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## Attorney-Client Privilege in the Corporate Context - Upjohn Co. v. United States, The

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## NOTES

### THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT—*UPJOHN Co. v. UNITED STATES*

**U**PJOHN is an American corporation that manufactures and sells pharmaceuticals in the United States and abroad.<sup>1</sup> Early in 1976 an independent audit produced evidence that one or more of Upjohn's foreign subsidiaries had made illegal payments to foreign government officials in an attempt to procure that government's business.<sup>2</sup> Upjohn's general counsel subsequently initiated a confidential internal investigation to discover which subsidiaries had made the payments and to prepare for potential litigation concerning the corporation's possible criminal or civil liability.<sup>3</sup> The investigation included questionnaires requesting information from all foreign general and area managers concerning the illegal payoffs, as well as interviews with corporate officers and employees.<sup>4</sup> Upjohn voluntarily submitted a report to the Internal Revenue Service disclosing the payments,<sup>5</sup> whereupon the IRS began an investigation to determine the tax consequences of the questionable payments.<sup>6</sup> In late

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1. Brief for Petitioners at 3, *Upjohn Co. v. United States*, 101 S. Ct. 667, 66 L. Ed. 2d 584 (1981), reprinted in 13 L. REPRINTS, TAX SER. (BNA), No. 2, at 281, 299 (1980-1981 Term) [hereinafter cited as Brief for Petitioners].

2. *Id.*

3. *Id.*

4. A letter accompanying the questionnaire informed the managers that the investigation was being conducted by corporate counsel at the request of the chairman of the board. The information requested was based upon promises of confidentiality. Full and complete responses were required concerning the following matters: (1) payments within the subsidiary relating to the direct or indirect channeling of funds under the company's control to or for the benefit of any official or employee of a government agency or facility; (2) payments made through the subsidiary relating directly or indirectly to any funds under the company's control, to or for the benefit of any candidate for political office or any party during the period under investigation; (3) any payments of funds under the company's control made by the subsidiary or any of its employees that were not reflected on the subsidiary's official company financial and accounting books and records; and (4) payments that were recorded on the official company financial and accounting books and records in accounts, the purposes and descriptions of which did not accurately reflect the transactions. Petition for Writ of Certiorari at 41a-42a, *Upjohn Co. v. United States*, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), reprinted in 13 L. REPRINTS, TAX SER. (BNA), No. 2, at 1, 91-92 (1980-1981 Term) [hereinafter cited as Petition for Certiorari].

5. The report was a copy of one sent to the Securities and Exchange Commission. The corporation evidently was attempting to police itself and thus voluntarily compensate for its employees' violations. Brief for Petitioners, *supra* note 1, at 4.

6. *Id.*

November 1976 the IRS issued a summons<sup>7</sup> requesting records relating to Upjohn's internal investigation, "includ[ing] but not . . . limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews."<sup>8</sup> Upjohn refused to produce the completed written questionnaires or any memoranda or notes of the interviews, asserting that such a request violated the attorney-client privilege.<sup>9</sup> The United States District Court for the Western District of Michigan ordered Upjohn to comply with the IRS summons.<sup>10</sup> The district court's decision was affirmed in part by the Sixth Circuit Court of Appeals,<sup>11</sup> and the United States Supreme Court granted certiorari. *Held, reversed and remanded*: Communications between corporate general counsel and any corporate employees are deemed protected by the attorney-client privilege. *Upjohn Co. v. United States*, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

### I. HISTORICAL DEVELOPMENT OF THE CIRCUIT DIVERGENCE: CONTROL GROUP VERSUS SUBJECT MATTER

The attorney-client privilege<sup>12</sup> has long been recognized by the courts.<sup>13</sup>

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7. The summons was issued in accordance with I.R.C. § 7602, which gives the IRS authority to discover and enforce discovery concerning matters determining the tax liability of any party.

8. Petition for Certiorari, *supra* note 4, at 18a. Upon request, Upjohn previously had provided the IRS with lists of all persons the corporation had interviewed concerning the payments as well as the names of all persons who had responded to the questionnaire. Brief for Petitioners, *supra* note 1, at 5.

9. Upjohn also claimed that the IRS's request violated the work-product doctrine. See FED. R. CIV. P. 26(b)(3). See generally 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 2016-2028 (1970).

