upon that decision's likely impact on the traditional limitations on the attorney-client privilege in the corporate context.¹⁰

I. COMMON LAW EVOLUTION OF THE ATTORNEY-CLIENT PRIVILEGE

Although the right of the public to every man's evidence stood as a fundamental principle at common law,¹¹ certain traditional exceptions to the rule have developed. Recognition of the attorney-client privilege as one of these exceptions resulted from the realization of the need for freedom of consultation between the client and his attorney, without apprehension of the court-compelled disclosure of the substance of their communications.¹² Rooted in the societal belief in the need for confidentiality in this relationship, the attorney-client privilege was originally recognized in order to preserve "*the oath and the honor of the attorney.*"¹³ Later, the emphasis shifted to the client and his concern for freedom from apprehension in conferring with his attorney in regard to confidential matters. This latter policy has gained wide judicial acceptance, and American courts now generally recognize a broad application of the privilege.¹⁴

In spite of this recognition, the courts are careful to protect the attorney-client privilege against corporate abuse. In several cases the privilege has been denied where the corporation, under the guise of the attorney-client privilege, has "funnelled" material into the hands of its lawyers for the purpose of avoiding disclosure.¹⁵ Similarly, limitations have been placed on the group of individuals who may act on behalf of the corporation as the client in communicating with corporate counsel. One approach to limiting the corporate personnel who may act in this capacity extends the benefit of the privilege only to those controlling the decision-making process.¹⁶ Another view has advocated extending the protection beyond those involved in the decision-making

⁹ 430 F.2d at 1103.

¹⁰ A choice of law question was raised in *Garner*. The court concluded that in order to preserve the fact-finding process in an independent judicial system, federal law must apply, although it is incumbent upon a court in that system to respect especially strong state policies. No such policy was found here. See Comment, 69 Colum. L. Rev. 309 (1969), for a detailed discussion of this aspect of the case.

¹¹ 8 J. Wigmore, *supra* note 7, § 2192, at 70.

¹² *Id.* § 2291, at 545.

¹³ *Id.* § 2290, at 543.

¹⁴ *Id.* § 2294, at 563.

¹⁵ *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d at 324.

¹⁶ Schaefer, *The Attorney-Client Privilege in the Modern Business Corporation*, 20 Bus. Law. 989 (1965).

process.¹⁷ Courts faced with this issue have generally adopted the "control group" approach.¹⁸ Influenced by these limitations on the attorney-client privilege in the corporate context, *Garner* would permit the corporation's assertion of the privilege to be obviated when the stockholders can present "good cause" as to why the communication should be disclosed.

II. THE FOUNDATIONS OF GOOD CAUSE

The *Garner* court's conception of good cause is derived from an analysis of the "particularized context"¹⁹ in which the corporation claims the attorney-client privilege. The particularized context results directly from the nature of the relationship between the parties involved in the suit. Ordinarily, parties engaged in litigation are allowed to assert the attorney-client privilege to avoid disclosure to their adversaries of confidential communications made to their attorneys. A different result, however, might be expected in a case such as *Garner* when the party asserting the privilege is legally obligated to act on behalf of those against whom the privilege is asserted. In *Garner* the fiduciary obligation of corporate management to the shareholders constitutes the particularized context which concerned the court. Since the corporation, as a fiduciary in the corporate-shareholder context, owes a high degree of care to its principal, it may be obligated to disclose information to the adversary stockholder, while against other adversaries such information would normally be privileged. *Garner* reasons that the special nature of this corporation-shareholder relationship warrants a reevaluation of the balance of interests that has traditionally determined the availability of the privilege.

Both the commentators and the cases²⁰ have consistently recognized assertion of the privilege as valid only when the harm which disclosure would cause to the attorney-client relationship would be greater than the benefit to be derived from placing all the facts into evidence. Put more simply, the court must determine whether the harm

¹⁷ Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 *Yale L.J.* 953 (1956).

¹⁸ See, e.g., *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962); *Garrison v. General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963).

¹⁹ 430 F.2d at 1101.

²⁰ Wigmore lists the following conditions as essential for the attorney-client privilege to arise:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained from correct disposal of the litigation.

8 Wigmore, *supra* note 7, § 2285, at 527, and cases cited therein. ; i

in limiting the client's freedom from apprehension of disclosure by his legal counsel outweighs the benefit of making the attorney's information discoverable. Because of the particularized context in which the case arises, *Garner* substitutes for the traditional test a balance of interests test based upon the presence or absence of the elements of good cause.

