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EVIDENCE—CORPORATE ATTORNEY-CLIENT PRIVILEGE. *Upjohn Co. v. United States*, 449 U.S. 383 (1981)

FACTUAL BACKGROUND—*Upjohn Co. v. United States*

Facts of the Case

The Upjohn Company, a multinational corporation with world-wide subsidiaries and branches in the pharmaceutical industry, discovered in January, 1976, that one of its foreign subsidiaries made payments to government officials, thus influencing these parties in business dealings.[1] After consultation with the chairman of the board, the company's general counsel[2] began an internal investigation.[3] The counsel elicited information about the payments from foreign managers and officers using interviews and questionnaires.[4] With the questionnaires was a letter of explanation, signed by the chairman, which detailed the aim of the investigation and urged compliance by the foreign employees.[5] Replies were to be considered confidential, and were so treated.[6]

The company made two reports to the Securities and Exchange Commission in relation to the payments.[7] These reports, concerning payments of $4.4 million made over a five-year period, were made available to the Internal Revenue Service (IRS) by the company.[8] The IRS immediately began an investigation to determine Upjohn's tax liability for the five years. Upjohn voluntarily provided the IRS with schedules and lists of payments concerning approximately $700,000 of the payments, which the company

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1. Upjohn Co. v. United States, 449 U.S. 383, 386 (1981).

2. General counsel of Upjohn consisted of in-house counsel and outside attorneys, headed by Gerard Thomas, who held positions as vice-president, secretary, and director of Upjohn and also served as an officer in several of the subsidiaries of the firm. United States v. Upjohn Co., 78-1, U.S. Tax Cases (CCH) ¶ 9277 (W.D. Mich. 1978) *aff'd in part, rev'd in part*, 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

3. The purpose of the investigation was to determine the nature of the questionable payments and to facilitate the formulation of legal advice. *Id.* at 83,599.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* The first report, made on Form 8-K, was a preliminary disclosure made in order to receive lenient treatment from the Securities and Exchange Commission (SEC). The SEC had previously adopted a policy of leniency for corporations that voluntarily disclosed questionable activities. The second report was an amendment to the first, updating it upon completion of Upjohn's internal investigation.

8. *Id.*

claimed was the extent of its federal income tax liability.[9] Maintaining that the $3.7 million balance did not affect its federal income tax during the five years, Upjohn refused to allow the IRS to conduct interviews of an unlimited scope on other issues.[10] The IRS then issued a summons for the information it sought in connection with the $3.7 million.[11] Upjohn refused to comply, claiming that this data existed in the form of notes, memoranda, and other types of material gathered during its internal investigation. To justify its refusal, Upjohn claimed that this information was thus protected by the attorney-client privilege and the work product doctrine.[12] To enforce the summons, the IRS brought suit

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9. *Id.* at 83,599-600. The materials yielded by Upjohn to the IRS concerned what Upjohn claimed to be the extent of the effect of the questionable payments on its domestic tax liability. Upjohn contended that only about $700,000 of the payments affected its prior federal taxes, and that the remaining $3,700,000 only concerned foreign liabilities.

10. *Id.* at 83,600.

11. *Id.* at 83,598. The IRS summons requested "[A]ll files relative to the investigation conducted [by counsel] to identify payments to employees of foreign governments." The summons also directed that "[t]he records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates and memorandums or notes of the interviews conducted . . . with officers and employees of the Upjohn Company and its subsidiaries." *Id.* The summons was issued under authority of I.R.C. § 7602, which provides:

> For the purpose of . . . determining the liability of any person for any internal revenue tax . . ., the Secretary or his delegate is authorized—
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> . . .
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> (2) To summon the person liable for tax . . . to appear before the Secretary or his delegate . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry.

12. *Id.* at 83,598. The work product doctrine, although in existence for years, was articulated in Hickman v. Taylor, 329 U.S. 495 (1947). The court held that it protected from invasion of the attorney's privacy the interviews, memoranda, correspondence, briefs, mental impressions, notes, and other objects reflecting the work of the attorney. 329 U.S. at 511-12. Inefficiency would result from the attorney's failure to write down pertinent information because of fear of disclosure. *Id.* at 511. An attorney must be free from unnecessary intrusions of his privacy by opponents. *Id.* at 510. However, the doctrine is not a privilege, but, rather, is an exception to the general, liberal use of discovery; it may be overcome. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3rd Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

The products may be discovered upon a showing of substantial need for the materials and of undue hardship in obtaining the information without discovery. 329 U.S. at 511. However, oral statements, in the form of mental impressions or memoranda, are generally beyond any showing of necessity because it would discourage an attorney from writing out anything that a client or witness told him, thus stimulating inaccuracy. *Id.* at 512-13.

Despite the prior rulings not applying the work product doctrine to patent litigation or grand jury proceedings, modern decisions have extended the doctrine to these areas just as if it were applied to ordinary controversies. *See, e.g., In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1230 (3d Cir. 1979) (extended work product doctrine to grand jury proceedings); *In re* Grand Jury Subpoena, 599 F.2d 504, 509 (2d Cir. 1979) (extended doctrine to grand juries); *In re* Grand Jury Proceedings (Duffy), 473 F.2d 840, 842 (8th Cir. 1973) (doctrine applied to grand juries); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 143 (D. Del. 1977) (doctrine applied to patent litigation); *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 946-47 (E.D. Pa. 1976) (applied doctrine to grand juries); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 35 (D. Md. 1974) (extended doctrine to patent matters).

The work product doctrine has been codified in the federal rules governing court proceedings. *See* FED. R. CIV. P. 26(b).

against Upjohn in the United States District Court for the Western District of Michigan.[13]

Disposition by the Lower Courts

In *United States v. Upjohn Co.*,[14] the trial court decided in favor of the IRS, holding the attorney-client privilege to be inapplicable in the context presented by Upjohn's situation.[15] Basing its decision on the control group test, the court noted that the weight of authority required supporting the strict scope of the test and that the rival subject matter test was dangerously broad.[16] The court did not reflect on any cases dealing with other approaches, save the subject matter test,[17] which was summarily dismissed from consideration.[18] The court found that no control group member made any of the communications in question and that the attorney-client privilege did not apply.[19] The reports to the Securities and Exchange Commission were held by the district court to constitute a waiver of any possible privilege applying to the materials.[20]

On appeal,[21] Upjohn again argued that the information revealed by the investigation was protected by the privilege. Although the Sixth Circuit reversed the lower court's determination that the voluntary reports were a waiver, it adopted the control group test without more than a mere comparison of the definitions of the conflicting tests.[22] Not discussing other tests in any detail, the court rationalized its selection of the control group standard by analogizing the corporate control group to the corpora-

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13. The IRS enforced the summons under authority of IRC §§ 7402(b), 7604(a). Section 7402(b) provides, in pertinent part:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction . . . to compel such attendance, testimony, or product.

Section 7604(a) provides, in pertinent part:

> If any person is summoned under internal revenue laws to appear, to testify, or to produce [certain data], the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of [the relevant data].

14. 78-1 U.S. TAX CASES (CCH) ¶ 9277 at 83,597 (W.D. Mich. 1978), *aff'd in part, rev'd in part*, 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

15. *Id.*

16. *Id.*

17. *Id.*

18. The trial court stated that "the *Harper & Row* formula would exclude virtually nothing from its sweep," and that it ran counter to the principle that the privilege should be construed as strictly as possible. *Id.* at 83,602.

19. *Id.* at 83,597.

20. *Id.* at 83,603.

21. United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

22. 600 F.2d at 1226-27.

tion itself. In adopting this test, Judge Merritt, speaking for the court, proclaimed that the narrower rule "recognizes that a corporation's decision-makers, like individual clients, must communicate freely and confidentially to counsel."[23] According to the court, the control group standard promotes the discussion of delicate matters with counsel and achieves the objectives of the privilege.[24] The attorney-client privilege, under the court's interpretation, should shield only the communications between the senior management of the corporation and the corporate attorney. Further, the court added that a broader test could create a "zone of silence" by inducing the routing of materials through the attorney, regardless of the nature of the information, in order to conceal from discovering a broad range of information,[25] thus resulting in inefficient management.[26] Having resolved the waiver issue, the Sixth Circuit remanded the case for a determination of whether any of the employees involved in Upjohn's materials were members of the firm's control group.[27] Following the Sixth Circuit's refusal to apply the attorney-client privilege and the work product doctrine to the data compiled in its internal investigation, Upjohn petitioned for and was granted certiorari to the United States Supreme Court.[28]

HISTORICAL BACKGROUND

History of the Attorney-Client Privilege

In the Anglo-American body of law, the attorney-client privilege is the oldest privilege, protecting confidential communications in the common law as far back as 1577.[29] Based on the policy of encouraging full disclosures by clients to their attorneys by shielding the communications between them from discovery, the attorney-client privilege recognized the apprehension of clients of divulging information to non-confidential parties.[30] The purposes of the privilege are to encourage the free and frank communication of facts by clients to attorneys and to

23. *Id.* at 1227.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1227-28. The court held that the voluntary disclosures made to the SEC waived the privilege "only with respect to the facts actually disclosed." (citations omitted). *Id.* at 1227 n. 12.
28. Upjohn Co. v. United States, 445 U.S. 925 (1980).
29. 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. ed. 1961).
30. *Id.* at § 2291 at 545.

promote the interests of justice.[31] Once a privilege belonging to attorneys, the attorney-client privilege now is a protection exercised by clients, who may prevent the involuntary disclosure of information that is cloaked by the privilege.[32] The privilege generally attaches if the communication was made by one seeking legal assistance from an attorney.[33] Most courts require that the attorney should be acting in a legal capacity.[34] Critics, however, attack the privilege because of its burdensome effects upon discovery, particularly the cloaking of pertinent facts with a near-impenetrable shield.[35] Such criticisms have resulted in a strict application of the privilege in an attempt to avoid its egregious use as a shield.[36]

Although there are a number of privileges which apply to communications made by one person to another, one treatise has suggested that the attorney-client privilege is paramount to all of them.[37] The impact of the privilege has been extended by three

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31. *See* Jarvis, Inc. v. A.T. & T., 84 F.R.D., 286, 290 (D. Colo. 1979); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 383 (D.D.C. 1978); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 32 (D. Md. 1974).

