DERIVATIVE LITIGATION AND THE ATTORNEY CLIENT PRIVILEGE

Derivative claims are brought by shareholders of a corporation against its officers and/or directors to recover damages suffered by the corporation. The typical allegation is that one or more of the corporate hierarchy violated some legal duty owed to the corporation causing it damage. In-house counsel for the corporation will almost certainly have factual information that is pertinent to the allegations, and out-side counsel may also have such information. The derivative plaintiffs will want the benefit of it. Can they get it? Let's add another feature. The Board of Directors has voted to oppose the derivative suit. Can the plaintiffs still get the information? Let's add one last feature. The derivative suit seeks damages suffered by the corporation, but several of the putative derivative plaintiffs have legal claims against the corporation for damages caused by registration violations. What now?

A LITTLE BACKGROUND

Before focusing on the attorney client privilege we first need to look at a universally accepted tenant of corporate law: The corporation is an entity separate from those who manage it, and in usual circumstances a lawyer will be employed by the managers of the corporation to act on its behalf. Therefore, the client, for better or worst, is the corporation acting through its current management. A second accepted tenant is that there is an attorney client privilege.[1] The lawyer will have a duty of confidentiality with respect to those facts learned in his capacity as the lawyer for the corporation, and a separate attorney client privilege arises when an authorized individual, on behalf of the corporations, seeks or receives legal advice (generally referred to as a "control group communication").[2] One or the other basis for confidentiality will usually protect the facts revealed as well as the advice given unless there is a court order to the contrary. In ***Upjohn v United States***, 449 U.S. 383, 389 (1981), the Court extended the attorney client privilege (not just a duty of confidentiality) to communications with employees who provided information to the lawyer at the direction of management where the subject matter of the directive related to the employee's area of responsibility. Thus, in federal court the "control group" test for determining the existence of the privilege was replaced by the "subject matter" test. Texas initially resisted the temptation to adopt that modification,[3] but in 1998, we capitulated. The modification was achieved by an amendment to the Evidence Rules (***TRE***) and the Disciplinary Rules of Professional Conduct (***TDRPC***).[4] Omitted was any requirement that the employee be acting at the direction of management. Thus, Texas seemingly extended the privilege beyond the zone of silence provided in ***Upjohn***. While a purist might take offense to this Texas extension that could make the lawyer a priest for those who need to confess their sins, let's not dwell on that bumble. Indeed, the inexplicable confusion in our state courts in applying the privilege is disconcerting enough.[5]

DERIVATIVE CLAIMS ARE DIFFERENT

Derivative claims, however, are, except in rare circumstances, asserted only for the benefit of the corporation. That is to say that any damage or benefit recovered belongs to the corporation not the derivative plaintiffs. Thus any confidential information that a lawyer may have that is adverse

to the defaulting employee, officer or director will benefit the corporation in the derivative action, and the revelation of that information would not be adverse to the corporation's immediate interests.[6] Therefore, a derivative claim requires different considerations, and the attorney client privilege may not be available.