Unlike the traditional test, this new balance emphasizes the harm to management flexibility rather than exclusively that harm which disclosure would have on the corporation's relationship with its attorney. The new balance of interests also focuses upon the good cause which the shareholder must show in order to pierce the corporation's privilege. From the stockholder's point of view, the presence or absence of good cause depends largely upon the extent of the shareholder interests involved in the suit, and upon the likelihood of harm to these interests.²¹ By measuring good cause in these terms, *Garner* attempts to preclude the possibility of harassment suits by a small number of shareholders. At the same time, by requiring the shareholders to show some likelihood of harm to their interests as a result of actual or proposed corporate action, *Garner* attempts to avoid impairment of the corporate management's capacity to function effectively. As *Garner* points out, the responsibility of corporate management to act in the best interests of the corporation may at times require it to act apparently adversely to some or all stockholder interests.²² The corporation's need for managerial flexibility and freedom from harassment suits must be balanced with the shareholder interests and the likelihood of their suffering legally cognizable harm. The necessity of balancing these interests, *Garner* posits, both militates against absolute denial of the attorney-client privilege to the corporation and suggests easing the burden on suing shareholders to prove the benefit of disclosure as against the injury to the corporation's managerial capacity.

Garner finds support for its limitation of the privilege among the traditional legal axioms of corporation-shareholder relations and among the common law exceptions to the attorney-client privilege. Corporate law has long recognized the right of shareholders to examine the corporation's books even though the basis for the inquiry may be to

²¹ In enunciating the factors necessary for consideration in its new balance of interests test, *Garner* lists, in addition to the number of shareholders and the likelihood of harm to their interests, the necessity of their procuring the information, and whether the claim is colorable. These additional factors will be treated subsequently, particularly the question of the necessity of the shareholders to have corporate information. 430 F.2d at 1104.

²² Such a situation might occur where a corporation decreases dividend payments in order to undergo capital development. Although this capital investment plan may ultimately increase the shareholder's interest in the corporation, an individual stockholder might object to the lower dividend rates. If the attorney-client privilege cannot be invoked at all, the dissident stockholder without any showing that his claims constitute a legally cognizable harm may be able, at discovery, to expose the proposed corporate transaction, perhaps endangering its completion.

commence an action.²³ Similarly, joint interest and prospective crime or fraud have been recognized as exceptions to the attorney-client privilege.²⁴ *Garner* argues that these exceptions and rules, when considered compositely, provide a sound rationale for limiting the availability of the privilege in the special relationship between the stockholders and the corporation. The exceptions and rules, *Garner* concludes, frame the limitations on the privilege in which the good cause test is rooted.

Garner's conclusion, however, ignores some fundamental legal limitations. It is submitted that the court erred in resting its rationale on these narrow exceptions and rules, since none of them have been, or should be, relied upon in considering the availability of the attorney-client privilege to the corporation in shareholder suits. The grounding of the rationale for its new balance of interests test on these rules and exceptions required the *Garner* court to (1) misapply the "right to inspect" rules, (2) embellish the joint interest exception, and (3) avoid the troublesome, but important, evidentiary problems of the expanding prospective crime or fraud exception.

III. THE ANALOGY TO THE RIGHT TO EXAMINE CORPORATE RECORDS

On the surface, the analogy of the shareholder's right to examine corporate records to the shareholder's right of access to the substance of client-attorney communications appears sound. Like the balance between corporate and stockholder interests which *Garner* articulates, the right to examine rule takes effect when the stockholder has no other means of ascertaining the information contained in the corporate records. Similarly, courts occasionally curtail the right to examine in cases where the extent of the petitioning stockholder's holdings are small compared to those of the other shareholders of the same class.²⁵

This analogy has definite limitations, however, the most important of which is the character of the evidence in question. When the availability of the attorney-client privilege is at issue, the court is concerned exclusively with communications between the client and his attorney made in the strictest confidence.²⁶ In contrast, when the issue before the court is the right to examine, the shareholder seeks evidence contained within the corporate records. Because they lack the aspect of confidentiality, corporate records, with the exception of confidential notes and letters to counsel, cannot assume the character of confidential communications.

In practice, the right to examine is more like the "work product"

²³ 5 W. Fletcher, *Private Corporations*, § 2225, at 829-30 (perm. ed. rev. 1967).

²⁴ Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for United States District Courts and Magistrates, 46 F.R.D. 161 § 5.03(d) (2) and (5) at 251.

²⁵ 5 W. Fletcher, *supra* note 23, § 2231, at 866.

²⁶ Wigmore's first condition is confidentiality. 8 J. Wigmore, *supra* note 7, § 2285, at 527.

doctrine of *Hickman v. Taylor*²⁷ than the attorney-client communication concept. The work product rule involves material or information collected or devised by the client's attorney which is privileged only if the adversary has an alternative means of ascertaining the data it contains.²⁸ The attorney-client privilege, in contrast, focuses upon the relationship of the client and his attorney, not upon the adversary's lack of information. While the work product rule merely concerns information, and the attorney's impressions of it,²⁹ the attorney-client privilege accords protection to a confidential relationship which the community deems necessary and beneficial. In treating the attorney-client privilege and the right to examine rule as analogous, *Garner*, in effect, equates the work product rule and the attorney-client privilege when, in fact, they are totally unrelated.³⁰ In relying upon the right to examine rule as a basis for permitting shareholders to defeat the corporation's assertion of the attorney-client privilege, *Garner* mistakes the policy considerations behind the right to examine and the privilege. As a result, the court's effort to analogize these concepts confuses rather than clarifies the question of shareholders' rights to corporate communications.