32. 8 J. WIGMORE, *supra* note 29 at § 2290. *See also* FED. R. EVID. 503(b).

33. *See* Wonneman v. Stratford Sec. Co., 23 F.R.D. 281, 285 (S.D.N.Y. 1959); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). At least one court would require that the communication be made with the intent of conducting a confidential discussion. *See* D.I. Chadbourne, Inc. v. Superior Court, 60 Cal.2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964).

34. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1978) (en banc); Hasso v. Retail Credit Co., 58 F.R.D. 425, 427 (E.D. Pa. 1973); Wonneman v. Stratford Sec. Co., 23 F.R.D. 281, 285 (S.D.N.Y. 1959).

35. 8 J. WIGMORE, *supra* note 29, § 2291 at 554. *See generally* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); Radiant Burners, Inc. v. American Gas Ass'n., 207 F. Supp. 771, *aff'd on reconsideration*, 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963).

36. Because many theorists have hypothesized that the privilege burdens the search for truth while providing intangible results at best, the attorney-client privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principles." 8 J. WIGMORE, *supra* note 29, § 2291 at 554.

37. According to Dean Wigmore, there are four criteria governing the establishment of an effective privilege protecting confidential communications. Unlike other privileges related to disclosures between two parties, such as the doctor-patient relationship, the attorney-client privilege meets all four of the requirements. 8 J. WIGMORE, *supra* note 29, § 2291 at 545.

The four fundamentals recognized as crucial by Dean Wigmore to the establishment of privilege are:

> (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 *inquiry* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation (emphasis by Dean Wigmore).

8 J. WIGMORE, *supra* note 29 § 2285 at 527.

widely-accepted definitions promulgated by jurists and scholars.[38] The privilege is often applied by courts which balance the need of litigants for relevant information with the necessity of protecting the confidentiality of the client's communications with the client's counsel.[39]

Once established, the attorney-client privilege is absolute. However, certain limitations surrounding the strict construction of the privilege have been developed by numerous courts. Although some courts have held that there is no presumption in favor of the privilege, thus placing the burden of proving the applicability of the privilege upon the asserting claimant,[40] one court has referred the question to the trier of fact when the evidence concerning the privilege was conflicting.[41] Other courts have limited the protection of the privilege to exchanges made with

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38. One of these definitions was promulgated by Judge Wyzanski in United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950). According to the *United Shoe* decision, the attorney-client privilege was applicable if four essential requirements were met. First, the holder of the privilege must have sought to become a client. Second, the party with whom the holder consulted must be a member of the bar of the court in question and must be acting as a lawyer in relation to the disclosure. Third, the communication to the lawyer must relate to a fact revealed by his client, the holder, while not in the presence of third parties. This communication must have been made for the purpose of obtaining legal services, a legal opinion, or legal assistance, and not for the purpose of committing a crime or a tort. Finally, the client must claim, and not waive the privilege. *Id* at 358-59.

In Wonneman v. Stratford Sec. Co., 23 F.R.D. 281 (S.D.N.Y. 1959), the court declared that "where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client are . . . permanently protected from disclosure by himself or by the legal advisor except the protection be waived." *Id.* at 285.

A third formulation was devised by Dean Wigmore. Consisting of eight points, this theory establishes the privilege:

> (1) where legal advice of any kind is sought, (2) from a professinal legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, except the protection be waived.

8 J. WIGMORE, *supra* note 29, § 2292 at 554. Although each is similar to the others, the three have been treated as separate. *See, e.g.*, 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2017 at 133 & n. 91 (West 1970); Comment, *The Corporate Attorney-Client Privilege: Alternatives to the Control Group Test,* 12 TEX. TECH. L. REV. 459, 459 nn.4 & 6 (1981).

39 *See, e.g.*, Diversified Indus., Inc. v. Meredith, 522 F.2d 596 (8th Cir. 1978) (en banc); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978).

40. The privilege must be claimed by the party asserting its protection at the time the materials are requested or when the documents are placed in an in camera review. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1160-61 (D.S.C. 1975). The court in the *United Shoe* decision required the client to claim the privilege to prevent its being waived. *United Shoe,* 89 F. Supp. at 359. *See generally* 8 J. WIGMORE, *supra* note 29 at § 2311.

41. D.I. Chadbourne, Inc. v. Superior Court, 60 Cal.2d 723, 729, 388 P.2d 700, 704, 36 Cal. Rptr. 468, 472 (1964).

an attorney primarily for legal purposes,[42] disallowing the privilege in situations in which the consultations were predominantly business-oriented.[43] If the client made the disclosures in the furtherance of a fraud, tort, or crime,[44] or for the sole reason of cloaking general information with confidentiality,[45] the privilege has been found not to attach.

Although the privilege may not be waived by an attorney, the client making the disclosure may waive its protection.[46] The privilege will not apply to communications made in the presence of third parties or to disclosures whose confidence was broken by the client.[47] If the client's conduct indicates a waiver, the privilege is considered to have been waived, notwithstanding the intent of the client.[48] The privilege cannot act as both a sword

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42. *See* Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 146 (D. Del. 1977); *Duplan Corp.*, 397 F. Supp. at 1161; Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 33 (D. Md. 1974); American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 89 (D. Del. 1962); *Zenith Radio Corp.*, 121 F. Supp. at 794 (D. Del 1954); *United Shoe*, 89 F. Supp. at 358.

The privilege may not be recognized if the communication was not made for the purpose of seeking legal services from an attorney. *Duplan Corp.*, 397 F. Supp. at 1161. The request for legal services may be inferred, as it is not required to be made explicitly by the potential client. *Hercules Inc.*, 434 F. Supp. at 144. The communications are, however, presumed to have been made pursuant to a desire for legal advice. 8 J. WIGMORE, *supra* note 29, at § 2296. According to Dean Wigmore:

> [T]he most that can be said by way of generalization is that a matter committed to a professional legal advisor *is prima facie so committed for the sake of the legal advice* which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.
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> Obviously, much depends upon the circumstances of individual transactions.

8 J. WIGMORE, *supra* note 29, § 2296 at 567.

43. *See* Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 147 (D. Del. 1977); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 33 (D. Md. 1974); American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 89 (D. Del. 1962); Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 794 (D. Del. 1954).

44. Hercules, Inc. v. Exxon Corp. 434 F. Supp. 136, 155 (D. Del 1977); *See also United Shoe*, 89 F. Supp. at 358.

45. United States v. Upjohn Co., 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981). *See In re* Grand Jury Subpoena (John Doe), 599 F.2d 504, 510-11 (2d Cir. 1979); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 385-87 (D.D.C. 1978). *See also* 81 AM.JUR. 2D WITNESSES § 220 at 253 (1976).

46. According to the *United Shoe* court, the client had to claim the privilege in order to avoid forfeiture of the protection by waiver. *United Shoe*, 89 F. Supp. at 359.

47. *See* Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 37 (D. Del. 1977); *United Shoe*, 89 F. Supp. at 358; D.I. Chadbourne, Inc. v. Superior Court, 60 Cal.2d 723, 735, 388 P.2d 700, 708, 36 Cal. Rptr. 468, 477 (1964).

48. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1162 (D.S.C. 1975). It has been held that a partial waiver of the privilege, concerning only certain materials involved in the client's communications with the attorney, constituted a waiver of the privilege as a whole, inasmuch as the disclosures pertained to the subject matter of the communications. *Id.* at 1161-62. A similar situation exists when the advice of counsel is placed into issue in a court proceeding. As stated by one court, the "deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice." Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976).

and a shield; courts refuse to allow a client to disclose facts which would aid his or her position and at the same time to prevent discovery of the facts which would harm his or her position.[49]

Application of the Attorney-Client Privilege to Corporations

The attorney-client privilege was unquestionably applied to corporations at one time, [50] but its applicability was restricted by courts fearing the volume of information that could be concealed by a corporation.[51] Because no one individual performs the information-giving and the decision-making processes of a corporation, it is difficult to determine which of a corporation's employees may be considered to be acting as the corporation, thus invoking the privilege on behalf of the company.[52] Prior to 1962, courts considered corporate clients as equivalent to individual clients, treating as privileged statements made by corporate employees to the firm's counsel.[53] The broad construction given the attorney-client privilege in the corporate context comported with the basic policy on which the privilege was grounded.[54] Generally, courts applied the privilege to communications made confidentially while in pursuit of legal services from an attorney.[55] One federal district court devised a "time test" which extended the privilege to communications made to an attorney, if the subject matter of the exchanges was primarily legal in nature.[56] Another district court required that each communication be examined separately to determine if the advice connected with that

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49. *Duplan Corp.*, 397 F. Supp. at 1161-62. *See Handgards, Inc.*, 413 F. Supp. at 929. Dean Wigmore commented that a client "cannot be allowed, after disclosing as such as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final." 8 J. WIGMORE, *supra* note 29, § 2327.

50. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b) [04] at 503-41 (1980).

It has been noted that "the availability of the privilege to corporations has gone unchallenged so long and has been so generally accepted that [one] must recognize that it does exist." City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 484 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 743 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

Several decisions prior to 1962 considered corporate clients to be equivalent to individual clients. *See, e.g.*, American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D. Del. 1962); Zenith Radio Corp. v. RCA, 121 F. Supp. 792 (D. Del. 1954); United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950).