DOES THAT DIFFERENCE MAKE A DIFFERENCE

Scant attention has been paid to this perplexing issue by state courts. In ***George v. LeBlanc***, 78 F.R.D. 281 (N.D, Tex. 1977) Judge Higginbotham concluded that the corporation's lawyer must share his knowledge of malfeasance by officers and directors with derivative plaintiffs because he is obligated to act in the interest of the corporation and owes no allegiance to the involved officers and directors. As usual this unique judge puts his finger directly on the sensitivity toggle and resolves an issue with understandable logic. History and precedent compelled him to recognize the corporation as the lawyer's client (this is not to suggest that he agrees with me that a robot doesn't need or deserve a lawyer), and his discussion of the seminal case (***Garner v Wolfinbarger***, 430 F.2d 1093 (5th Cir. 1970)) is instructive. ***Wolfinbarger*** established a "just cause" standard for piercing the attorney client privilege in derivative litigation. There the court listed the factors that it believed determined whether the privilege should not apply.[7] Generally, if the claim is colorable, if the Plaintiff has no other means to obtain the information, and if the communication does not relate to the derivative litigation itself, the privilege will be pierced.[8] This decision from forty years ago continues to have vitality. And the Fifth Circuit has further explained that a court should not decline to pierce the corporate attorney client privilege because the revelations may benefit one group of shareholder and cause damage to another, i.e. where the information may establish director or officer liability to the corporation that benefits only a subset of shareholders.[9] Indeed, ***Wolfinbarger*** involved derivative claims as well as claims against the corporation for securities violations. Other courts have struggled to answer the question. Many seem to conclude that the benefit to the corporation does not trump the need for an attorney client privilege to attach so that the involved employee, officer or director can provide information to the corporate attorney without concern that the revelations could come back to bite him on the rump. See ***Nunan v Midwest, Inc***., 814 N.Y.S.2d 891 (Supr. Ct. 2006)(unpublsihed)[10]; ***Shirvani v Capital Investing Corp.***, 112 F.R.D. 389 (D. Conn, 1986). Those courts simplistically argue that " representative of the client" includes employees, officers and directors who provide the information to the lawyer, that the resulting communications are privileged, and that the "crime - fraud" exception to the attorney client privilege is sufficient to satisfy the corporation's needs. The obvious problem with this contrary view is its failure to account for the situation presented when the corporation itself initiates the claim against the involved employee, officer or director. In that circunstance all courts agree that the corporation can discover and/or use the factual revelations.[11] As to the crime-fraud exception, it is applicable only to ongoing or future conduct. See ***TRE*** Rule 503(d)(1). Thus the revelations in an intra-corporate investigation that dealt with a completed crime or fraud would not be discoverable.

WOLFINBARGER IN TEXAS AND OTHER APPLICABLE RULES

Texas appears to have adopted the ***Wolfinbarger*** rationale, at least in the one case (unpublished) that focused on the issue. See ***In Re Halter, et al.***,1999 Tex. App. LEXIS 6478 (Tex. App.

Dallas 1999, orig. proceeding). There are a gaggle of Bar Rules that are marginally relevant. Most involve the prospective use of the lawyer's services and are inane: (1) If a corporate operative has committed or plans to commit a violation of a duty to the corporation or a violation of law that may cause substantial injury to the corporation the corporation's lawyer should request the operative to reconsider the matter, advise that a legal opinion be obtained from some other lawyer to present to corporate authorities, or refer the matter to higher authority within the corporation. See ***TDRPC*** Rule 1.12. (2) Or resign under Rule 115(b)(2). It is noteworthy that this is the only instance where completed conduct is considered in the Rules. (3) If the lawyer learns of proposed criminal or fraudulent conduct that threatens substantial financial or property injury to another person the lawyer is required to attempt to dissuade the client from committing the crime or fraud. See Rule 1.02. (4) If the lawyer learns of proposed corporate conduct to commit a fraudulent or criminal act that will likely result in death or serious personal injury he shall reveal the proposed conduct to the extent necessary to prevent the client from committing the act. See Rule 1.05(e). (5) Revelation may be necessary when the lawyer has reason to believe that it is necessary to do so to prevent the client from committing a criminal or fraudulent act.[12] See Rule 1.05(c)(7). (6) When a lawyer learns that material evidence offered by him in a proceeding is false he must attempt to convince the client to correct or withdraw the evidence, failing which the lawyer shall take appropriate remedial action. This duty terminates when remedial measures are no longer possible. Rule 3.03(b) and (c). (7) Texas' crime-fraud exception is contained in the evidence rule, ***TRE*** Rule 503(d)(1), and as pointed out above it does not relate to crimes or frauds that have already occurred.