IV. THE JOINT INTEREST EXCEPTION

The *Garner* court also cited the growth and expansion of the joint interest exception to the attorney-client privilege as an indication of the limitations on the availability of the privilege to the corporation.³¹ The joint interest exception arises, according to Wigmore, "when the same attorney acts for two parties having a common interest, and each party communicates with him."³² Communications from one client to the attorney "are not privileged in a controversy between the two original parties, in as much as the common interest and employment forbade concealment by either from the other."³³ Recalling its conception of the "particularized context" of corporation-shareholder relations, *Garner* concluded that both parties to the suit have a common interest in the success of the corporate undertaking and that the policy of the joint interest exception applies to the corporation-shareholder relationship.

On the surface, the relationship between the corporation and the shareholders and their attorney appears quite similar to the traditional

²⁷ 329 U.S. 495 (1947).

²⁸ *Id.* at 511.

²⁹ "Nor does . . . [the attorney-client] privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." 329 U.S. at 508.

³⁰ See, e.g., *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir. 1963).

³¹ 430 F.2d at 1103.

³² 8 J. Wigmore, *supra* note 7, § 2312, at 603.

³³ *Id.*

business setting in which the joint interest exception arises. Under close scrutiny, however, application of the joint interest exception to the corporation's assertion of the attorney-client privilege fails in two respects. First, the joint interest exception has generally been recognized only in cases involving business partners who may exercise the right of *delectus personarum*—the right to choose one's partners. Second, the application of the joint interest exception in cases concerning business associations in which *delectus personarum* is less prominent is not analogous to the corporate context for another reason: the corporate structure naturally precludes the opportunity for communication that the parties and their attorneys must normally have in order for the joint interest exception to arise.

Garner draws, in part, from partnership cases³⁴ in order to show the wide acceptance of the joint interest exception. In relying upon these cases the court largely ignored the difference in the character of the legal relationship between the parties of joint interest in partnership cases and the parties in shareholder suits against the corporation. Because of the entirely consensual nature of the partnership form, which results in each partner having agency status, as well as personal liability for partnership debts, the courts have consistently observed the right to choose one's own partner as being fundamental.³⁵ The economic responsibility each partner undertakes results in a highly consensual relationship of intimacy and confidence³⁶ which naturally vests each partner with the right "to take an equal part in the transaction of the firm's business."³⁷ The concomitant responsibility this right entails also naturally restricts the latitude of action each individual has when he acts in his capacity as a partner. The corporation, on the other hand, is treated as a separate legal entity as distinguished from its shareholders.³⁸ As a result of this separation, liability for corporate actions cannot be assessed against the shareholders beyond the amount of their investment. Consequently, the corporation, though held to a fiduciary standard, has greater freedom of action than does the partnership. Such basic differences between partnership and corporate associations must affect the application of the joint interest

³⁴ *Billias v. Panageotou*, 193 Wash. 523, 76 P.2d 987 (1938) is cited by the court as an example. 430 F.2d at 1103.

³⁵ F. Mechem, *Elements of the Law of Partnership*, § 5, at 7 (2nd ed. 1920). The right of a partner to consent to the selection of his fellow partners is entirely foreign to the corporation. Individual shareholders may normally sell their shares to any purchaser (thereby bringing such a purchaser into the corporation) without conferring with other shareholders or, for that matter, with the corporation itself. Of course, stock transfer restrictions are sometimes placed on shares, but in general they only give the corporation or other shareholders an option to purchase the shares first. More stringent restrictions than this are viewed unfavorably as unreasonable restraints on alienation of property. See O'Neil, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting*, 65 Harv. L. Rev. 773 (1952).

³⁶ F. Mechem, *supra* note 35, § 5, at 7.

³⁷ *Id.* § 177, at 160.