51. *See, e.g.*, *City of Philadelphia*, 210 F. Supp. 483; Radiant Burners, Inc. v. American Gas Ass'n., 207 F. Supp. 771, *aff'd on reconsideration*, 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

52. 2 J. WEINSTEIN & M. BERGER, *supra* note 50, at 503-41 to 503-42.

53. *See, e.g.*, *American Cyanamid Co.*, 211 F. Supp. 85; *Zenith Radio Corp.*, 121 F. Supp. 792; *United Shoe*, 89 F. Supp. 357.

54. *See* 2 J. WEINSTEIN & M. BERGER, *supra* note 50, at 503-44.

55. *See supra* note 53.

56. *United Shoe*, 89 F. Supp. at 360-61.

disclosure was of a legal nature[57] and if the attorney was acting in a legal capacity during the consultation.[58] Both of these decisions held that communications of any corporate employee were privileged,[59] providing that the disclosure met criteria established in *United States v. United Shoe Machinery Corp.*[60]

Legal scholars and jurists feared that corporate clients would channel important data through corporate attorneys in order to invoke the new, boundless attorney-client privilege, thus concealing relevant information.[61] Heeding admonitions from experts that the privilege resulted in concrete obstructions to the general duty to disclose,[62] courts began to restrict the application of the privilege to corporations. The most provocative decision on this subject, rendered in answer to these fears, was made in 1962 in *Radiant Burners, Inc. v. American Gas Association,*[63] in which District Judge Campbell held that the attorney-client privilege did not apply to corporations.[64] This conclusion was rationalized on grounds that the personal nature of the privilege barred its application to non-human corporate entities.[65] Although reversed on appeal,[66] the decision heralded a new generation of cases whose resolution was based upon variegated restrictions of the attorney-client privilege in the corporate context. Many of these limitations were based upon interpretations of dictum in *Hickman v. Taylor.*[67] New questions arose concerning the applicability of the privilege to corporations: "Who speaks for the corporations? Are the statements of all the employees the statements of the client? Are house counsel . . . lawyers for purposes of the privilege?"[68]

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57. *Zenith Radio,* 121 F. Supp. at 794.

58. *Id,* at 794-95.

59. *Zenith Radio,* 121 F. Supp. at 795; *United Shoe,* 89 F. Supp. at 358-59.

60. 89 F. Supp. 357. *See also supra* note 38.

61. *See* United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), *rev'd,* 449 U.S. 383 (1981).

62. 8 J. WIGMORE, *supra* note 20, § 2291 at 554.

63. 207 F. Supp. 771, *aff'd on reconsideration,* 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd,* 320 F.2d 314 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963).

64. 207 F. Supp. at 773.

65. *Id.* at 773-74.

66. *Radiant Burners,* 320 F.2d 314 (7th Cir. 1963), *cert. denied* 375 U.S. 929 (1963).

67. 329 U.S. 495 (1947). Many recent decisions have considered a corporation's employees to be mere witnesses, particularly if the employees acquire relevant information by fortuitous means. This interpretation of the "witness" has encouraged courts which adhere to the *Hickman* dictum to restrict the applicability of the attorney-client privilege. Speaking for the court, Justice Murphy elaborated that "the protective cloak of privilege *does not extend to information* which an attorney secures *from a witness* while acting for his client in anticipation of litigation." 329 U.S. at 508 (emphasis added).

68. *American Cyanamid Co.,* 211 F. Supp. 85, 88. The privilege has been applied frequently to house counsel, and house counselors are generally considered to be attorneys for purposes of attacking the privilege to communications received by them from their employers. *See* Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 36 (D. Del. 1977); Georgia-Pac. Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 464-66 (S.D.N.Y. 1956).

STANDARDS OF DETERMINING APPLICABILITY OF THE PRIVILEGE TO THE CORPORATE CLIENT

A corporation acts through its agents and employees, who may be divided into those who give information upon which legal advice is to be based, and those who act on the advice rendered by the attorney.[69] Courts must designate the employees who act as representatives of the corporation, thus qualifying the corporation and the employee as a client.[70] Numerous standards have been proposed in an attempt to discover which employees acquire the status of client for the corporation.[71] Some of the rules devised have their origins based on existing standards which were adopted to deal with the facts on hand.[72] The diversity in the number of tests, developed to provide continuity and consistency in decisions, has generally contributed to an uncertainty in applying the attorney-client privilege.

The Control Group Test

Subsequent to Judge Campbell's sweeping statement in *Ra-*

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69. 2 J. WEINSTEIN & M. BERGER, *supra* note 50, at 503-42.

70. Hercules, Inc. v. Exxon Corp., 18 F.R.D. 463, 464-66 (S.D.N.Y. 1956).

71. The majority of the tests have received little or no recognition and support. *See* Note, *Control Group Test Adopted as Standard for Assertion of Attorney-Client Privilege by Corporate Client*, 58 WASH. U. L. Q. 1041 (1980).

In Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1975), the court held that the subject matter rule was merely a corollary to the control group test. *Id.* at 1165. *See infra* note 76 and accompanying text; *see infra* note 125 and accompanying text.

According to *Duplan* the communications not only had to come from members of the control group in order to be privileged, but the disclosures also had to be incidental to requests for legal services. *Duplan Corp.*, 397 F. Supp. at 1165. *See also* Note, *supra*, at 1047-48.

State courts, apparently not as alarmed by the burden placed on discovery by the attorney-client privilege, have often maintained the pre-1962 approaches in applying the privilege to corporations. *See* Stern, *Attorney-Client Privilege: Supreme Court Repudiates the Control Group Test*, 67 A. B. A. J. 1142, 1144 (1981).

In D. I. Chadbourne, Inc. v. Superior Court, 60 Cal.2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964), the California Supreme Court promulgated several basic principles aimed at the protection of disclosures made by a corporate employee to corporate counsel. *Id.* at 736, 388 P.2d at 709, 36 Cal. Rptr. at 477. Notable among the eleven principles propounded by the court were those attaching the attorney-client privilege to communications made by "the natural person to be speaking for the corporation," *Id.*, and those communications made by an employee whose employment was connected to the subject matter of the consultation. *Id.* These tenets reflect the general policy followed by the state courts as well as the more recent federal decisions. *See* Stern, *supra* at 1144-45.

72. Many of the standards have resulted from the contention that the complexities of the modern corporation dictate that a more subjective standard be used. Various authors have proposed standards, and others have offered persuasive arguments in favor of certain existing standards. Suggestions for approaches which vary from those previously adopted by courts have also been promulgated. *See, e.g.*, Comment, *supra* note 38 (a five-point test proposing to achieve "a proper balance" between the policy of the privilege and the liberal rules of discovery); Note, *Death-Knell for the Control Group Test and a Plea for a Policy-Oriented Standard to Corporate Discovery*, 31 SYRACUSE L. REV. 1043 (1980) (a "records immunity" doctrine merging the attorney-client privilege and the work product doctrine and eliminating separate requirements for similar results) [hereinafter cited as *Death-Knell*]; Note, *Evidence—Privileged Communications—The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360 (1970) (privileging communications made by the natural person to speak for a corporation).

diant Burners, a new standard was developed. *City of Philadelphia v. Westinghouse Electric Corp.*[73] rejected Campbell's theory, but it also refused to revert back to the broad test of *United States v. United Shoe Machinery Corp.*[74] Noting an apparent conflict between the dictum in *Hickman* and the *United Shoe* decision,[75] the court enunciated its own rule.[76] Dubbed the "control group test,"[77] this test was refined[78] and adopted by a majority of federal courts[79] and the Proposed Federal Rules of Evidence.[80]

The control group test was designed to privilege the communications of the upper levels of management of a corporation.[81] It was developed to provide a "bright-line" test by which a judge could resolve the question of privilege by merely dividing the documents and communications into those generated by the control group and those which were not.[82] Only the communications of the control group would be privileged.[83] This "bright-line" test would provide an expedient standard which could be easily applied and which would result in greater predictability before litigation in deciding which disclosures by the client would be privileged.[84] Because the test was objective, it was readily

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73. 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub. nom.* General Electric Co. v. Kirkpatrick, 312 F. 2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

74. 89 F. Supp. 357 (D. Mass. 1950).

75. *City of Philadelphia*, 210 F. Supp. at 485.

76. Judge Kirkpatrick's rule was expressed as follows:

> [If] the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an unauthorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.

210 F. Supp. at 485.

77. *See* Garrison v. General Motors Corp., 213 F. Supp. 515, 517-18 (S.D. Cal. 1963).

78. Natta v. Hogan, 392 F. 2d 686, 692 (10th Cir. 1968). The court, in clarifying the rule, stated that "the test is whether the person has the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or is an authorized member of a group that has such power." *Id.*

79. According to the Third Circuit, "[a] clear majority of the federal courts adhere to the control-group test." *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1234 (3d Cir. 1979). *See also* Jarvis, Inc. v. AT & T, 84 F.R.D. 286, 291 (D. Colo. 1979); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975).

80. Proposed Rules of Evidence 5-03 (a)(3), 46 F.R.D. 161, 250 (1969). "A 'representative of the client' is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto on behalf of the client." *Id.*

81. *City of Philadelphia*, 210 F. Supp. at 485. Upper management is difficult to define because corporate terminology varies among the many corporations. Because terms like "manager", "executive", and "officer" are not clearly defined in corporate business as a whole, the rank of an employee is precluded as a guide. *Id.*

82. *See* Note, *Attorney-Client Privilege for Corporate Client: The Control Group Test*, 84 HARV. L. REV. 424, 430 (1970).