WHAT'S WRONG WITH THIS PICTURE

These tensions are, of course, the inevitable result of treating the corporation as the client entity. Under Texas law the lawyer represents the corporation – not the management of the corporation. I am on record as saying that this fiction distorts rather than clarifies the lawyers obligations. See Ravkind, ***Corporate Attorney Client Privilege***, 57 Tex. B. J. p. 1193 (1994). In truth he represents current management and should have loyalty to them rather than the amorphous and faceless entity (although it will be his duty to advise management concerning its fiduciary relationship to the corporation). The fiction, however, permits a law firm to perpetually represent a corporation in spite of changes in management. *Ibid.* This distortion also permits the corporation or a successor or even a receiver to waive the attorney client privilege which will require the lawyer to provide evidence against his former bosses who trusted him with their private thoughts and concerns.[13] Just why the attorney client privilege should have such broad impact where the client is an entity instead of an actual person is beyond my understanding.[14] In either event it is important to differentiate between attorney client communications, on the one hand, and confidential communications on the other. In my view the former should exist only where the person seeking the legal advice has corporate (or entity) authority and responsibility to seek it or occupies a position to act on it. The latter should apply when the person providing the information reasonably expects confidentiality but does not qualify as a person authorized to solicit or act on legal advice. An example might be helpful: Assume a lawyer is directed by management to investigate possible bribery of government officials by low level corporate operatives who are ordered to cooperate. In that process one of the low level operatives confesses his wrong doing to the lawyer. The lawyer writes a report of the conversation and provides it to

management with an opinion on legality and recommendations about how to handle the revelation. Obviously, the opinion and recommendations are attorney client communications and are privileged. But the communication with the low level employee should not be if a civil ***Miranda*** warning was given even though the employee might have had an unrealistic expectation of a non-disclosure privilege.[15] This is just an example of a lawyer receiving confidential information that he is duty bound not to voluntarily reveal. See ***TDRPC*** Rule 1.05 (a) and (b). Plainly, using a lawyer to collect the facts should not surround them with an attorney client privilege. **But wait**. Our country's highest court adopted in ***Upjohn*** rationale that infuses the communication with special status because it resulted from an upper management directive and therefore was the same as if the facts had been recited to the lawyer by those superiors.[16] The High Court held that trial judges must focus on the subject matter of the communication to determine its entitlement to an attorney client privilege not the identity and position of the informant. As pointed out above, in Texas this proposition and more have been adopted as positive law by the Texas Supreme Court. Even before the amendments of the ***TRE*** and ***TDRPR*** in 1998, several of our courts of appeals had interpreted the Rules to completely bar revelation of facts reported in an attorney client communication, and that view has persisted after the amendments.[17] Not even commentators critical of ***Wolfinbarger*** suggest such a broad reach of the ***Upjohn*** privilege.[18] Fortunately, it appears that the tide pushing this zone of silence may be ebbing. That line of decisions simply cannot be squared with cases like ***In re Texas Farmers Ins. Exchange***, 990 S.W.2d 337, 342 (Tex App Texarkana 1999)(original proceeding), where the court bifurcated the fact findings of a lawyer from his legal conclusion. Fact findings were said to be investigative in nature to which no attorney client privilege attached, although the privilege did obviously apply to the legal conclusion. Justices Hecht and Owen dissented from the denial of mandamus by in the Supreme Court in this case. See ***In re Texas Farmers Ins. Exchange***, 12 S.W.3d 807 (Tex. 2000). That dissent argued that the holding of the court of appeals virtually abrogated the attorney client privilege in so far as factual matters were concerned. Maybe so, but the facts will still carry a seal of confidentiality and may even be clothed with a work product privilege in appropriate circumstances.[19] It is well to point out here that the recognized purpose of the attorney client privilege – to encourage communication with the lawyer so that appropriate legal advice can be obtained – is totally absent when the information comes from an outside or non-privileged source. The case by case approach directed by ***Upjohn*** could theoretically protect all factual information uncovered in a wide ranging investigation. An approach obviously rejected by the Texarkana Court, and unanswered is what happens when a representative of the client reveals facts to the lawyer adverse to the interest of that representative without a civil ***Miranda*** warning.[20] Clearly the lawyer has violated ***TDRPC*** Rule 1.12(e), which requires such a warning. But can the statement still be used by the corporation in a claim against the employee – client representative? If not, does a derivative plaintiff have greater rights than the corporation itself? These questions are beyond the scope of this article, but I wouldn't be surprised if the answer to the latter question is "no," and the answer to the former is "yes." I suggest that the proper way to look at this issue where no ***Miranda*** warning is given is to consider it an example of a joint representation communication to which no privilege attaches in a dispute between the corporation and the client representative.[21] Under this approach no attorney client privilege would shield the information in derivative litigation. Remember, the real party plaintiff in derivative litigation is the corporation not the putative plaintiffs. If the representative of the client is forewarned that the lawyer does not represent him in connection with his personal wrongdoing and that his revelations