³⁸ *Id.* § 8, at 14; 1 W. Fletcher, *supra* note 23, § 25, at 96.

exception. In the partnership, the requisite closeness of the association does give the parties a joint interest in making any business-related decision, including those arrived at during communications with the partnership's counsel.³⁹ The corporation as a legal entity, conversely, is permitted flexibility in making management decisions in spite of its fiduciary obligation. Shareholders do not have, as the exception is commonly applied, a joint interest with the corporation in any business decisions, and, therefore, should not necessarily have access to corporation-attorney communications.⁴⁰

The joint interest exception has been validly recognized, however, in other business associations in which *delectus personarum* is not prominent. For example, the application of the joint interest exception to the insured-insurer relationship has gained wide acceptance. The parties involved in this relationship are in a conditional creditor-debtor relationship⁴¹ much like that of the corporation and its shareholders. In most insurance cases the question of whether the joint interest exception applies has been raised when the insurer has its attorney represent the insured, and the insured then brings an action against the insurer for bad faith or negligence in settling his claims.⁴² Usually, a crucial part of the insured's case hinges on the communications between the insurer and its attorney, and generally, courts do not permit the insurer to raise the attorney-client privilege since both parties had an opportunity to communicate with the lawyer.⁴³ Except in the case of the closely held corporation, the expansive nature of the public or quasi-public corporation practically precludes opportunities for both parties to confer confidentially with the corporation's counsel. Thus, the application of the joint interest exception to insurance cases⁴⁴ cannot really be considered analogous to the corporate situation discussed in *Garner*.

Other corporate situations, however, possess the necessary conditions for the application of the joint interest exception. Principally,

³⁹ J. Crane and A. Bromberg, *Law of Partnership*, § 48, at 273 and § 67, at 386 (1968).

⁴⁰ Of course, the shareholders and the corporation have a common interest in making profits. However, the "joint interest" exception seems to focus more on the character of the relationship than on its purpose; confidence and intimacy, rather than a common goal, determine a relationship to which the joint interest exception applies.

⁴¹ W. Vance, *Insurance*, § 19, at 121 (Anderson 3rd ed. 1951). The relationship is conditional in that at the end of the insured period, the insurer will pay, in addition to the full value of the policy, such equitable share of the surplus as may be apportioned to such policy.

⁴² See, e.g., *Henke v. Iowa Home Mutual Gas Co.*, 249 Iowa 625, 87 N.W.2d 920 (1958).

⁴³ *Id.*; *Car and General Ins. Corp. v. Goldstein*, 179 F. Supp. 888 (S.D.N.Y. 1959), *aff'd.*, 277 F.2d 162 (2d Cir. 1960); *Liberty Mutual Ins. Co. v. Engels*, 41 Misc. 2d 49, 244 N.Y.S.2d 983 (1963); Note, 44 Iowa L. Rev. 215 (1959).

⁴⁴ *Garner* also cites cases on joint trustees, *Boyle v. Kempkin*, 243 Wis. 86, 9 N.W.2d 589 (1943), and makers of mutual wills, *Wilson v. Gordon*, 73 S.C. 155, 53 S.E. 79 (1905), in order to demonstrate the universal application of the joint interest exception. Neither of these situations seems analogous to the corporate-shareholder relationship.

the recent judicial and legislative developments in the area of the close corporation indicate that the close corporation should, in some instances, be subjected to partnership, rather than corporate law, principles. For example, some courts have imposed a fiduciary duty on shareholders dealing with each other⁴⁵ much like the fiduciary duty partners owe to each other.⁴⁶ Commentators and cases have urged application of partnership liability to stockholders in undercapitalized close corporations when the shareholders appear to have taken the corporate form merely to shield themselves from personal liability.⁴⁷ In addition, changes in the rules regarding the admissibility of corporate books and records in criminal prosecutions against the corporation's officers have extended "... to close corporations the rules applicable to the admissibility of partnership books."⁴⁸ The application of partnership principles to the close corporate form, especially in matters concerning the corporation's duty to give evidence, tends to erode the corporation's privilege to keep certain communications from its shareholders. Furthermore, the close corporation, because of its size, does not preclude opportunities for the shareholders to consult with the corporation's counsel, but rather fosters such opportunities since many close corporation shareholders serve as the corporation's officers.⁴⁹

Despite the apparent adaptability of the joint interest exception to the close corporation, the exception, as delineated in the non-corporate context, cannot be applied to the publicly held corporation. Both the limited right of the shareholder to participate in business decisions and the structural character of the publicly held corporation dispel any serious argument for analogizing the joint interest exception in other business associations to corporation-shareholder relations.

Some support for the joint interest analogy apparently emerges from a case in the corporation-shareholder context dealing with the accountant-client privilege. In *Pattie Lea, Inc. v. District Court*,⁵⁰ a shareholder brought an action against the corporation for an accounting on behalf of himself and all stockholders similarly situated. As part of the investigation, the shareholders sought to compel the corpora-

⁴⁵ *Gord v. Iowana Farms Milk Co.*, 245 Iowa 1, 60 N.W.2d 820 (1953); *Sher v. Sandler*, 325 Mass. 348, 90 N.E.2d 536 (1950).

⁴⁶ *F. Mechem*, *supra* note 35, § 170, at 152.