10. The decision of the court was based primarily upon the recommendation of a magistrate. 101 S. Ct. 677, 682, 66 L. Ed. 2d 584, 590 (1981). The opinion and orders of the court are reproduced in Petition for Certiorari, *supra* note 4, at 171a.

11. *United States v. Upjohn Co.*, 600 F.2d 1223, 1225 (6th Cir. 1979). The court of appeals ruled that the attorney-client privilege did not apply "[t]o the extent that the communications [questionnaires and interview notes] were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" *Id.* at 1225. The circuit court thus afforded the adoption of the control group test as the standard for determining the scope of the privilege in the corporate context, but reversed the lower court finding that the work-product doctrine was not applicable to these particular administrative seminars. The court subsequently remanded the case for a determination of which communications sought by the IRS were made by members of the control group, denying enforcement of the summons with regard to such control group communications. *Id.* at 1224. In their partial affirmance, however, the court rejected the magistrate's finding that the attorney-client privilege had been waived by voluntary disclosure to the SEC. *Id.* at 1227.

12. See 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2292-2329 (McNaughton rev. ed. 1961). The attorney-client privilege provides that:

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

*Id.* § 2292, at 554. See also *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

13. See, e.g., *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457 (1876), one of the

The purpose of the privilege is to encourage clients to make unequivocal disclosures to their attorneys so that they may render informed legal advice.<sup>14</sup> It is designed to protect the client from counselor betrayal and extends to all legal matters, whether administrative, civil, or criminal.<sup>15</sup> The privilege generally is granted if the asserted holder of the privilege is or has sought to become a client, and if the person to whom the communication was made was acting in his representative capacity as an attorney.<sup>16</sup> The communication must be related to the securing of legal advice or services,<sup>17</sup> and the privilege cannot be invoked solely to prevent disclosure of the communication to proper authorities.<sup>18</sup> Although federal statutes or rules have never specifically applied the attorney-client privilege to corporate entities, the courts historically have recognized its application to corporations.<sup>19</sup>

#### A. *The Control Group Test*

Because a corporation generally is composed of many individuals, special problems arise when it asserts the attorney-client privilege in the corporate context. *City of Philadelphia v. Westinghouse Electric Corp.*<sup>20</sup> first presented the question of how to apply the privilege to a corporation. The district court held that only those members of the "control group" constituted the client,<sup>21</sup> and thus only they would be afforded the attorney-client

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earliest cases in which the Supreme Court discussed the attorney-client privilege. See also *Hunt v. Blackburn*, 128 U.S. 464 (1888). For a general survey of the history of the privilege, see Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978).

14. *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 458 (1876).

15. See *Trammel v. United States*, 445 U.S. 40 (1980); *Fisher v. United States*, 425 U.S. 391 (1976); *United States v. Louisville & N.R.R.*, 236 U.S. 318 (1915); *Hunt v. Blackburn*, 128 U.S. 464 (1888). See generally Hazard, *supra* note 13; Miller, *The Challenges to the Attorney-Client Privilege*, 49 VA. L. REV. 262 (1963). See also ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon No. 4, EC 4-1 to -6, DR 4-101.

16. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950). See also *United States v. Boffa*, No. 80-36 (D. Del. Apr. 3, 1981) (privilege extended to confidential communications made in mistaken but genuine belief individual is an attorney).

17. 89 F. Supp. at 358.

18. See *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 547-48 (D.D.C. 1970); *In re Natta*, 264 F. Supp. 734, 741 (D. Del. 1967), *aff'd on other grounds*, 388 F.2d 215 (3d Cir. 1968); *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463, 464 (S.D.N.Y. 1956); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 794 (D. Del. 1954).

19. See, e.g., *United States v. Louisville & N.R.R.*, 236 U.S. 318, 336 (1915) (explicitly recognizing that attorney-client privilege extends to corporations as well as individuals). See generally Barnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901 (1969); Note, *The Corporate Attorney-Client Privilege: Culpable Employees, Attorney Ethics, and the Joint Defense Doctrine*, 58 TEXAS L. REV. 809, 810 n.3, 812 n.12 (1980); Comment, *The Privileged Few: The Attorney-Client Privilege As Applied to Corporations*, 20 U.C.L.A. L. REV. 288 (1972). See also *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963).

20. 210 F. Supp. 483 (E.D. Pa. 1962).