may be used against him in litigation with the corporation (the civil ***Miranda*** warning) there can be no reasonable expectation of confidentiality, and the privilege would not apply to the facts revealed, at least in subsequent litigation with the corporation. But what about non-shareholder litigation? In that circumstance these compelling, if technical, reasons for piercing the privilege are absent. My conclusion would be that the facts revealed when a ***Miranda*** warning is given do not qualify for attorney client privilege because there could be no expectation of confidentiality. If no warning is given, the attorney client privilege would attach to the resulting joint client communication.

WHEN THERE IS NO GOOD CAUSE

Assuming that ***Wolfinbarger*** represents the appropriate rule in Texas, a finding of no "good cause" is not the end of the inquiry. In the absence of good cause, contention interrogatories can be used to uncover the facts, but not the facts that were communicated to the lawyer or what the lawyer thought about them. If the lawyer knows that the client's response to the factual inquires is false (because of what the client told him confidentially) the lawyer must refuse to sign off on them. The more jaded amongst us may argue that the wolf will not properly guard the chickens if his employment depends on them being served for dinner. For my part, I am willing to trust the professionalism of Texas lawyers.

DEMAND ON THE BOARD

In Texas and most states, a demand must be made by the proposed derivative plaintiffs to the corporate board of directors to pursue the claim or authorize the proposed plaintiffs to do so, and a decision by an independent and disinterested board of directors that the action should not be pursued is an absolute bar to such an action.[22] Of course, that decision is subject to a claim that the board was not independent and disinterested. And that claim may well delve into lawyer communications with the corporate leadership.[23] If an independent and disinterested board of directors votes not to sue the officers and directors for their defalcations the putative plaintiffs have few choices. They can abandon their derivative claim and proceed directly against the corporation for the registration violations or they can seek to oust current management through shareholder proceedings. If successful the new board could then waive the privilege.

PLAINTIFFS WITH MIXED MOTIVES

Derivative Plaintiffs who have an independent claim against the corporation for registration violations will likely be disqualified to serve as named plaintiffs in the derivative litigation. It is said that they have a conflict in interest in representing the corporation in the derivative claim and at the same time asserting a claim against the befuddled corporation for securities violations.[24] The Fifth Circuit has mitigated the effect of this conflict in its holding that it may not significantly impact the piercing of the attorney client privilege,[25] and maybe the same ambivalence will be used in determining the adequacy of the shareholder representative. We'll see.

CONCLUSION

In our hypothetical case where the corporate operatives have caused the corporation to violate

the registration requirements under the securities laws, no one is more befuddled than the corporation's lawyer. If he knew the facts, he most certainly was obliged to, and do doubt did, advise the corporation to refuse to engage in the registration violation. In the same vein he was duty bound to advise the involved officers and directors to desist from the unlawful conduct which was permitting several of them to reap significant profits. If the corporation is registered under the Securities and Exchange Act of 1934 revelation of all of this may be required by the Sarbanes-Oxley Act.[26] This Congressionally imposed lesson in ethics tells us that the attorney client privilege should be more narrowly applied than as directed by ***Unjohn***. According to Blackstone, the attorney client privilege was founded on the fundamental principle that no person should be required to provide evidence of his guilt and the lawyer must know the facts in order to properly represent him.[27] This is consistent with our anglo-american view of criminal law that requires the prosecutor to prove his case beyond a reasonable doubt without any help from the defendant. In civil cases, however, the privilege has usually been used to subvert the search for truth. Expanding this zone of silence is not justified.