⁴⁷ Note, *Should Shareholders Be Personally Liable for the Torts of Their Corporations?* 76 Yale L.J. 1190 (1967); *Minton v. Cavaney*, 56 Cal. 2d 576, 364 P.2d 473 (1961); *Automotriz Del Golfo De California S.A. De C.V. v. Resnick*, 47 Cal. 2d 792, 306 P.2d 1 (1957).

⁴⁸ See O'Neil, *Developments in the Regulation of the Close Corporation*, 50 Cornell L.Q. 641, 653 (1964-65), in which Prof. O'Neil discusses *Wilkes v. United States*, 80 F.2d 285 (9th Cir. 1935) and *Cullen v. United States*, 2 F.2d 524 (9th Cir. 1924), cert. denied, 267 U.S. 593 (1925). Prof. O'Neil points out that traditionally the party bringing the complaint has been required to show cause why corporate records should be admitted as evidence. Partnership records, in contrast, have always been admitted without such a showing.

⁴⁹ 1 F. O'Neil, *Close Corporations* § 1.07, at 13 (1958).

⁵⁰ 161 Colo. 493, 423 P.2d 27 (1967).

tion's accountant to testify concerning certain matters affecting the corporation's financial condition. Even though a statute recognized the certified public accountant-client privilege,⁵¹ the Colorado Supreme Court held that the privilege did "not protect a corporation from being required to disclose to its own stockholders in a derivative suit brought in good faith against the corporation, communications made by the corporation to its certified public accountant."⁵² In light of the recognition of the accountant-client privilege in several states,⁵³ this case apparently provides a sound basis for the *Garner* decision's joint interest analogy. Close scrutiny of this decision and other federal decisions involving the accountant-client privilege, however, reveals *Pattie Lea* to be somewhat of an anomaly and perhaps inapplicable to the situation in *Garner*.

The lack of identification of the alleged communications by the court in *Pattie Lea* contributes in large measure to the case's uncertainty as good precedent. The court's opinion does not indicate which of the broad range of privileged communications covered in the statute is in dispute. According to the provisions of the statute, the working papers of an accountant are included as privileged communications.⁵⁴ Since there is no description of the communications involved in the opinion, it might well be argued that the court's rationale in denying the privilege is predicated on the "work product" rule of *Hickman v. Taylor*,⁵⁵ which protects the working papers of an attorney, rather than on the traditional concept of the attorney-client privilege. Further support for this contention may be found in the cases cited in the *Pattie Lea* opinion. The court raised only one supporting case,⁵⁶ one concerned exclusively with discovery efforts to gain access to material which the defendant's attorney had obtained from a witness.

Recent legal developments concerning the accountant-client privilege itself also undermine the applicability of the accountant-client privilege to attorney-client problems. A persuasive factor is the federal courts' refusal to recognize the extension of the accountant-client privilege to work papers held by the accountant.⁵⁷ In *Himmelfarb v.*

⁵¹ The statute provided in part: "A certified public accountant shall not be examined without consent of his client as to any communication made by his client, to him in person or through media of books of accounts and financial records, or his advice, reports or *working papers* made thereon in the course of professional employment. . . ." (Emphasis added.) Witnesses, Colo. Rev. Stat. Ann., ch. 154 § 1-7(1) (1963).

⁵² 423 P.2d at 29.

⁵³ "Fifteen states and Puerto Rico have enacted statutes conferring the status of privileged communications upon professional information obtained by accountants. Although there are substantial variations among these statutes, the overall trend is toward the creation of a broad accountant-client privilege." Note, 46 N.C. L. Rev. 419, 420-22 (1968).

⁵⁴ 433 P.2d at 29.

⁵⁵ 329 U.S. 495 (1946).

⁵⁶ D.I. Chadbourne, Inc. v. Superior Ct., 60 Cal. 2d 723, 388 P.2d 700 (1964).

⁵⁷ Sale v. United States, 228 F.2d 682 (8th Cir.), cert. denied, 350 U.S. 1006 (1956).

United States,⁵⁸ a federal court extended the limitations even further by failing to recognize any privileged communication between an accountant and his client. In contrast to the broad acceptance of the attorney-client privilege, the accountant-client privilege has been widely criticized⁵⁹ and, despite its initial acceptance, has not been adopted in most jurisdictions.⁶⁰ Regardless of the basis upon which *Pattie Lea* was decided, the tenuous acceptance of the accountant-client privilege is simply not analogous. The contention in *Garner* that a shareholder may pierce the attorney-client privilege asserted by the corporation simply because shareholders in a similar situation have been permitted to avoid the accountant-client privilege is untenable.