21. *Id.* at 485. To be privileged, a communication to an attorney must be made by the attorney's client. See note 12 *supra*.

privilege.<sup>22</sup> The court determined that an employee is a member of the control group only if he "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."<sup>23</sup> The standard articulated by the *Westinghouse* court now is recognized as the control group test. Subsequent case law suggested a fivefold rationale justifying its use: (1) it was most easily applied by the courts; (2) it was most easily understood and adhered to by attorneys; (3) it was most likely to be deemed reasonable by the parties; (4) it allowed for the greatest amount of discovery; and (5) it was most congruent with the traditional purposes of the attorney-client privilege.<sup>24</sup> After *Westinghouse* the Third, Sixth, and Tenth Circuits adopted the control group test as the basic standard for applying the attorney-client privilege to corporations.<sup>25</sup>

While ease of application seemed to be the most appealing factor in limiting the corporate attorney-client privilege only to the control group, several subsequent cases presented peculiar factual settings that created some difficulties in applying the test.<sup>26</sup> Most notable was the basic problem of

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22. 210 F. Supp. at 485.

23. *Id.* The court further limited the control group test by requiring that the employee's authority to participate in and affect a contemplated decision must be actual as opposed to apparent.

24. See *Virginia Elec. & Power Co. v. Sun Shipbldg. & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975). For other cases articulating a rationale for the control group test, see *United States v. Upjohn Co.*, 600 F.2d 1223, 1227 (6th Cir. 1979); *In re Grand Jury Investigation*, 559 F.2d 1224, 1236-37 (3d Cir. 1979); *Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286, 291 (D. Colo. 1979). See also Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970); Note, *supra* note 19, at 813-16; *cf. In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 386-87 (D.D.C. 1978) (control group test modified and rationale redefined).

25. See *United States v. Amerada Hess Corp.*, 619 F.2d 980 (3d Cir. 1980); *United States v. Upjohn Co.*, 600 F.2d 1223 (6th Cir. 1979); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979); *Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968); *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82 (E.D. Pa. 1969) (by stipulation), *aff'd mem.* 478 F.2d 1398 (3d Cir. 1973); *Garrison v. General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963). See also Note, *supra* note 24, at 435 (endorsing application of control group test).

Only one state has made an attempt to implement the conservative control group test through the avenue of appellate decision. See *Day v. Illinois Power Co.*, 50 Ill. App. 52, 199 N.E.2d 802, 806 (1964) (employee making alleged confidential statement must be in control to activate privilege). This ruling was seriously undermined, however, by the Illinois Supreme Court's decision in *Cox v. Yellow Cab Co.*, 61 Ill. 2d 416, 337 N.E.2d 15, 18 (1975) (refusing to attack the privilege question directly but citing to the California case of *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964), as authority for standard of application). See note 49 *infra*. The Illinois Supreme Court has yet to respond definitively to the corporate privilege standard. See COMMITTEE ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT, PROPOSED FED. R. EVID., art. V, rule 5-03 (1969), reprinted in 46 F.R.D. 161, 249-50 (1969). The control group test later was deleted from the proposed Rules of Evidence.

26. See *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 145-46 (D. Del. 1977) (privilege extended beyond control group where scientific information required by attorney could be obtained only from research department); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974) (control group standard partially abandoned in decision requiring that communication be ancillary to request for legal opinion); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970) (context of patent infringement action creates difficulties in defining specific members of the control group).

determining who should be included within the undefined control group itself.<sup>27</sup> Courts and commentators expressed concern over extending the attorney-client privilege too deep within the corporate structure, thereby creating a "zone of silence" that might impede judicial inquiry.<sup>28</sup> Generally, however, courts applying the control group test restricted the privilege to the uppermost echelons of corporate management.<sup>29</sup>