83. *Id.*

84. *See* Comment, *Control Group Test Adopted as Standard for Assertion of Attorney-Client Privilege by Corporate Client*, 58 WASH. U. L. Q. 1041 (1980).

understood by interested parties.[85] The control group test would also promote sound corporate policy and morality by reducing the opportunity for the corporate attorney to cloak relevant data with the privilege.[86]

Control group proponents purport that too broad a test allows corporate management to distract discovery by requiring subordinates to channel data on sensitive legal matters and even general business matters to the hierarchy via the corporation's counsel.[87] This "zone of silence" would protect relevant information from discovery by shielding it with the attorney-client privilege, which would attach by virtue of the employee's discussion with the attorney while following orders.[88] The control group test would uphold the policy of liberal discovery of pertinent materials and would encourage the management to be aware of all sensitive issues and other matters which had been shifted to the corporate lawyer under broader standards.[89]

One attractive aspect of the test is its reduction of the burden of discovery placed on opposing parties.[90] Much of the information needed by the litigant is not privileged under the test, because the majority of the relevant facts are within the possession of the lower levels of employees.[91] This test thus achieves justice by making all relevant facts available for courts to examine. It also reduces the litigants' expenses of time and money.

Supporters of the control group test allege that it promotes the policies justifying the attorney-client privilege.[92] By restricting the privilege to the communications of those within the control group, the client's appreciation of the risks of disclosure is enhanced.[93] "The incentive to confide is at least partially dependent upon the client's ability to predict that the communication

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85. *Virginia Elec.*, 68 F.R.D. 397. The court here stated that "the rule most likely to obtain the greatest discovery, the rule more easily applied by the court, the rule more easily understood by lawyers, the rule more likely to be recognized as reasonable . . . and the rule most consonant with . . . the attorney-client privilege is the control group test." *Id.* at 400.

86. *See* Comment, *supra* note 38, at 463.

87. *Id. See also* United States v. Upjohn Co., 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

88. Because of the vast number of agents of a corporation, the overwhelming volume of communications and documents and the regular use of attorneys, a zone of silence could be created and could grow as the corporation increases its dealings with its attorneys. Courts would hesitate to allow facts to be cloaked by the attorney-client privilege merely on the pretext of discussing activities with attorneys. Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L. J. 953, 955-56 (1956).

89. *See* Comment, *supra* note 38, at 462-64.

90. *See* Note, *supra* note 82, at 429.

91. *Id.* at 429-30.

92. *See* 33 VAND. L. REV. 999, 1004 (1980).

93. *Id.*

will be held in confidence."[94] Because the control group is small in number and has interests similar to those of the corporation, the members have a compelling incentive to keep the communication confidential, whereas the vast number of employees on the payroll would not be so inclined.[95]

Despite the glowing accolades granted the control group test, many criticisms have arisen. The principal criticism is that the test equates the control group with individual clients.[96] Individual clients both inform their attorneys of important material and act on the advice based on that material. The corporate client usually has the two functions divided among many people.[97] However, the control group is treated as an individual. Not only does the upper management give information to the corporation's attorneys, but it also acts on the advice given.[98] The exclusion of lower-level employees from the privilege denies the attorney valuable information pertinent to the formulation of legal advice.[99] The purpose of the attorney-client privilege is to encourage full disclosure of relevant facts by clients to attorneys in order to insure the rendition of effective representation by the counsel.[100] All available sources of information must be examined by the corporate attorney in preparing for potential or existing litigation.[101] The control group test impedes the assimilation of relevant material by detering the attorney from obtaining information from control members.[102] Employees may also hesitate in offering potential evidence to attorneys for fear of disclosure by the attorney.[103] The free flow of data from the client to the attorney, necessary for preparing the best possible advice, is blocked by the control group test, thus defeating the purposes of the attorney-client privilege.[104] As one court assessed the situation:

> The attorney dealing with a complex legal problem "is thus faced with a 'Hobson's choice'. If he interviews employees

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94. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1235 (3d Cir. 1979).

95. *See* Note, *supra* 82, at 430.

96. *See In re* Grand Jury Investigation (Sun Co.), 599 F.2d at 1236; Diversified Indus., Inc. v. Meredith, 572 F. 2d 596, 608 (8th Cir. 1978) (en banc). *See also* Note, *supra* note 92, at 1005.

97. 2 J. WEINSTEIN & M. BERGER, *supra* note 50, at 503-42.

98. Natta v. Hogan, 392 F.2d 686, 692.

99. *See, e.g., In re* Grand Jury Investigation (Sun Co.), 599 F.2d at 1236; *Diversified Indus.*, 572 F.2d at 608-09. *See also* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164-65 (D.S. C. 1975).

100. *See* Comment, *supra* note 38, at 460.

101. *See* Comment, *supra* note 84, at 1051.

102. *Id.* at 1052.

103. *See* Note, *supra* note 82, at 431. *See also* Comment, *supra* note 84, at 1046 n. 36.

104. *Diversified Indus.*, 572 F.2d at 609.

> not having 'the very highest authority', their communications to him will not be privileged. If, on the other hand, he interviews *only* those with 'the very highest authority', he may find it extremely difficult, if not impossible, to determine what happened."[105]

The control group, rather than aiding the preparation of legal servies by an attorney, acts as a detriment, and it counteracts the purposes of the attorney-client privilege.[106]

Other critics have proposed that the control group test dissuades corporations from making communications to their attorneys in good faith efforts to promote compliance with complex laws or to identify potentially suspect activities.[107] Management may be hesitant about having employees involved in questionable dealings discuss the details with attorneys if it is possible for the opposing party to secure an order forcing production of these details; the employees themselves may likewise fear such an occurrence.[108] Without the protection of the privilege, the control group may not police the activities of the corporation, resulting in a lower standard of corporate morality, which could potentially damage the equity of the stockholders from a loss of goodwill and from large pecuniary penalties.[109]

Another complaint is that the control group test is too inflexible to meet the infinite contexts involving the attorney-client privilege.[110] Abuses of the privilege avoid detection by the use of the objective control group test, which examines the identity of the communicant instead of the nature and content of the communication. A subjective weighing of all pertinent circumstances would disclose the presence of many of the abuses.[111]

Perhaps the most interesting complaint is that the control group test does not actually provide the predictability asserted by

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105. *Id.* (quoting Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B. C. INDUS. & COMM. L. REV. 873, 876 (1970)).

106. *Diversified Indus.*, 572 F.2d at 609. *But see In re* Grand Jury Investigation (Sun Co.), 599 F.2d at 1236. The Third Circuit held that applying the privilege to lower employees would be illusory. The corporate heirarchy could waive the privilege concerning communications made by subordinates to corporate counsel, thus leaving the lower-level employees unprotected, regardless of the application of the privilege.

107. *Diversified Indus.*, 572 F.2d at 608-09. *But see Jarvis, Inc.*, 84 F.R.D. at 292.

108. *Diversified Indus.*, 572 F.2d at 609. *But see In re* Grand Jury Investigation (Sun Co.), 599 F.2d at 1237 (even if corporate attorneys cannot obtain privileged facts, the corporation has no choice but to investigate if it wishes to avoid possible criminal or civil liability); Note, *supra* note 82, at 431-32 (the firm certainly would not cease to monitor its employees' activities, freeing them to create treble damages liability).

109. *See* Comment, *supra* note 84, at 1053-54.

110. *See* Comment, *supra* note 38, at 464.

111. *See supra* note 92, at 1005.

its proponents.[112] Although touted as supplying needed certainty in determining who speaks for a corporation, the control group test has been diluted by subjective reasoning in various jurisdictions.[113] Courts have reached conflicting conclusions in defining what constitutes a control group.[114] Judge Kirkpatrick, in *City of Philadelphia*,[115] stated that corporate rank is not a determinant, and that terms such as manager, executive, and officer are too ambiguous, and capable of different meanings within different companies.[116] With the many possible situations and communications involved in corporate legal matters, it is not possible for a court to apply a wholly objective test to decide if the privilege applies to the corporation.[117] The courts would be forced to examine each document and disclosure involved in a case to determine if an employee was a control group member.[118] A non-predictable method of applying the privilege must be used in order for the attorney-client privilege to have any effect in a practical sense.

The *Harper & Row* "Subject Matter" Test

By the end of the 1960's, the control group test had been adopted by a number of courts[119] and had been incorporated into the proposed rules of evidence.[120] During this time, the adequacy of the control group test was being questioned increasingly. The Seventh Circuit answered those questions by holding the test to be inadequate to meet the needs of corporations in the landmark decision of *Harper & Row Publishers, Inc. v. Decker*.[121] This was a consolidated antitrust action in which the plaintiff sought

112. *Id.*

113. *Id.*

114. *See, e.g., Upjohn*, 600 F.2d 1123 (remanded case to lower court for determination of whether chairman, president, and other upper-echelon officers were control group members); Natta v. Hogan, 392 F.2d 686 (patent division and research department managers were included in the control group); Congoleum Indus., Inc. v. GAF Corp., 49 F.R.D. 82 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3d Cir. 1973) (division and corporate heads, but not directors of research, constitute part of control group); Garrison v. General Motors Corp. 213 F. Supp. 515 (S.D. Cal. 1963) (directors, officers, and division managers comprise the control group).

115. *City of Philadelphia*, 210 F. Supp. 483.

116. 210 F. Supp. at 485.

117. Note, *supra* note 92, at 1005.

118. Note, *supra* note 82, at 430. Since it is not possible to determine the author of each document, the court placed the burden on the claimants to prove it. Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117, 119-20 (M.D. Pa. 1970).

119. *See supra* note 79.

120. *See supra* note 80.