The effort in *Garner* to reconsider the attorney-client privilege through use of the joint interest analogy directly conflicts with the rationale of another case cited by the court. In *Re Prudence Bonds Corp.*,⁶¹ the bondholders brought an action for an accounting against the trust company to which they were subscribed. As in *Pattie Lea*, the plaintiffs sought to compel testimony concerning certain trust company communications, but in this case the communications were made to an attorney. In upholding the privilege as applied to the trust company, the court denied "that anyone, who . . . bought a bond or an interest in a bond, thereby made the counsel for the trustee its attorney. . . ."⁶²

Garner relies on the strength of the analogies of the joint interest exception in other business associations as well as on the accountant-client privilege to undercut the effect of *Re Prudence*.⁶³ Reliance on these analogies ignores not only the character of the relations between the corporation and its shareholders, but also the public corporation's structure and its natural exclusion of shareholders from the decision-making process. Furthermore, these analogies ignore the deep roots of the attorney-client privilege in the common law. In light of these considerations, the application of the joint interest exception to the corpo-

⁵⁸ 175 F.2d 924 (9th Cir.), cert. denied, 388 U.S. 860 (1949).

⁵⁹ See generally Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. Chi. L. Rev. 113 (1969). In particular, one survey of lawyers, jurists, leading commentators and legal organizations found strong opposition to the privilege among these segments of legal opinion. See also Comment, *The Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226, 1247 (1962).

⁶⁰ Compare comment, 71 Yale L.J. 1226 (1962), with Note, 46 N.C. L. Rev. 419, 420-22 (1968).

⁶¹ 76 F. Supp. 643 (E.D.N.Y. 1948), aff'd, 174 F.2d 288 (2d Cir. 1949).

⁶² Id. at 646.

⁶³ Surprisingly, the *Garner* court mentions *Re Prudence* while offering its analysis of the corporate client asserting the attorney-client privilege. *Re Prudence* has served as a basis for the commentators who argue against application of the joint interest exception to the corporation-shareholder relationship. See, e.g., Comment, *supra* note 8, at 317. In recounting the case, *Garner* fails either to distinguish *Re Prudence* on its facts or to declare it bad law. In light of the arguments for not applying the joint interest exception to the corporate client, *Re Prudence*, unchallenged in *Garner*, suggests that *Pattie Lea* provides a poor analogy.

ration as client should have little impact on the boundaries of the attorney-client privilege in stockholder suits.

V. THE PROSPECTIVE CRIME OR FRAUD EXCEPTION

In addition to the joint interest exception, *Garner* also refers to the prospective crime or fraud exception to the attorney-client privilege in order to illustrate the less than absolute nature of the privilege. This exception developed in response to the abuse of the attorney-client privilege as a shield for a client's planning of a crime or fraudulent scheme. The rationale of the exception, set forth in *Queen v. Cox*,⁶⁴ was that the attorney-client privilege should be available to the client only when both (1) professional confidence and (2) professional employment were present in the attorney-client relationship. The presence of both these elements guaranteed that the extension of the privilege to attorney-client communications would not be exploited to defeat community interests. If the client disclosed his criminal or fraudulent intent to his attorney, then no professional relationship could exist between them, since the attorney could not professionally abet illegal activity. At the same time, the failure of a client to inform his attorney of his criminal or fraudulent intent resulted in less than complete confidentiality in their communications.⁶⁵

In recent years the kinds of attorney-client communications precluded from privilege by this exception have broadened both theoretically and practically. Under the exception, denial of the privilege to the corporation is no longer limited to prospective criminal or fraudulent schemes. Since the decision in *United States v. United Shoe Machinery Corp.*,⁶⁶ federal courts have included any prospective tortious conduct under the exception.⁶⁷ Practical expansion of the exception has also occurred, particularly in the corporate area, through the enactment of federal securities laws⁶⁸ and Supreme Court decisions extending rights under these statutes to private individuals.⁶⁹ The extension of civil liability to once unproscribed activities of the corporation broadens the scope of this exception to the privilege, bringing diverse kinds of attorney-client discussion within the exception. The broadening of the prospective crime or fraud exception to the attorney-client privilege not only imposes new limitations on the availability of the privilege to the corporation, but gives shareholders commensurately greater access to corporate communications.⁷⁰

⁶⁴ 14 Q.B.D. 153 (1884).

⁶⁵ *Id.* at 168.

⁶⁶ 89 F. Supp. 357 (D. Mass. 1950).

⁶⁷ There is some dispute as to whether the prospective crime or fraud exception has been expanded to include tortious conduct in general. See Proposed Rules of Evidence, *supra* note 24, § 5-02(d)(1), at 251.

⁶⁸ For a discussion of new amendments, see Note, An Appraisal of Some Coverage Aspects of the 1964 Securities Acts Amendments, 60 Nw. U.L. Rev. 331 (1966).