In *In Re Grand Jury Investigation*<sup>30</sup> the Third Circuit articulated a theoretical basis for limiting the attorney-client privilege to the upper echelon control group. In this case questionable foreign payments were the subject of a corporation's in-house investigation. General counsel questioned thousands of employees located in a number of foreign nations concerning the allegedly illegal payments.<sup>31</sup> The corporation asserted that the communications between counsel and the employees were privileged. The Third Circuit Court of Appeals held they were not.<sup>32</sup> The court identified three overriding policy considerations in applying the attorney-client privilege to corporations: (1) the need to encourage open communication and full disclosure between attorney and client; (2) the need to minimize the potential pejorative influence of any corporate privilege standard upon the factfinding process; and (3) the need for confidentiality in investigations.<sup>33</sup> The court concluded that lower-level employees not maintained within the control group would confide in corporate counsel regardless of whether the privilege was applicable, and thus refusing to make such communications privileged would not impede full attorney-client disclosure or confidentiality.<sup>34</sup> Furthermore, limiting the privilege's application would minimize its adverse effect on full judicial inquiry.<sup>35</sup> Since the control group test was consonant with these three basic policy needs, the Third Circuit reasoned that no sound rationale justified extending the attorney-client privilege any deeper within the corporate structure than necessary.<sup>36</sup> The Third Circuit's decision thus emphasized the balance between facilitating communications to in-house counsel and simultaneously avoiding the obstruction of

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27. See *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970).

28. See *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir.) (en banc), cert. denied, 375 U.S. 929 (1963); Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 365-66 (1972); Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 955-56 (1956).

29. See *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82, 85 (E.D. Pa. 1969) (control group includes corporate vice presidents, division vice presidents, and general managers); *Garrison v. General Motors Corp.*, 213 F. Supp. 515, 518 (S.D. Cal. 1963) (control group includes directors, officers, department heads, division managers, and division chief engineers).

30. 599 F.2d 1224 (3d Cir. 1979).

31. *Id.* at 1227.

32. *Id.* at 1237.

33. *Id.* at 1236-37.

34. *Id.* at 1236.

35. *Id.* at 1235.

36. *Id.* at 1237. Subsequent decisions following the holding and reasoning of *In re Grand Jury Investigation* include *United States v. Upjohn Co.*, 600 F.2d 1223, 1226-27 (6th Cir. 1979); *Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286, 290 (D. Colo. 1979); *United States v. Lipshy*, 492 F. Supp. 35, 43 (N.D. Tex. 1979).

legitimate discovery through an overapplication of the privilege.<sup>37</sup>

### B. *The Subject Matter Test*

In spite of the adoption of the control group test by many courts,<sup>38</sup> the standard was heavily criticized by commentators.<sup>39</sup> One of the most frequent criticisms was that the test failed to recognize the basic reality of the corporate structure, namely, that lower-level employees not in the control group frequently are the only practical source of information for corporate counsel. The limited scope of the control group test thus impeded and discouraged full disclosure and investigation.<sup>40</sup> In *Harper & Row Publishers, Inc. v. Decker*<sup>41</sup> the Seventh Circuit Court of Appeals refused to adopt the control group test and instead adopted the subject matter test as the standard to be applied to the attorney-client privilege in the corporate context. Rather than limit the corporate attorney-client privilege to the echelon in control, the Seventh Circuit allowed the privilege to be extended freely throughout the corporate structure.<sup>42</sup> The *Harper & Row* court reasoned, contrary to the rationale of the control group theorists, that lower-level employees were "sufficiently identified with the corporation" so that a communication made from any member of the corporation to the general counsel constituted a communication from "client" to attorney, subject to two additional criteria:<sup>43</sup> first, the employee must have made the communication at the direction of his controlling superiors, and secondly, the subject matter about which the attorney was seeking information must have dealt with the employee's performance of his on-the-job duties.<sup>44</sup> The subject matter test thus greatly expanded the earlier control group test. The court in *Harper & Row*, however, failed to articulate any rationale for its holding. Neither did the court indicate precisely how far down the corporate ladder the attorney-client privilege would or should extend under the subject matter test. Moreover, while expressly rejecting the control

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37. 599 F.2d at 1236-37. The *In re Grand Jury* investigation, unlike the *Upjohn* investigation, encompassed thousands of employees located in a number of foreign nations. If the court had found the in-house questionnaires to be privileged, an SEC investigatory team would have been forced into the position of bearing the effort and expense of discovering this information on their own. By ruling that only the control group may exercise the privilege, the court alleviated an extreme pretrial discovery burden on the SEC.

38. See notes 24-25, 28-29 *supra*.

39. See commentaries cited in *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608 (8th Cir. 1977) (en banc); Kobak, *supra* note 28; Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COM. L. REV. 873 (1970); Comment, *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation*, 39 FORDHAM L. REV. 281 (1970); Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759 (1971). See also Maurer, *Privileged Communications and the Corporate Counsel*, 28 ALA. LAW. 352, 375 (1967); Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 59 MICH. L. REV. 360, 373-74 (1970).