121. 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971).

discovery of memoranda prepared by attorneys while interviewing corporate employees who had testified before a federal grand jury. In granting mandamus, compelling the lower court to deny production, the court rejected the control group test and adopted a more practical approach.[122] The *Harper & Row* test, also known as the "subject matter" or "scope of employment" test,[123] articulated two prerequisites for identifying an employee with the corporation in order for the privilege to attach to the communications of the employee.[124] If the subject matter of the disclosure is the performance by the employee of his duties, and if the communication was made at the direction of corporate supervisors, the privilege would apply.[125] This test emphasizes the nature of the communications rather than the identity of the communicant.[126] After being affirmed by the United States Supreme Court,[127] the ruling was adopted by a small number of courts.[128]

Proponents of the subject matter test suggest that it is a better-reasoned approach to the problem.[129] By entertaining a more subjective standard, courts may avoid abuses which befall the application of the objective test.[130] Corporate counsel are able to obtain a freer flow of information from clients whose employees may consult more openly with the attorney, thus enhancing the preparation of legal advice by the attorney.[131] Internal investiga-

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122. 423 F.2d at 491-92.

123. Most courts refer to the *Harper & Row* rule as the "subject matter" test. *See* Jarvis, Inc. v. A.T. & T., 84 F.R.D. 286, 291 (D. Colo. 1979); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1165 (D.S.C. 1975). However, the term "scope of employment rule" was employed by the Second Circuit. *In re* Grand Jury Subpoena v. United States, 599 F.2d 504, 509 (2d Cir. 1979).

124. 423 F.2d at 487.

125. The court in *Harper & Row* considered that an employee, while not a control group member, may be covered by the attorney-client privilege:

> [A]n employee of a corporation . . . is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

Harper & Row, 423 F.2d at 491.

126. *See* Comment, *supra* note 38, at 465.

127. Decker v. Harper & Row, Inc., 400 U.S. 348 (1971).

128. *See, e.g.*, Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974); Hasso v. Retail Credit Co., 58 F.R.D. 425 (E.D. Pa. 1973). *Cf.* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164-65 (D.S.C. 1975) (adopted *Harper & Row* rule as corollary to control group test). *But see In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 385-87 (D.D.C. 1978) (rejected both the subject matter test and the control group test).

129. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc); Jarvis, Inc. v. A.T. & T., 84 F.R.D. 286, 291 (D. Colo. 1979). *See also* 15 TULSA L. J. 390, 396 (1979).

130. *See supra* note 92, at 1005.

131. *See* Note, *Attorney-Client Privilege*, 28 DRAKE L. REV. 191, 194 (1978).

tions, whether to detect wrongdoing or to insure compliance with complex laws and regulations, are not as inhibited under the subject matter test as under the control group approach.[132] The test is easily applied because any employee can potentially be privileged upon meeting the two criteria.[133]

Opponents are scornful of the subject matter test for several valid reasons. The greatest amount of criticism concerns its potential for abuse and for impeding discovery.[134] It tends to create the zone of silence feared by those who opposed the unlimited approach of earlier decisions.[135] Relevant information necessary to an individual litigant is virtually beyond discovery if the corporation is allowed to protect all its communications to its counsel.[136] This is contrary to the modern policy of liberal discovery espoused by the Federal Rules of Civil Procedure.[137] By using the corporate attorney as an "exclusive repository of unpleasant facts," corporate management could remain ignorant of important but sensitive matters, leaving the only record of full details in the hands of the corporate attorney.[138] The control group proponents consider that test as preventing the possible establishment of a zone of silence, and hold the subject matter test as encouraging such zones.[139]

Adversaries of the *Harper & Row* standard consider the broad privilege to be ineffectual in protecting discovery and in promoting greater disclosures. Confidentiality, required for the attorney-client privilege to exist, is doubtful because of the number of parties which a communication will pass through within a corporation.[140] At least one decision doubted that a broader privilege could assist the search for relevant evidence, stating that the privilege would be illusory.[141] That court opined that the subordinates would be confiding in corporate counsel at the risk of having the control group decision-maker waive the privilege.[142]

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132. *See* 44 MO. L. REV. 350, 357 (1979).

133. *Diversified Indus.*, 572 F.2d at 609.

134. *See* Comment, *supra* note 84, at 1054.

135. *Upjohn*, 600 F.2d at 1227.

136. *Diversified Indus.*, 572 F.2d at 608-09. *See also* Note, *supra* note 131, at 194; Note, *supra* note 129, at 396.

137. *See generally* FED. R. CIV. P. 26(b)(1),(3).

138. *Upjohn*, 600 F.2d at 1227.

139. *See supra* note 92, at 1004.

140. *Id.* at 1007.

141. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979).

142. *Id.* at 1236. The court hypothesized a situation in which corporate employees had engaged in wrongdoing. The control group could waive the privilege as to their discussions with the corporate counsel and turn them in to the authorities. If they had done no wrong, they would have no fear of giving unprivileged information to counsel. Therefore, the court concluded that the application of the privilege to lower-level employees was illusory. *Id. See also* Jarvis, Inc., 84 F.R.D. at 292.

One final complaint is based on the scope of an attorney's efforts while engaged in collecting data for actual or possible litigation.[143] Not only may the zone of silence include legal matters, but it may also include communications of a non-legal nature.[144] Inasmuch as the privilege has been held applicable only to disclosures of a legal kind,[145] the subject matter test can conceal knowledge of a wide span of business events. For the privilege to apply, the attorney must be "acting as a lawyer" and in his legal capacity.[146] By rendering advice on technical, economic, or business concerns, the attorney is not "acting as a lawyer."[147] As one court surmised, the application of a narrower standard would "result in less frequent use of attorneys as corporate sleuths."[148] The wide range of communications protected by the privilege under the subject matter test has also raised fears that, even though the attorney is acting in a legal capacity, the client may not be acting as a client. This theory stemmed from dictum in *Hickman v. Taylor,*[149] which precluded from the protection of the privilege the communications of mere witnesses.[150] Subsequent decisions, most notably *City of Philadelphia,*[151] have used that dictum in barring from the application of the privilege the communications of employees who gained information fortuitously.[152]

The *Diversified* or Modified Subject Matter Test

Faced with choosing between the two tests, some courts refused to follow either and developed alternative standards.[153] Partly based on the two original approaches, these hybrid tests have not been followed with any regularity.[154] This has contributed to the

143. *See* Comment, *supra* note 38, at 466.

144. *Id.*

145. *See* Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 147 (D. Del. 1977); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 39 (D. Md. 1974).

146. *Hercules, Inc.* at 147. *See also* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (attorney must be "acting as a lawyer" in order for the privilege to attach); 8 J. WIGMORE, *supra* note 29, § 2292 at 554 (the attorney must be working in his legal capacity).

147. *See* Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 794 (D. Del. 1954).

148. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d at 1237.

149. 329 U.S. 495 (1947).

150. *See supra* note 67.

151. 210 F. Supp. 483 (1963).

152. *Id.* at 485. Judge Kirkpatrick postulated that an employee who gave information to counsel without himself being the client was only a witness and was precluded by the *Hickman* doctrine from protection by the attorney-client privilege.

153. *See* Comment, *supra* note 84, at 1054.

154. *Id.*

chaotic situation of uncertainty exising prior to 1981.[155] Despite the affirmance of the *Harper & Row* decision by the Supreme Court, the ruling was dubiously received because there was no opinion given to explain the significance of the evenly split vote.[156]

In the aftermath of the attacks on the subject matter test, the Eighth Circuit devised a new standard in *Diversified Industries, Inc. v. Meredith.*[157] Diversified, a defendant in another action, sought mandamus to prevent the court-ordered disclosure of certain memoranda prepared by its attorneys.[158] The court, in an en banc hearing, agreed with Diversified and allowed mandamus to issue. The court determined that the control group test relied on by the lower court was inadequate because of its failure to consider the realities of the modern corporate business client.[159] Ruling that the free flow of information from the client to the attorney was obstructed, the court stated that a corporate attorney was faced with choosing between losing valuable information by not interviewing subordinates and giving insufficient advice because of the lack of valuable information.[160]

Judge Heaney endorsed the subject matter test as being the more reasonable approach because of its subjective elements.[161] However, admitting that there were creditable arguments against that standard, the court suggested a rule which incorporated modifications hypothesized by Judge Weinstein.[162] The result was a five-pronged test that could apply potentially to the communications of any employee.[163] The court rationalized its "modified

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155. The various circuits have followed different approaches in determining who speaks for a corporation. Three have adopted the control group test. *See* United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981); *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979); Natta v. Hogan, 392 F. 2d 686 (10th Cir. 1968). The subject matter test has been adopted by one circuit. *See* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971).

Another modified the *Harper & Row* rule. Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc). Two other circuits have avoided the issue by resolving the cases on other grounds. *See In re* Thompson, 624 F.2d 17 (5th Cir. 1980); *In re* Grand Jury Subpoena (John Doe), 599 F.2d 504 (2d Cir. 1979). The others have not yet faced the issue.

156. Doubt has been raised because of the collateral issue of mandamus in *Harper & Row.* Because the *Harper & Row* decision was split evenly, and since six justices participated both in *Upjohn*, which was unanimous, and *Harper & Row*, it appears that there may have been reliance by some justices in *Harper & Row* upon their objection to the use of mandamus. *See* Stern, *supra* note 71, at 1144.

157. 572 F.2d 596 (8th Cir. 1978) (en banc).

158. *Id.* at 599.

159. *Id.* at 608.

160. *Id.* at 609. *See supra* note 105.

161. 572 F.2d at 609.

162. 2 J. WEINSTEIN & M. BERGER, *supra* note 50, at 503-46.1 to 503-50.