ENDNOTES

1. Only at Harvard would there be debate whether the privilege had a utilitarian or non-utilitarian origin. See ***Development of the Law – Attorney Client Privilege***, 98 Harv. L. Rev. 1501 (1985). Perhaps like the "Origin of the Species" there can be no clear answer until it is too late to write about it. Fred Simpson, recently deceased, took up the torch and found the answer ambiguous. See Simpson, ***Has the Fog Cleared***, 37 St. Mary's L. J. 197, 198-99 (2001).

2. The privilege attaches with only minor variation to communications from the client to the lawyer as well as communications from the lawyer to the client. See ***United States v Mobil Corp***., 146 F.R.D. 536 (N.D. Tex 1993). The client provides factual information, and the lawyer provides legal advice.

3. See ***National Tank Co. v Brotherton***, 851 S.W.2d 193, 197-198 (Tex. 1993).

4. See ***Tex. R. Evid.*** (***TRE***), Rule 503(2)(B) and ***Tex Disciplinary R Professional Conduct (TDRPC)***, Rule 1.05(e).

5. Texas decisions are all over the map on the scope of the attorney client privilege. Some seem to hold that recitations of pure investigative facts are not protected. See e.g. ***In re Texas Farmers Ins. Exchange***, 990 S.W.2d 337, 342 (Tex App Texarkana 1999)(original proceeding). But see ***Harlandale Indep. School Dist. v Cornyn***, 25 S.W.3d 328 (Tex App Austin 2000, petition denied)(concluding that a lawyer's factual investigation may also be attorney client privileged, but it was certainly work product.) The court in ***Texas Farmers*** said that the lawyer was being used as an investigator not as a lawyer. This was different, said the court, from the usual circumstance where the client representative already knows the facts and provides them to the lawyer when seeking legal advice. This line of cases distinguishes facts learned by the lawyer from an employee (or other non-privileged source) and the facts learned by the lawyer from the client representative who learned them from the non-privileged source. Is the rule so technically oriented that this distinction actually makes a difference? To me the answer is easy – Yes. The communication from

the lawyer to the client should contain the legal opinions of the lawyer. If it was necessary to include a reference to the facts the communication should make clear the source of that information. If that source was not the entity-manager seeking the opinion or a lower level employee acting at the direction of the entity-manager no attorney client privilege should attach to those facts. On the other hand, some of our courts refuse to examine the content of an attorney client communication, apparently believing that the "communication" is a totally protected document. See ***Keene Corp. v Caldwell,*** 840 S.W.2d 715, 720 (Tex App Houston (14th) 1992)(original proceeding); ***In re ExxonMobil Corp***., 97 S.W.3d 353, 357-358 (Tex App Houston (14th) 2003)(original proceeding). This line of cases runs afoul the requirement that the communication must be examined to determine whether the crime-fraud exception to the privilege is applicable. They also erect a barrier to determining whether the lawyer was being used for non-lawyer tasks like investigator, accountant or business man. Some courts focus on the requirement that all witness statements must be produced even if they were obtained in contemplation of litigation and were work product; although a witness statement may be protected if it was part of an attorney client communication, see ***In re Jiminez***, 4 S.W.3d 894 (Tex App C.C. 1999)(original proceeding), while others say that to allow such an exception would swallow the privilege. See ***In re Fontenot***, 13 S.W.3d 111, 113-114 (Tex App Ft Worth 2000)(original proceeding). None actually analyzes the ***Upjohn*** decision or considers its rationale determinative. None focuses on the criminal evidence rule that regards all information obtained by a lawyer in representing a criminal defendant as inviolate and undiscoverable. See ***TRE*** Rule 503(b)(2).