40. See authorities cited note 39 *supra*.

41. 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971).

42. 423 F.2d at 491-92.

43. *Id.* at 491.

44. *Id.*

group test as "not wholly adequate,"<sup>45</sup> the Seventh Circuit did not analyze the subject matter test in its relation to the control group test.<sup>46</sup> In spite of its deficiencies, however, the *Harper & Row* decision marked the first major departure from the strict limits of the original control group test.<sup>47</sup>

The Eighth Circuit in *Diversified Industries, Inc. v. Meredith*<sup>48</sup> adopted a modified version of the subject matter test as articulated in *Harper & Row*.<sup>49</sup> The court rejected the control group test on the grounds that it equated corporate clients with individual clients and thus ignored the realities of the corporate structure.<sup>50</sup> The court required, in addition to the *Harper & Row* test, that: (1) the parties attempting to utilize the privilege must bear the relationship of attorney to client; (2) the attorney must have been consulted specifically for the purpose of obtaining legal advice; and (3) the communication was not disseminated beyond those individuals who needed to know of its contents.<sup>51</sup> The *Diversified* court recognized the

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45. *Id.*

46. *Id.* Noting that the control group test had at that time fallen under some criticism, the court rested its decision primarily upon a string citation of cases and law reviews. *See id.*

47. Subsequent decisions adopting the subject matter standard of application as pronounced in *Harper & Row* include: *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 621 (D.D.C. 1980); *Xerox Corp. v. IBM Corp.*, 64 F.R.D. 367, 377-78 (S.D.N.Y. 1974); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1165 (D.S.C. 1974); *Hasso v. Retail Credit Co.*, 58 F.R.D. 425, 428 (E.D. Pa. 1973).

48. 572 F.2d 596 (8th Cir. 1977) (en banc).

49. A clear majority of state decisions has consistently favored application of the more liberal subject matter test. *See, e.g.*, *Jay v. Sears, Roebuck & Co.*, 340 So. 2d 456, 457-58 (Ala. Civ. App. 1976) (attorney's disclosure of corporate employee's statement violated attorney-client privilege); *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 736, 388 P.2d 700, 709, 36 Cal. Rptr. 468, 477 (1964) (lower-level employee communication privileged if made in confidence to obtain corporate legal advice); *Texaco, Inc. v. Phoenix Steel Corp.*, 36 Del. Ch. 456, 264 A.2d 523, 524 (1970) (adopting *United Shoe Machinery* standard); *Wise v. Western Union Tel. Co.*, 178 A. 640, 644 (Del. Super. Ct. 1935) (agent's statement to principal in anticipation of litigation privileged); *Fire Ass'n v. Fleming*, 78 Ga. 733, 737-38, 3 S.E. 420, 422-23 (1887) (rule excluding confidential communication between attorney and corporate client extends to agent of either); *Schuit v. Emery*, 211 Minn. 547, 2 N.W.2d 413, 416 (1942) (corporate employee's communications to attorney in preparation for trial deemed privileged); *State ex rel. Terminal R.R. Ass'n v. Flynn*, 363 Mo. 1065, 257 S.W.2d 69, 73 (1953) (privilege extends to documents prepared by employee at direction of employer for use in litigation); *Lindberg v. Safeway Stores, Inc.*, 525 S.W.2d 571, 572 (Mo. Ct. App. 1975) (corporate manager's report of accident privileged); *State ex rel. Union Oil Co. v. District Court*, 160 Mont. 229, 503 P.2d 1008, 1012 (1972) (corporate manager's confidential statements to in-house counsel protected by privilege); *Ex parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276, 279 (1906) (fact that employer kept employee witness's statement confidential activated privilege); *Jackson v. Kennecott Copper Corp.*, 27 Utah 2d 310, 495 P.2d 1254, 1257 (1972) (adopting *United Shoe Machinery* standard); *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E.2d 352, 360 (1943) (employee is client if confidential statement made to employer with intent to transfer it to attorney for litigation); *Horlick's Malted Milk Co. v. A. Spiegel Co.*, 155 Wis. 201, 144 N.W. 272, 276 (1913) (conversation of employee to company officer and/or attorney protected by privilege); *accord*, *A. v. District Court of Second Judicial Dist.*, 191 Colo. 10, 550 P.2d 315, 323 (1976) (court endorses broad statement in *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 322 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963), that privilege exists without regard to whether client is a corporation), *cert. denied*, 429 U.S. 1040 (1977).