163. *Diversified Indus.*, 572 F.2d at 609 (8th Cir. 1978) (en banc). The five-point test was stated as follows:

Harper & Row test" by deeming it capable of safeguarding against the abuses that critics claimed to have resulted from the pure subject matter test.[164]

According to the court, the *Diversified* test would further the aims of the attorney-client privilege. By restricting the subject matter of the disclosures of employees to the duties of the employees, the rule would reduce the number of potential communicants in relation to a particular matter as well as excluding fortuitous witnesses.[165] It would also preclude from the privilege routine reports routed through the attorney's office, thus shattering the zone of silence.[166]

Proponents believe that the *Diversified* test achieves the necessary balance between protecting the confidentiality of a client's communication and the litigant's need of obtaining all relevant data affecting his case.[167] The *Harper & Row* test was refined by the requirements that the communication had to be made in order to secure legal advice and that only those with a "need to know" were to be privy to the disclosure.[168] These refinements reconcile differences between the pure subject matter test, and the policy underlying the attorney-client privilege.[169] The rule also avoids possible conflicts between the subject matter test and the *Hickman* dictum, and it comports with the modern theory of broad discovery.[170] Although the question of whether the communication was made to obtain legal advice is a sensitive issue, the majority settled the problem by applying Dean Wigmore's presumption in favor of the client's assertion of the privilege.[171] By re-

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> [T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Id. The court added that the corporation has the burden of meeting all of these criteria in order to establish a valid claim of privilege.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See supra* note 92, at 1008.

168. *See supra* note 132, at 358.

169. According to Dean Wigmore, the privilege, as it exists now, is based on subjective considerations. "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent." 8 J. WIGMORE, *supra* note 29, §2291, at 545.

170. *See supra* note 132, at 358.

171. *Diversified Indus.*, 572 F.2d at 610. The court referred to Dean Wigmore's statement that "a matter committed to a professional legal adviser is prima facie so committed for the sake

stricting this "prima facie" approach to the circumstances of each individual case, the court maintained the subjective nature of the approach.[172] Although this tactic places the burden of rebutting the presumption on the party seeking disclosure of the data, the corporation has the burden of proving the satisfaction of the five criteria of the rule.[173]

Although recognized as a possible happy medium between the *Harper & Row* and the control group tests,[174] the *Diversified* approach has often been criticized for not having fully defined the scope of the privilege.[175] The rule has been considered as placing too extreme a burden upon the opposing party because of the presumption in favor of the claimant of the privilege.[176] Also, those opposing the broad application of the attorney-client privilege cite the potential for abuse inherent in the subject matter test as grounds for adhering to the control group test.[177] These weaknesses have in turn pointed out the unpredictability of the test, shown by the uneven application of the rule in subsequent cases.[178]

The *Ampicillin* Standard

The District of Columbia District Court enunciated a new rule of its own shortly after the *Diversified* decision. *In re Ampicillin Antitrust Litigation*[179] involved several antitrust actions in which the plaintiffs sought production of documents identified by the defendant in interrogatories. Although a special master had suggested both the subject matter and control group tests in testing various documents, the court concluded that both were insuffi-

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of the legal advice." 8 J. WIGMORE, *supra* note 29, §2296, at 567. Thus, the court made it possible for corporations to establish a presumption in favor of the privilege by easing what was the most important requirement necessary for the privilege to attach. 572 F.2d at 610.

172. 572 F.2d at 610.

173. *Id.* at 609-610.

174. *See supra* note 132, at 359; Note, *supra* note 131, at 197.

175. *See Jarvis, Inc.*, 84 F.R.D. at 291. *See also* Comment, *supra* note 38, at 469.

176. *See* Comment, *supra* note 38, at 469.

177. *See supra* note 92, at 1009.

178. *Id.* at 1009 n.61. Two cases cited herein exemplify the hesitancy of courts to follow this test. One court refused to consider all five elements. SEC v. Dresser Indus., Inc., 453 F. Supp. 573 (D.D.C. 1978). Another court held that the rule did not apply to an employee's communication because he was not an agent of the corporation when he made the communication. SEC v. Canadian Javelin Ltd., 451 F. Supp. 594 (D.D.C. 1978). *But see* Union Planters National Bank v. ABC Records, Inc., 82 F.R.D. 472 (W.D. Tenn. 1979) (the court followed the *Diversified* test).

179. 81 F.R.D. 377 (D.D.C. 1978).

cient and proclaimed a new rule.[180] Judge Richey noted that this rule was superior to the other approaches because it was based on the relevance of the communication to a particular legal problem,[181] whereas the control group test and the subject matter rule were based upon the identity of the communicant and the nature of the communication, respectively.[182] The *Ampicillin* rule strikes a middle ground between the two.[183] The court held that the control group test artificially restricted the availability of the privilege to only a few of those offering information to the attorney, frustrating the policy of frank interchange between the client and the attorney.[184] By requiring the communications to be relevant to a particular legal difficulty, the *Ampicillin* test eliminates the need to examine the communicant's job status and the effects of orders from the upper echelon of management.[185] This more pragmatic rule allows employees with personal knowledge of important facts to disclose that data without having to have orders from supervisors; it also curbs the privileging of communications of those with only a slight awareness of the facts.[186] Perhaps the only valid criticism is that it is applicable only upon a case-by-case basis, thus endangering its uniformity, but this is the most valuable aspect of the rule. By having subjective values, it is applicable to more diverse situations, while its other provisions protect against abuse.[187] This standard probably is closer to what the privilege seeks to achieve than any other test enunciated before it.[188]

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180. *Id.* at 385. The court required that the following criteria be met:

> (1) The particular employee or representative of the corporation must have made a communication of information which was *reasonably believed to be necessary to the decision-making process* concerning a problem on which legal advice was sought; (2) The communication must have been made for the purpose of securing *legal* advice; (3) The subject matter of the communication to or from an employee must have been related to the performance by the employee of the duties of his employment; and (4) The communication must have been a confidential one . . . . (emphasis by the court).

Id.

181. *Id.* The court explained that, by "relevance of the communication to a particular legal problem," it meant that the communication had to foster a reasonable belief that the information was necessary in making a decision. The court then added that its rule would curb the scope of the privilege more than the broad *Harper & Row* rule and would deal with the relevancy of the disclosure of the employee to the problem at hand. *Id.* at n.10.

182. *Id.* at n.10. *See also* Note, *The Corporate Attorney-Client Privilege: The Subject Matter Test v. The Control Group Test: Will Reasonableness Prevail?* 5 DEL. J. CORP. L. 480, 490 (1980) (neither the control group test nor the subject matter rule considers the relevance of the communication to the legal problem).

183. 81 F.R.D. at 386.

184. *Id.* at 387.

185. *See* Comment, *supra* note 38, at 469-70.

186. *Id.*

187. *Id.*

188. *Id.*

THE SUPREME COURT DECISION: *Upjohn Co. v. United States*

A unanimous decision by the Supreme Court in *Upjohn Co. v. United States*[189] supposedly laid the control group standard to a well-deserved rest. In reversing the Sixth Circuit,[190] the Court reiterated the purposes and policies underlying the attorney-client privilege. According to the Court, the privilege, designed to encourage frank consultation between clients and attorneys while protecting the interests of justice, "recognizes that sound legal advice or advocacy serves public ends and . . . depends upon the lawyer [sic] being fully informed by the client."[191] Justice Rehnquist noted that the control group test ran counter to the basic rationale behind the privilege by discouraging the free communication of data from corporate employees to lawyers providing legal advice to the client.[192] Rationalizing its opinion, the Court observed that the control group test violated the privilege by neglecting to guard both the giving of legal advice to those who can act on it and the tendering of relevant facts to the attorney to facilitate the formulation of sound and adequate advice.[193]

The majority reasoned that the communications of Upjohn's employees[194] to the general counsel were made at the direction of the chairman for the purpose of obtaining legal advice based

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189. 449 U.S. 383 (1981).

190. The lower courts held that the work product doctrine was inapplicable to administrative summonses issued under I.R.C. §7602(b), and that the IRS had only "to show that the inquiry [was] relevant to a good faith investigation conducted pursuant to a legitimate purpose, that the information sought [was] not in the IRS' possession and that proper administrative procedures [had] been followed." United States v. Upjohn Co., 600 F.2d 1223, 1228 n.13 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981). In reviewing the history of the doctrine, the Supreme Court held that the lower tribunals had used an improper standard. 449 U.S. at 401. The test employed by the lower courts, based on "substantial need and undue hardship," was inapplicable in this case. *Id.* Memoranda and mental impressions, based on oral communications made to an attorney, have been held to be beyond the purview of the "substantial need and undue hardship" test. Hickman v. Taylor, 329 U.S. 495, 512 (1947). These materials, labelled opinion work product, have been deemed as being absolutely protected from discovery by some courts. *See In re* Grand Jury Proceedings (Duffy), 473 F.2d 840, 848 (8th Cir. 1973); *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 949 (E.D. Pa. 1976). Although the Court did not go so far as to uphold the absolute status given the opinion work product in those and other cases, 449 U.S. at 401, it did hold that "a far stronger showing of necessity and unavailability . . . than was made . . . in this case would be necessary to compel disclosure." *Id.* at 402. This holding may, in effect, overturn decisions treating opinion work product as less than absolutely protected. *See In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1231 (3d Cir. 1979). The Court remanded the issue to the lower court for further proceedings, requiring a greater showing of need and hardship. 449 U.S. at 402.

191. 449 U.S. at 389.

192. *Id.*

193. *Id.* at 390.