6. As will be discussed *infra* the information will sometimes implicate the corporation in claims like securities fraud where only a limited number of shareholders will recover damages.

7. "There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; 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; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons." 240 F.2d at 1104. Of interest is the fact that these criteria have not been restricted to just derivative litigation. See ***Fausek v White***, 965 F.2d 126, 132-133 (6th Cir. 1992); ***Ward v Succession of Freeman***, 854 F.2d780, 786 (5th Cir. 1988). The Ninth Circuit has held otherwise. ***Weil v Investment/Indicators Research & Mgt Co.***, 647 F.2d 18, 23 (9th Cir. 1981). But piercing the corporate attorney client privilege may not provide the Plaintiffs with access to all of the lawyer's opinions and observations. Those not relevant or those that may impact other litigation would not be revealed. They fall under the last listed criteria above. See ***In re Bairnco Corp. Securities Litigation***, 148 F.R.D. 91, 99 (S.D.N.Y. 1993), where the court refused to require revelation of attorney client communications which would reveal strategy in pending Asbestos claims.

8. See e.g. ***I.B.M. Corp. Securities Litigation***, 1993 U.S. Dist. Lexis 18215, *44 (S.D.N.Y. 1993); ***RMED Intern., Inc. v Sloan's Supermarkets, Inc.***, 2003 U.S. Dist. Lexis 71, *17-18 S.D.N.Y. 2003); Article, ***Carlton Investments, Inc. v TLC Beatrice Intern, Holdings, Inc.***, 22 Del. J. Corp. L. 665, 669 (1997)(unreported case). Article, ***Lee v Engle,*** 21 Del. J. Corp. L. 709, 716-717 (1996)(unreported case).

9. See ***In re Occidental Petroleum Corp***., 217 F.3d 293 (5th Cir. 2000).

10. This decision by a New York trial court also suggests that ***Wolfinbarger*** did not survive the ***Upjohn*** case.

11. See ***TRE*** Rule 503(c). Only the client can claim the privilege. See Note 21, and associated text, for discussion of when and under what circumstances a non-managerial employee might be considered a joint client. If a joint client relationship exists a sophisticated argument can be made that both clients must agree to waive the privilege. But that argument has no force in a dispute between the joint clients.

12. I find no case where this obscure Rule has been used to pierce the privilege. Logically it could have broad application if an objective standard were used to determine when the lawyer should act. Even if the standard were subjective it might cause many lawyers to at least pause and reflect on the circumstances in providing advice to the corporation. In many respects this Rule is at odds with the duties imposed by the other Rules, except the one involving serious injury or death which requires the lawyer to act. It is similar to the crime-fraud evidence rule exception, but the language is less exacting. The comments suggest that it is considerably less than mandatory. See Comments 9 and 10, ***TDRPC*** Rule 1.05

13. See ***Commodity Futures Trading Corp. v Weintraub***, 471 U.S. 343, 348-349 (1985); ***TRE*** Rule 5.03(c).

14. Analysis of the privilege when a proprietorship is involved seemingly avoids these pitfalls. As far as I can find, no one contends that an attorney client privilege attaches to a statement given to the lawyer by an employee of such a non-entity; although technically a proprietorship might qualify as an "entity" under ***TRE*** Rule 503(a)(1). Representation of a partnership or LLC, in a perverse way, can raise some of the same issues that plague the corporate lawyer. See Santoni, ***Application of the Attorney Client Privilege to Disputes Between Owner and Managers of Closely Held Entities***, 31 Creighton L Rev 849 (1998); Keatinge, ***The Implications of Fiduciary Relationships in Representing Limited Liability Companies ad Other Unincorporated Associations and Their Partners and Members,*** 25 Stetson L. Rev. 390 (1995). Thankfully the rules governing derivative litigation are limited to corporate squabbles, and many of the restrictions are not even applicable to close corporations. See ***Tex. Bus. Organizations Code*** § 21.563.