50. 572 F.2d at 608. The court emphasized that although the control group test was the predominating standard at that time, the control group theory nevertheless had been the subject of increasing criticism. *Id.*; *see note 39 supra*.

51. 572 F.2d at 609.



difficulty of deciding whether or not parties for a given communication can be classified as "attorney" or "client."<sup>52</sup> Noting the divergence of opinion among the circuit courts in consistently and adequately articulating which members of the corporation constituted the client, the *Diversified* court nevertheless based its definition of the "client" upon the imprecise definitions in *Harper & Row*.<sup>53</sup> Thus, while providing these additional criteria in modifying the subject matter test, the court failed to articulate a more practical standard of application.

The Eighth Circuit, not unlike the Seventh Circuit, did not specify precisely who among a corporation's employees could potentially activate the attorney-client privilege in the corporate context. The implication survived both the *Harper & Row* and *Diversified* decisions, however, that anyone employed by the corporation who responded to a confidential investigation by in-house counsel at the direction of a superior concerning an occurrence within the scope of employment could claim protection of the privilege, regardless of employment status. Nevertheless, the modified subject matter test of *Diversified* was preferable to the vague standard of *Harper & Row* because it provided a greater degree of protection against indiscriminate over-application of the privilege to lower-level corporate employees. The holding in *Diversified* subsequently was adopted by a number of district courts.<sup>54</sup>

Endorsement of the subject matter test by the Seventh and Eighth Circuits openly conflicted with the control group decisions of the Third, Sixth, and Tenth Circuit Courts.<sup>55</sup> Other circuits either had not addressed the question of the standard to be applied or implicitly had endorsed versions of both tests in dicta.<sup>56</sup> *Upjohn Co. v. United States* thus presented an opportunity for the Supreme Court to resolve the circuit divergence concerning application of the attorney-client privilege in the corporate context.

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52. *Id.* at 602.

53. *Id.*; see text accompanying notes 42-46 *supra*.

54. See, e.g., *Baxter Travenol Laboratories, Inc. v. Lemay*, 89 F.R.D. 410, 413 (S.D. Ohio 1981); *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 621 (D.D.C. 1980); *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 687 (S.D.N.Y. 1980); *In re D.H. Overmyer Telecasting Co.*, 470 F. Supp. 1250, 1254 (S.D.N.Y. 1979). See generally Note, *supra* note 19, at 816 (noting that "the momentum of new decisions" is in the direction of the subject matter test). See also *In re Grand Jury Subpoena*, 599 F.2d 504, 510-11 (2d Cir. 1979) (Second Circuit implies it would follow modified subject matter standard if presented with issue); *Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977) (D.C. Circuit implies, in a dictum, that it would follow modified subject matter test if necessary); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 385 (D.D.C. 1978) (privileged communication must be reasonably believed to be necessary to obtain sound legal advice).

55. See note 25 *supra* and accompanying text.

56. See *In re Grand Jury Subpoena*, 599 F.2d 504, 510-11 (2d Cir. 1979); *Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 385 (D.D.C. 1978); note 54 *supra*. See also Note, *supra* note 19, at 809 n.2.

II. *UPJOHN CO. v. UNITED STATES*

In *Upjohn Co. v. United States* the Supreme Court confronted the question of how far to extend the attorney-client privilege within the corporate structure. The Court ruled that communications between general counsel and corporate employees, regardless of those employees' classification as control group members, were protected by the attorney-client privilege.<sup>57</sup> Consequently, the IRS summons<sup>58</sup> could not be used to compel Upjohn to disclose the content of communications between its lower-level employees and corporate counsel.<sup>59</sup> The Court thus adopted the subject matter test<sup>60</sup> and expressly overruled the control group test.<sup>61</sup> Rejecting the Sixth Circuit's rationale that a broader application of the attorney-client privilege might make discovery excessively burdensome and create a "zone of silence" that would inhibit full investigation,<sup>62</sup> the Supreme Court concluded that application of the attorney-client privilege to communications similar to those in *Upjohn* placed the adversary in no worse position than if the communications had never taken place.<sup>63</sup> Thus the privilege only protects disclosure of the actual communication but not disclosure of the background facts known to the employee who cooperated in the investigation.<sup>64</sup> The Court concluded that it is the control group test, not the sub-

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57. 101 S. Ct. at 685, 66 L. Ed. 2d at 595; see note 4 *supra*.