194. Seven of the eighty-six employees interviewed by Upjohn's counsel were not employed at the time of the interview. Neither the district court nor the circuit court addressed the claim made by Upjohn that the attorney-client privilege applied to communications made by former employees while still employed. Because of the lack of treatment by the lower courts, the Supreme Court refused to entertain the matter. *Id.* at 394 n.3.

on information gleaned from the performance of the employees' duties.[195] The opinion implied that the subordinates were aware that the content of their communications was to be kept confidential and was to be used for the preparation of legal services.[196] This was held to be consistent with the policy of the privilege, and the Court ruled that the restriction of information channels was an irrational infringement on the client's right to prevent the unauthorized disclosure of its statements.[197]

The Court justified its rejection of the control group test after reflecting on several of the faults that it detected within the rule. Noting that the control group test forced counsel to choose between accepting unprivileged data and giving deficient legal opinions, the Court added that the control group test ignored the primary reason for the existence of the privilege, that of protecting disclosures made to aid the attorney in giving legal advice.[198] Justice Rehnquist mused that an attorney must assimilate all relevant data in order to determine what actually happened and to devise a course of action.[199] As the Court opined, often these facts are not in the possession of control group members, but of lower level employees. These people are often capable of causing legal difficulties for the corporation, and it is natural that they know of pertinent facts connected to those problems.[200] Additionally, the Court said that these employees are the individuals who will utilize the end-products of the lawyer's efforts.[201] As Justice Rehnquist assessed the situation, the control group test dissuades employees from conveying germane details to attorneys seeking to advise clients.[202]

In addition to these comments, the opinion discussed the detrimental effects of the restrictive control group standard upon the attempts by corporate attorneys who encourage compliance

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195. *Id.* at 394.

196. *Id.* at 395. Justice Rehnquist opined that "even those interviewees not receiving a questionnaire were aware of the legal implications" of the communications, which were indeed considered to be "highly confidential." *Id.*

197. *Id.*

198. *Id.* at 390.

199. *Id.* at 390-91.

200. *Id.* The majority added that lower level employees could "embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed" for the developing of adequate advice for the client on such matters. *Id.* at 391. *See also Diversified Indus.*, 572 F.2d at 608-09.

201. *Upjohn*, 449 U.S. at 392. *See Duplan Corp.*, 397 F. Supp. at 1164 (lawyer's opinion "is of no immediate benefit to the chairman of the board or the president").

202. *Upjohn*, 449 U.S. at 392. *But see In re* Grand Jury Investigation (Sun Co.), 599 F.2d at 1236 (without regard to the privilege, the lower level employees are not protected from disclosure; even if it applied, the control group could waive the privilege as it applied to each employee).

with complex regulations and who investigate internal malfeasance.[203] The value of these actions by corporate counsel are depreciated by the unnatural limitations placed on the application of the privilege by the control group test.

The Court found that the test adopted by the Sixth Circuit denied the corporate attorney the opportunity to gather all of the existing facts concerning a particular controversy. As the Court viewed the situation, the lawyer was subject to further disillusionment in attempting to determine the representatives of a corporation; not only would the attorney have to risk the receipt of unprivileged information, but he also would have to gamble that the actual communications would fit the differing control group definitions which varied from jurisdiction to jurisdiction.[204] The application of the control group test, according to the Court, resulted in conflicting conclusions in different courts, thus rendering it incapable of providing the predictability required to give the privilege meaning.[205] The majority opinion declared that an uncertain privilege, or privilege susceptible to indefinite application, was little better than no privilege at all.[206]

The Court of Appeals' disparaging comments about the subject matter test were considered inconsequential. The Court dismissed the Sixth Circuit's assertion that the broad standard would obstruct the rules of discovery; it espoused the proposition that the privilege extended only to communications, and not to the facts underlying the communications to the attorneys.[207] The party seeking production in the instant case, declared the Court, could interview the employees and examine the facts and documents which precipitated the controversy; the same data could be found by that party without attempting to use discovery.[208] The Court held that convenience in searching for evidence was an insufficient cause to overcome the long-established purposes of the privilege.[209]

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203. *Upjohn*, 449 U.S. at 394. *See Diversified Indus.*, 572 F.2d at 609.

204. *Upjohn*, 449 U.S. at 393. *See supra* note 114.

205. *Upjohn*, 449 U.S. at 393. *See supra* note 155.

206. *Upjohn*, 449 U.S. at 393.

207. *Upjohn*, 449 U.S. at 395-96 (quoting *City of Philadelphia*, 205 F. Supp. at 831). *See Diversified Indus.*, 572 F.2d at 611. Litigants may still examine business documents, depose corporate employees, and interview nonemployees, [and] obtain pre-existing documents and financial records not prepared . . . for the purpose of communications with the law firm in confidence." 572 F.2d at 611. *See also In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 389 (D.D.C. 1978); 97 C. J. S. *Witnesses* § 276 at 785 (1957).

208. *Upjohn*, 449 U.S. at 395-96. *See* Note, *supra* note 155; Note, *supra* note 207.

209. Note, *supra* note 155, at 396.

The discussion of the privilege issue was concluded by the Court's pronouncement of an ad hoc approach in applying the attorney-client privilege. In adopting such a rule, the majority refused to be bound by either one test or the other. The Court claimed that the Federal Rules of Evidence required an ad hoc basis.[210] The Court felt that a broader, subjective approach would prevent some of the inherent inequities of the objective test without vitiating the privilege. The Court then reversed the Sixth Circuit, holding that the communications by the employees to the general counsel were privileged, in so far as the comments were made while seeking legal services.[211]

Chief Justice Burger, in a concurring opinion, agreed with the majority's decision pertaining to the attorney-client privilege,[212] but he alleged that the Court had shirked its duty in not providing attorneys and lower courts with guidance for similar situations. He would have implemented, at least, a minimum standard for governing similar situations in the future.[213]

Analysis of the Possible Implications of *Upjohn Co. v. United States*

A definitive ruling on the question of determining who speaks for a corporation was long overdue, as evidenced by the diffusive conclusions reached by the various federal courts. Many writers, desiring uniformity in applying the privilege, had promoted one test or another.[214] The hopes of many had been raised in the expectation that the *Upjohn* decision would settle the conflict by promulgating a standard which would be of general application in future controversies.[215]

The *Upjohn* ruling, while decreasing the discretion of judges by reducing the number of options available to courts regarding the attorney-client privilege, provided limited guidance to courts

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210. *Id.* Rule 501 states that "the privileges of a witness [or] person . . . shall be governed by 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." FED. R. EVID. 501.

211. *Upjohn*, 449 U.S. at 402.

212. *Upjohn*, 449 U.S. at 402 (Burger, C.J., concurring).

213. *Id.* at 402-03. (Burger, C.J., concurring).

214. *See, e.g.*, Note, *The Sixth Circuit Adopts the Control Group Test*, 9 CAP. U. L. REV. 809, 826 (1980) (supported the *Diversified* rule); Note, *supra* note 132, at 496-97 (supporting broader subject matter tests); Brown, *supra* note 131, at 196-97 (supports the *Diversified* rule); Note, *supra* 82, at 434-35 (adheres to control group test); Note, *supra* note 132, at 359 (supports the *Diversified* rule); Note, *supra* note 92, at 1015 (prefers the control group test).

215. *See, e.g.*, Comment, *supra* note 38 at 479; Comment, *supra* note 84, at 1054; *Death Knell, supra* note 72, at 1102-03.

in construing the privilege. The case also realized that a broader standard could better protect the underlying principles of the privilege while recognizing complicated aspects of modern corporations.[216] Corporate attorneys are now practically guaranteed freedom from involuntary disclosure of communications from lower-level employees. Legal services may now be rendered without the tainting effects of forced disclosure impairing the application of the privilege.

Although signalling the advent of broader applications of the attorney-client privilege to communications of corporate clients, the decision left several issues, including some new questions, unresolved. Unpredictability may result from the Court's failure to establish a standard rule. Notwithstanding the potential for uncertainty, the Court may have taken the correct approach in not drafting a concrete test. Prior decisions had reached the conclusion that the many diverse probabilities rendered almost impossible the development of an established dogma, and that the ad hoc method was the only practical manner to treat the problem.[217] The Court stated that it would not announce a standard, "even were [it] able to do so."[218] Complexities in modern business have created innumerable situations involving the attorney-client privilege in the corporate context. Many different rules have come about in litigation concerning only a few of the instances. The inability to foresee potential difficulties has made the prior rules inadequate to serve in each individual matter without some modification of the existing standards. Justice Rehnquist's refusal to anticipate the vicissitudes in corporate business may have been the wisest approach possible. The interpretations of this decision by jurists and legal theoreticians will have to determine the actual implications of this case and to settle the various issues arising from the criteria of the Court.

The *Upjohn* decision, however, has raised almost as many issues as it has settled. The lack of precision by the majority could lend to the dilution of this decision by its being distinguished on its facts from the many permutations available in the corporate setting. The opinion cited the Federal Rules of Evidence as re-

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216. Upjohn Co. v. United States, 449 U.S. 383, 392-93 (1981).

217. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 47 (1980) (the privilege should be determined on a case-by-case basis); Radiant Burners, Inc. v. American Gas Ass'n., 320 F.2d 314, 324 (7th Cir. 1963) ("These matters will all have to be resolved on a case-by-case basis. No one is wise enough to decide them in advance."); Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 794 (D. Del. 1954) (there is no blanket privilege; each document must be considered separately).

218. *Upjohn*, 449 U.S. at 386.

quiring an ad hoc approach toward the attorney-client privilege, based on the separate circumstances of each individual situation.[219] According to Chief Justice Burger, however, the rules require the Court to provide guidance to the lower courts, which dictates that a more uniform mode of application should be established for the privilege.[220] Under the majority's interpretation of Rule 501, each judge facing a privilege question could formulate a different rule.