15. See the discussion in the text relative to Note 20, *infra*. ***Miranda v Arizona***, 384 U.S. 436 (1966), requires criminal investigators to advise a suspect that he is entitled to a lawyer and that his statements can a will be used against him. A civil ***Miranda*** warning would require the lawyer to advise the client representative being interrogated that the lawyer does not represent him and

that any statement can and will be used against him.

16. This may be my selective interpretation. However, Justice Breyer (see ***Rubin v United States***, 525 U.S. 990 (1998)(Justice Breyer dissenting from a denial of certiorari) apparently saw the issue this way as did Judge Schell of the Eastern District of Texas (see ***Robinson v Texas Automobile Assoc.***, 214 F.R.D. 432, 440 (E.D. Tex. 2003)). To me it is unthinkable that the Court in ***Upjohn*** did not intend to so limit the reach of the privilege. The original "subject matter" case, ***Harper & Roe Publishers, Inc. v Decker***, 423 F.2d 487, 491-492 (7th Cir. 1970)(***Decker***), specifically required that the employee be acting at the direction of management. The corporation is embodied in its management, and logic can tell us that these managers may need legal guidance in attending to corporate affairs. If an employee with factual knowledge is directed to share it with the lawyer so that the lawyer can fulfill his function, I am willing to accept the fiction that the employee, to that extent, becomes an assistant manager. True enough, the Court in ***Upjohn*** stated: "The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. *See, e.g., Duplan Corp. v. Deering Milliken, Inc.,* 397 F.Supp. 1146, 1164 (SC 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it")." ***Upjohn***, 449 U.S. at 392. The Fifth Circuit continues to recognize the validity of the ***Decker*** requirements, see ***In re Avantel***, 343 F.3d 311, 315 (5th Cir. 2003), and the quoted language from ***Upjohn*** should not be interpreted to mean that unilateral communications from a non-managerial person somehow and automatically achieves privileged status. On the other hand that seems to be exactly what the Texas amendments in 1998, that omitted the requirement that the employee be acting at the direction of management, actually accomplish. We can only hope that the courts will not seize on this omission to justify unlimited application of the privilege.

17. This interpretation was, until recently, confined to the Fourteenth Court of Appeals in Houston and the Dallas Court. See ***Keene Corp. v Caldwell,*** 840 S.W.2d 715, 720 (Tex App Houston (14th) 1992)(original proceeding); ***Marathon Oil Co. v Moye,*** 893 S.W.2d 585, 589 (Tex App Dallas 1994)(original proceeding); ***In re ExxonMobil Corp***., 97 S.W.3d 353, 357-358 (Tex App Houston (14th) 2003)(original proceeding). The Corpus Christi and El Paso courts have now joined them. See ***In re Mason & Co.***, 172 S.W.3d 308, 312-313 (Tex App C.C. 2005)(original proceeding); ***In re Seigel***, 198 S.W.3d 21, 27 (Tex App El Paso 2006)(original proceeding). There was no precedent dictating this result, and it was certainly not intuitive or logical. All that seems to be required is for the client to say that the provided information, whether by management or anyone else, was needed to obtain a legal opinion.

18. See Saltzberg, ***Garner Revisited***, 12 Hofsera L. Rev. 817 (1984). His reference to ***Garner*** is the same as my reference to ***Wolfinbarger***. He would not extend the privilege to communications with any source that does not control it:
"For example, a corporate employee's communications ought not to be privileged if (1) the