⁶⁹ See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

⁷⁰ The consequences of this expansion of the exception are best demonstrated in a

In making these communications available to the suing shareholder, the expanded exception may, however, damage the flexibility of corporate officers to manage effectively, and, as *Garner* points out, there is need for the corporation to be free from harassment suits by disgruntled shareholders. The corporation should be able to communicate freely with its attorney in regard to legitimate matters which cannot be made public. Gross application of the expanded prospective crime or fraud exception enhances the risk of destruction of both corporate flexibility and the actual availability of the privilege to the corporation. Thus, some limitations must be imposed on the application of the exception to attorney-client communications. Yet, assuming a stockholder can demonstrate some basis for raising this exception to the privilege, there is no compelling reason for denying him access to corporate communications relating to future illegal activity which the corporation may be contemplating. In fact, community access to such communications is the essence of the strong policy behind the exception which denies the privilege to the client when he abuses it, regardless of whether the client is a corporate person. Unfortunately, *Garner* neglects to discuss in depth the circumstances in which the exception may be raised,⁷¹ although it generally broaches the problem of what evidence the shareholder must show of the illegal activity in order for the prospective crime or fraud exception to arise. The confusion in *Garner* on this evidentiary point is indicative of the general inability of courts and commentators to agree on the quantum of evidence that⁷² must be proved in order to raise the exception.

The uncertainty surrounding the evidentiary problem largely results from the language of *Clark v. United States*.⁷³ That case actually dealt with a juror who had defrauded a court in being impanelled. In passing on the question of a juror's privilege,⁷⁴ however, the United

case like *Garner* where the shareholder's complaint charged the corporation with violations of federal and state securities laws and fraudulent activity. The expanded securities law gives the shareholders greater opportunity to pierce the attorney-client privilege. For example, under the prospective crime or fraud exception if evidence is presented which gives color to the charge that the purpose of the attorney-client consultation concerned the client's prospective criminal or fraudulent activity, then the attorney-client communications are unprivileged. *Clark v. United States*, 289 U.S. 1 (1933).

⁷¹ In addition to its cursory treatment of the issue of the quantum of evidence required to raise the prospective crime or fraud exception to the attorney-client privilege, the court avoids the crucial issue of the appropriate limitations on the expanded prospective crime or fraud (tort) exception, leaving the question of limitation for further speculation and litigation. Although this latter problem was not at issue in *Garner*, it may subsequently cause significant problems. One problem, for example, might involve the question of whether the corporation should be reasonably aware that the subject matter of the communication relates to an illegal purpose before the exception could arise.

⁷² Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A. J. 708 (1961).

⁷³ 289 U.S. 1 (1933).

⁷⁴ In considering a case involving a juror's privilege, the dicta of that opinion laid out the basic evidentiary standard for the piercing of the attorney-client privilege through the prospective crime or fraud exception. *Id.*

States Supreme Court analogized the case to the attorney-client privilege and observed that "to drive the privilege away there must be 'something to give color to the charge'; there must be *prima facie* evidence that it has some foundation in fact."⁷⁵ Ever since the Supreme Court offered this dictum, courts have offered a wide range of interpretations of it. The first notable decision, *United States v. Bob*,⁷⁶ applied the *prima facie* standard to the fraud charged, not merely to the establishment of a wrongful purpose during attorney-client consultations. Other cases, such as *Union Camp Corp. v. Lewis*,⁷⁷ also observe the *prima facie* standard, but apply it only to a "showing that the lawyer's advice was designed to serve his client in the commission of a fraud or crime."⁷⁸ In narrowing the *prima facie* requirements to a showing of illegal purpose, the *Lewis* opinion noted that the plaintiff "... was not at this stage required to prove crime or fraud in order to secure the evidence."⁷⁹ This distinction has been further refined to require a judge to find that there is sufficient evidence to sustain a finding that the communication was for a forbidden purpose, rather than to actually make such a finding.⁸⁰

The distinctions in the quantum of evidence required to raise the prospective crime or fraud exception apparently escaped the *Garner* court, although it refers to the "obviously colorable" character of the plaintiff's claim in listing the essentials of good cause. In a very brief discussion, *Garner* includes *Bob* and *Union Camp Corp.* as standing for the same proposition, when, in fact, they hold differently. *Bob* requires a *prima facie* case of fraud to be made out in order for the privilege to be pierced, while *Union Camp Corp.* holds that an illegal purpose, not fraud, has to be proved for the exception to arise. From the shareholder's point of view, the *Union Camp Corp.* case articulates the soundest test. If the shareholder has the burden of actually proving the fraud or tort, as *Bob* presumes, the requisite evidence to pierce the corporation's privilege could rarely be accumulated. Moreover, under the *Bob* test, it seems doubtful that gaining access to the privileged communications would prove very beneficial since the stockholder would already have substantiated the charge of fraud without the evidence excluded by the privilege. If, in contrast, the shareholders were required to make out a *prima facie* case of illegal purpose, both the corporation and the shareholder's interests would be advanced. The corporation's flexibility and freedom from harassment suits would be protected from overzealous stockholders who seek privileged information without any real justification. Conversely, the stockholder whose interests are genuinely imperilled would also benefit. In imposing on

⁷⁵ *Id.* at 15.