58. See notes 7, 8 *supra* and accompanying text.

59. 101 S. Ct. at 685, 66 L. Ed. 2d at 595.

60. See notes 38-54 *supra*.

61. 101 S. Ct. at 684, 66 L. Ed. 2d at 593. Justice Rehnquist, writing for the majority, stated that "[t]he control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information." *Id.*

The Court also ruled that the work-product doctrine applies to IRS summonses. 101 S. Ct. at 686-87, 66 L. Ed. 2d at 596; see note 9 *supra*. Emphasizing the strong public policy supporting the work-product doctrine, the Court ruled that even though the government might suffer inconvenience and incur expenses in tracking down the 86 interviewees scattered around the world, such inconvenience and expense do not outweigh the protective policies of the work-product doctrine. 101 S. Ct. at 686-87, 66 L. Ed. 2d at 596. Noting that the IRS summons for attorney's notes of oral interviews with clients in *UpJohn* is precisely the type of material intended to be protected by the work-product doctrine, the Court ruled that an IRS summons for attorney's notes of an oral interview will not be enforced. *Id.* at 688, 66 L. Ed. 2d at 598. The Supreme Court thus ruled for the first time that the exception to the work-product doctrine of substantial need and without undue hardship does not apply to attorney-prepared memoranda based upon the oral statements of client interviews. *Id.* at 686, 66 L. Ed. 2d at 596. The Court refused to address the issue of precisely what standard of necessity, if any, must be met in order to overcome the work-product privilege as applied to notes of oral interviews with clients. *Id.* at 688, 66 L. Ed. 2d at 598-99. Instead, it remanded the case to the district court for a determination of the question consistent with the Court's opinion.

62. 101 S. Ct. at 685, 66 L. Ed. 2d at 595. The Sixth Circuit had argued that the privilege did not apply based on the theory that lower-level employees did not constitute a client in the context of the privilege. 600 F.2d at 1225, 1227.

63. 101 S. Ct. at 685, 66 L. Ed. 2d at 595.

64. *Id.* The Court's ruling reemphasized the traditional rule that the attorney-client privilege applies to specific communications, not factual knowledge:

A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

ject matter test, which frustrates the essential purpose of the privileged attorney-client relationship.<sup>65</sup> Because middle and lower-level employees often are the ones who possess the necessary information the corporate attorney requires, the Court reasoned that limiting the privilege to the control group and excluding corporate employees with potentially relevant information would complicate and impair the attorney's ability to convey frank legal advice to the upper echelon members who ultimately are responsible for implementing corporation policy.<sup>66</sup> Justice Rehnquist stated that the control group test is simply too difficult to apply consistently and emphasized the need for a standard that would provide greater prospective predictability for attorneys and corporate clients alike.<sup>67</sup>

In ruling in favor of the subject matter test, however, the *Upjohn* Court "decline[d] to lay down a broad rule or series of rules to govern all conceivable future questions in this area."<sup>68</sup> Noting that privilege decisions must be determined on a case-by-case basis,<sup>69</sup> the Court emphasized the narrowness of its holding by reciting the specific facts and circumstances of the case being decided.<sup>70</sup>

The Court concluded its discussion of the privilege issue by emphasizing that while the extension of the privilege protects disclosure of specified communications, the attorney-client privilege could not be used as a cloak to hide disclosure of underlying facts that may have been the subject of the communication.<sup>71</sup> Thus, the IRS itself could interview the employees who responded to the corporate questionnaire.<sup>72</sup> Such discovery is not prevented even by an expansive version of the subject matter test. The investigating party, however, must bear the cost and burden of such discovery.<sup>73</sup>

The decision in *Upjohn* represents the Supreme Court's first attempt at

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*Id.*

65. *Id.* at 684, 66 L. Ed. 2d at 593; see 8 J. WIGMORE, *supra* note 12, § 2290. See also *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

66. 101 S. Ct. at 684, 66 L. Ed. 2d at 593.

67. *Id.*, 66 L. Ed. 2d at 593-94.

68. *Id.* at 681, 66 L. Ed. 2d at 589. Justice Rehnquist prefaced his opinion with the caveat that "[w]e are acutely aware . . . that we sit to decide concrete cases and not abstract propositions of law." *Id.*

69. *Id.* at 686, 66 L. Ed. 2d at 595.