Inasmuch as the federal rules call for courts to apply the principles of the common law privilege, as experience would dictate, trial judges would be able to choose from a range extending from the broad rules of *Harper & Row, Diversified,* and *Ampicillin* to the practically unlimited applications of the privilege used in decisions before 1962, such as *Zenith* and *United Shoe.* Such a wide diversity of methods would result in a chaotic state of affairs. No reasonable person would be able, with any precision, to predict which communications would be privileged. Forum shopping would result from the searching by plaintiffs for jurisdictions with more liberal discovery policies and stricter applications of the attorney-client privilege. Appellate courts would be flooded by parties who had thought that communications made to their attorneys were confidential and privileged. Chief Justice Burger's interpretation of the federal rules offers a more consistent application of the privilege. With at least some rudimentary principles as guidelines, future decisions might achieve harmonious results, even without an absolute standard to follow.

The concurring opinion alluded to various factors relied upon by the majority in finding the attorney-client privilege applicable to the instant situation.[221] These factors, according to Justice Rehnquist, were present in this instance, consonant with the principles of the privilege, and dispositive of the matter.[222] The Court did not indicate that the factors should constitute a new set of rules governing the use of the privilege; indeed, the opinion explicitly stated that there would be no series of criteria issuing forth from

219. *Id.* at 396-97.

220. *Id.* at 403-04.

221. *Id.* at 402.

222. *Id.* at 394-95. In justifying the application of the privilege, the majority relied on several factors. In the instant case, the communications involved information that was unavailable from the hierarchy and was concerned with subjects within the scope of employment of the employees of the company. The employees communicated the information to the company's counsel on orders from superiors. They were informed that the disclosures were for the purpose of securing legal advice and would be considered confidential, as indeed they were. The majority held that the company and employees met these factors, which were consistent with the policies of the attorney-client privilege.

the decision.[223] Those who rely on this case in future controversies, even with these factors as guides, may remain uncertain as to which employees speak for the corporation, and which do not. The factors do not consider the extension of the privilege to communications made by an employee at his own initiative. They also do not specify the superiors to which an employee would be responsible for making the disclosure. The Court also noted that the employees in the instant matter were aware that the attorneys' interviews were part of the process of preparing legal advice for Upjohn's internal examination. The opinion, limited to its facts by the Court itself, did not address possible communications of lower-level employees who provide attorneys with facts pertinent to the giving of legal services in the course of normal litigation.[224]

In devising these factors, the Court apparently adopted the criteria of the *Diversified* rule.[225] Although stating that it decided only "concrete cases and not abstract propositions,"[226] one of the conclusions inferable from the indefinite ruling is that the Court impliedly approved the *Diversified* rule.[227] By doing so, the Court may have reasoned that the *Diversified* requisites were better suited for the facts at hand; it might have adopted another test had the circumstances dictated the need for a different test. Additionally, the Court may have tacitly approved the *Diversified* modifications of the *Harper & Row* ruling by modeling its factors after the *Diversified* test. The revised subject matter approach may therefore be the preferable standard in applying the attorney-client privilege to corporations in the future.

The possible acceptance of the modified subject matter test raises an interesting question concerning impending use of the subject matter rules. Prior to *Upjohn,* the Supreme Court had passed on only the *Harper & Row* rule, the broadest of the modern approaches. The decision in *Harper & Row* was reached by an equally-split vote, and no opinion was given. Because six members of the present Court participated in both decisions, some doubt has been cast upon the justification of the dissenting votes.[228] The lack of a clear-cut endorsement in *Harper & Row* denied a much-

223. *Id.* at 386, 396.

224. *See* Feld, *Supreme Court in Upjohn Protects Attorney-Client Privilege; Upholds the Work-Product Doctrine,* 54 J. TAX 210, 212-13 (1981).

225. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th cir. 1978) (en banc). *See supra* note 163.

226. *Upjohn,* 449 U.S. at 386.

227. *Diversified Indus.,* 572 F.2d at 609.

228. There was some controversy over the use of mandamus as a means of protecting the attorney-client privilege. Did the change in votes result from a shift in thinking by several justices or the absence of the mandamus issue? *See also supra* note 156.

needed affirmance to the subject matter standard. The change in votes may signify that the Court would accept much broader interpretations of the privilege by future courts.[229]

In upholding Upjohn's claim of privilege, the Court appeared to have incorporated tenets of the *Diversified* test into the factors it listed as being dispositive of the case. The opinion placed emphasis upon the nature of the communication, and not upon the identity of the communicant. The majority failed, however, to address the relevance of the disclosure to the legal problem. This is a regrettable omission. As found in *Ampicillin,* the consideration of a communication's relevance to the controversy at hand results in a logical balance between protecting liberal discovery policies and guarding the purposes of the attorney-client privilege.[230] The *Ampicillin* rule would close gaps left by the Court's inadequate resolution of this case, and it would comport with the decision's ad hoc application of the privilege.[231] Even though the Court apparently adapted the *Diversified* rule to fit the facts, the majority should have given the *Ampicillin* rule at least a cursory examination.

Justice Rehnquist definitely rejected the control group test, but did not expressly condemn all objective standards. Despite holding the control group standard as being violative of the principles of the privilege, the majority did not disapprove of all objective measurements. The opinion considered the test adopted by the Sixth Circuit, and the decision was restricted to the instant facts. Therefore, it is uncertain whether the Court rejected tests utilizing a measure of objectivity. Because of the limited applicability of this decision, it may be premature to declare the control group test dead, as was done after the Court's affirmance of the *Harper & Row* rule.[232] Subsequent decisions "resurrected" the control group test, and it eventually gained superiority over all other standards.[233]

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229. There has been speculation that the *Harper & Row* test would have been approved overwhelmingly, had there been no mandamus issue. *See* Stern, *supra* note 156 at 1144.

230. *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 387 (D.D.C. 1978).

231. *Id.* at 385. The *Ampicillin* decision requires a case-by-case examination of the disclosure and of the context in which it was made. The test protects communications by employees acting on their own initiative, if the communications were made with a reasonable belief that the information was necessary in making a decision concerning a legal problem. No consideration has to be given to whether the disclosure was made at the behest of superiors, thus relieving the attorney of the burden of choosing which superiors may order privileged communications and which cannot. *Id.* at 385-87.

232. *See supra* note 92 at 1009.

233. A majority of federal courts abide by the control group test, even after its "death" in 1971. *See* Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975).

The uncertainty of *Upjohn* may well cause needless future litigation. Chief Justice Burger stated that the unnecessary unpredictability inherent in the majority opinion would promulgate "continuing uncertainty and confusion."[234] He contended that the Court should at least enunciate a minimum standard and that the Court had incurred a special duty under the federal rules "to clarify aspects of the law of privileges" for the guidance of the lower courts.[235] This standard could provide direction for attorneys who are uncertain in gathering information from corporate subordinates because of the indefinite boundaries of the privilege. At least a minimal rule could allay some of these fears.

Conclusion

Upjohn raises almost as many questions as it settles. However, its importance to attorneys with corporate clients cannot be overemphasized. By recognizing the state of modern business, the Court has rejected the control group test, upon which the Sixth Circuit and the majority of federal courts relied, as being an unnecessary burden upon the policies of the attorney-client privilege. The Court expressly resounds the historical precedents for maintaining the privilege, holding that the interests of justice in protecting the free and confidential flow of information between attorneys and clients are greater than the aims sought by the control group test and the liberal rules of discovery.

Despite this, the questions which have arisen from the indefinite results of the *Upjohn* decision may prove to be a fresh source of litigation and controversy. Although the Court had good cause in refusing to espouse a new hypothesis, the ensuing uncertainty becomes troublesome. Since the majority of jurisdictions favored the control group test, the resultant gap must be filled. Without some guidelines, the courts may invent new rules or apply already existing theories. It may lead to more equitable decisions, based on each individual situation and dealing with the peculiar nuances of the cases. However, no continuity will be available as a basis of predicting the outcome of future difficulties, thus

234. *Upjohn*, 449 U.S. 383, 402 (1981) (Burger, C.J., concurring).

235. *Id.* at 403-04. The Chief Justice stated in his minimum rule that the "attorney must be one authorized by the management to inquire into the subject." He added that the lawyer should be seeking information to aid in the performance of any of the following: "(a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct." Chief Justice Burger stated that the court had a duty to clarify matters which were ambiguous or conflicting, and that a minimum rule was the least the court could do. *Id.*

placing an additional burden on counsel's ability to give sound legal advice.

The concurring opinion had the proper idea in mind when it devised a minimum standard for guiding courts, clients, and counselors in the application of the privilege. Although the majority's ruling will have far-reaching effects in the corporate context of legal relations, necessity dictates that some direction must be given in order for clients to claim the privilege. Chief Justice Burger properly interpreted Rule 501 as requiring the Court to establish a rule. The shining expectations of *Upjohn* have been tarnished by the ambivalence of the Court toward promulgating a respectable standard capable of at least slight uniformity. It will remain for future decisions to devise such principles. Although headed in the right direction, this ruling lacks certain aspects which prevent it from being an adequate standard.

The majority and concurring opinions provide a foundation for the development of a sufficient test. If courts in the future would assimilate characteristics attributed to the *Ampicillin* rule, this would resolve questions concerning the possession of knowledge by certain parties, and relating to the orders and aims of corporate superiors. By adding these requisites to the factors enunciated by the majority, upcoming decisions could result in the emergence of a satisfactory standard. With refinements, such a rule would create an equitable equilibrium between the rules of discovery and the ends sought by the privilege. Under this hybrid test, disclosures could be privileged if the communication is relevant to the legal problem, related to the performance of the employee's duties, made to secure legal aid, and intended to be confidential. Such a rule would restore confidence to corporate attorneys, end abuses of the privilege, and instill greater vitality to a time-proven right of law.

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