⁷⁶ 106 F.2d 37 (2d Cir. 1939), cert. denied, 308 U.S. 589 (1939).

⁷⁷ *Union Camp Corp. v. Lewis*, 385 F.2d 143 (4th Cir. 1967).

⁷⁸ *Id.* at 144.

⁷⁹ *Id.* at 145.

⁸⁰ *In re Selser*, 15 N.J. 393, 105 A.2d 395 (1954); Model Code of Evidence, Rule 212 (1942).

the shareholder the burden of presenting evidence sufficient to support only a finding of illegal purpose, cases like *Union Camp Corp.* curb the possibility of the corporation's abuse of the attorney-client privilege to wrongfully deny its shareholders access to corporate communications.⁸¹

Despite the *Garner* court's inadequate treatment of the issue, the prospective crime or fraud exception provides the most fertile basis for contraction of the attorney-client privilege in the corporate context. The prospective crime or fraud exception, unlike the joint interest exception, has natural application to the corporation-shareholder setting since the exception clearly involves abuse of the attorney-client privilege to infringe shareholder rights. The joint interest exception, on the other hand, really has application only to the close corporation unless traditional legal rules governing the corporation and the partnership are ignored. In addition, the interests of both the corporation and the stockholder could be better served if the standard of proof the plaintiff must meet in order to raise the prospective crime or fraud exception were more clearly delineated.

CONCLUSION

The continuing presence of new cases denying corporations the right to invoke the attorney-client privilege is prompted, in part, by the unprecedented growth in the size and impersonality of the modern corporation.⁸² In response to the societal effort to curb the unlimited power of corporate management, cases which hold as *Garner* does have sought to increase shareholder power at the expense of corporate confidentiality.

Perhaps the best way to preserve the rights and privileges of both parties is to effect some balancing of interests, as did the *Garner* opinion at the outset. Such a weighing of the interests, however, engenders problems as to appropriate limitations, especially in the sensitive area of the attorney-client privilege. Like the earlier cases that denied the privilege, *Garner* unfortunately fails to devise a solution which both balances the parties' interests and observes the legal foundations of the privilege.

Through the use of analogies from other areas of the law, both inside and outside the domain of privilege, *Garner* posits the less than absolute nature of the privilege in the corporate context. However, in attempting to articulate a new standard for determining the availability

⁸¹ Elimination of the abuse of the attorney-client privilege by the corporate client would be enhanced by this lesser standard. Initially, the imposition of the lesser evidentiary burden on the shareholders in invoking the prospective crime or fraud exception would very likely encourage more shareholder suits. In response to such a situation, the corporation would not only be less likely to abuse the privilege, but might also release more corporate information in order to assuage disgruntled stockholders and to discourage them from litigating disputes.

⁸² *Radiant Burner's, Inc. v. American Gas Ass'n*, 209 F. Supp. 321 (N.D. Ill. 1962).

of the privilege, *Garner* erroneously lays the foundation for the "good cause" balancing test on very narrow rules and exceptions.

One of these rules, the right of the shareholder to examine corporate records, initially appears to be a substantial reason for applying new limitations on the attorney-client privilege in the corporate situation. A detailed analysis of this rule indicates, however, that its application involves considerations more akin to the "work product" rule than to the attorney-client privilege. To graft "work product" considerations into the attorney-client balance of interests is tantamount to fundamentally altering the privilege and is, in light of the privilege's wide acceptance and broad legal foundation, untenable.

Application of the joint interest exception to the corporate context similarly requires a fundamental alternation of traditional legal concepts. Although the joint interest exception may be adaptable to the close corporation, the court's consideration of the exception fails to draw appropriate distinctions between the obligation which the publicly held corporation owes to its shareholders and that owed by the parties to each other in other business associations. The court also neglects to consider the structure of the modern business corporation and the slight opportunity that this structure provides for consultation between shareholders and corporate counsel. Finally, *Garner* consistently draws upon cases or rules, such as *Pattie Lea*, which do not have a clear application to the attorney-client privilege.

Garner's discussion of the crime or fraud exception to the attorney-client privilege also raises some unsettled issues. Despite the correctness of the decision in focusing its discussion on this expanding exception to the availability of the privilege, *Garner* increases, rather than eliminates, confusion over the quantum of evidence required to pierce the privilege. Perhaps, however, *Garner* does make one indirect contribution by raising the prospective crime or tort exception. That is, the decision exposes the need for a clear delineation of the quantum of evidence required to make the exception available.

Examined in reference to its inconsistencies and general failure to assert a clear new standard, *Garner* creates more problems than it solves. As a result, no greater limitation has been imposed on the attorney-client privilege, nor has a firm rule of law evolved to control this privilege in the corporate context.

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