employee is ordered to meet with a lawyer hired by the corporation to conduct an investigation -- for instance, into improper payments to foreign government officials; (2) the employee speaks with the lawyer without any understanding that the lawyer represents anyone but the corporation; and (3) the employee does not have the authority to control the subsequent use of his statements. After all, this employee cannot be said to be giving information that he might not have given absent a privilege, since the communications to counsel are not preceded by any guarantee that what the employee says will not be used to his disadvantage. A person obviously willing to make, or at least in a position where he might find it difficult to resist making, statements without a promise of confidentiality is exactly like any nonclient witness who is asked questions by a lawyer or another representative of a client. The questioner might have reason to be concerned about the ultimate revelation of the answers the employee gives, but this concern gives rise to work product protection, not the protection of the attorney-client privilege.
This analysis leads to an approach that is narrower than many advocates of corporate privilege would prefer. Although it is different from the approach used thus far by the Supreme Court, the suggested approach gives corporations and other entities the protection that they can fairly claim and no more. They cannot properly argue for a broader approach, since affording privileged status to communications made without any guarantee of confidentiality for the speaker would remove evidence from the reach of tribunals without promoting the communications in the least. This would result in an unjustified loss of evidence." *Id* at 827.

19. Obviously, if an attorney client privilege does not attach, the next line of protection is the work product privilege. See ***Tex R Civ Proc. (TRCP)***, Rule 192.5. This Rule may protect the factual revelations in the communication from disclosure if they were obtained in connection with real or prospective litigation and good cause for its disclosure cannot be demonstrated. See ***TRCP*** Rule 192.5(b)(2). Core work product – the lawyers analysis, opinion, and theories – will never be revealed. See Rule 192.5(b)(1).

20. I base my contention that a ***Miranda*** warning is necessary on the fact that most employees will know that the jig is up when the investigation gets underway. Failing to advise that employee that management will not protect him will lead him to believe the opposite.

21. There is a joint client provision in the evidence rule. See ***TRE*** Rule 5.03(d)(5). Judge Ambro's exhaustive opinion in ***In re Teleglobes Comm. Corp***., 493 F.3d 345 (3rd Cir. 2007) discusses the issues involved in joint client representation. He would not think much of my suggestion to apply the provision to the instant facts. Clearly he would say that the lawyer could not jointly represent parties with such divergent interests. Just as clearly the ethics rules prohibit such a relationship. See ***TDRPC*** Rule 1.06(b)(1)(Comment 6). But what about the employee who is not conversant with the Rules and who thinks he is doing his job by revealing his secrets and cooperating with the lawyer and corporate management? Without a ***Miranda*** warning he no doubt believed that the lawyer and management will protect him. To me that's close enough to a lawyer client relationship to consider him a joint client.

22. Tex. Bus. Organizations Code § 21.554

23. Tex. Bus Organizations Code § 21.559. Surely shareholders are entitled to know the legal input relevant to the Board's refusal to authorize the derivative suit. If you have a week, read Radin, ***New Stage of Corporate Governance Litigation***, 28 Cardozo L Rev 1287, 1379-1385 (2006). That article discusses this issue at length.

24. See Stanfield, ***Marriage of the Texas and Model Business Corporation Act's Derivative Action Statute,*** 35 Tex Tech L Rev 347 (2004), where the change in 1997 from adequate "representative of stockholders similarly situated" to adequately "represent the corporation" was explained. This amendment of the Texas Business Corporations Act was carried forward in the new ***Texas Business Organizations Code*** § 21.556 (2006). Under the prior language many courts had viewed a plaintiff an inadequate representative if he had other significant litigation with the corporation. See ***Zarowitz v BankAmerica Corp.***, 866 F2d 1164 (9th Cir. 1989); ***Davis v Comed, Inc***., 619 F.2d 588 (6th Cir. 1980). The language change in 1997 seemingly reinforces this disqualifying feature.

25. See note 8.

26. See Godfrey, ***In-House Counsel: The Revised Role of Lawyers After Sarbanes-Oxley***, 68 Tex. B. J. 932 (2005).

27. See ***Rochester City Bank v Suydam, Sage & Co.***, 5 How. Pr. 254, 258-259 (N.Y. Sup. Ct. 1851; 3 Blackstone, ***Commentaries*** * 370 (1768).