70. *Id.* at 688, 66 L. Ed. 2d at 598. These facts and circumstances included the following: the communications were made to counsel acting in their legal capacity, at the direction of corporate managers, to obtain legal advice; the subject matter of the communications pertained to the employees' duties; the questionnaire identified the investigators as legal counsel; and the employees were fully aware of the legal nature of the investigation. *Id.*

71. *Id.* at 685-86, 66 L. Ed. 2d at 595.

72. The IRS, in fact, had interviewed at least 25 of the 86 individuals involved in the investigation at the time of the *Upjohn* decision. *Id.* at 686, 66 L. Ed. 2d at 595. Seven of the other 86 *Upjohn* employees interviewed by general counsel in the investigation were no longer employed by the corporation at the time of the IRS interviews. As the question concerning whether or not the communications of these seven individuals is to remain privileged after termination of employment was not addressed at the trial level or in the circuit court, the Supreme Court declined to decide the issue in *Upjohn*. *Upjohn* had argued that such communications should indeed be deemed protected. *Id.* at 685 n.3, 66 L. Ed. 2d at 594 n.3.

73. See *Hickman v. Taylor*, 329 U.S. 495 (1947). As Justice Jackson noted in his con-

resolving the circuit divergence over the proper standard for judging a corporation's invocation of the attorney-client privilege. The significance of the Court's rejection of the control group test, however, eventually may be minimized by its refusal to apply the subject matter test beyond the specific facts of *Upjohn*.<sup>74</sup> The Court's repeated qualification of its decision<sup>75</sup> may encourage those circuit courts favoring the control group test to continue development of their own corporate privilege standards by distinguishing *Upjohn* on factual grounds.<sup>76</sup> Although the Court criticizes the control group test as unpredictable and uncertain in application,<sup>77</sup> its endorsement of the subject matter test that is expressly limited to specific facts is not likely to provide an appreciably greater standard of predictability or certainty of application. If the circuit courts distinguish *Upjohn* consistently on a factual basis and continue to adhere to the control group test, as Justice Rehnquist's opinion so readily invites them to do, the essential significance of *Upjohn* eventually may be its own insignificant effect.<sup>78</sup>

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curing opinion in *Hickman*, "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Id.* at 516.

74. Chief Justice Burger concurred with the majority, objecting only to the Court's failure to promote a more certain standard of application. 101 S. Ct. at 689, 66 L. Ed. 2d at 600. "I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts." *Id.* at 689, 66 L. Ed. 2d at 599. Burger concluded that the Court had abdicated its responsibility to provide future guidance and predictability within the law, since the opinion "neither minimizes the consequences of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging uncertainty while declining to clarify it within the frame of issues presented." *Id.* at 689, 66 L. Ed. 2d at 600.

75. See notes 67-70 *supra* and accompanying text.

76. For example, the IRS summons in *Upjohn* was initiated solely by Upjohn's voluntary filing with the SEC and the IRS. See note 5 *supra* and accompanying text. Upjohn clearly was attempting to self-police its own operations. If a situation arose where a corporation was instead caught by the IRS making illegal foreign government payoffs, a court favoring the control group test might use this fact to distinguish *Upjohn*. In addition, *Upjohn* involved communications with a finite group of only 86 employees. If a situation arose involving thousands of undefined employees, as in *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979), Justice Rehnquist's opinion certainly does not make clear that the subject matter test would be mandated in such a situation. See note 37 *supra*. Finally, the IRS argued that Upjohn's submission of the results of the investigation to the SEC constituted a waiver of the attorney-client privilege. The Court, however, never addresses the issue. This unanswered question could be a factor that might sway future decisions arising under similar circumstances and effectively would penalize the corporate entity for self-policing and honest revelation. See note 11 *supra*.

77. 101 S. Ct. at 684, 66 L. Ed. 2d at 593.

78. The courts have historically predicated their decisions concerning the attorney-client privilege upon the specific facts of disparate factual contexts. See S. REP. NO. 93-1277, 93d Cong., 2d Sess. 13 ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis"). See also *United States v. Gillock*, 445 U.S. 360, 367 (1980); *Trammel v. United States*, 445 U.S. 40, 47 (1980).

Recent cases in the wake of *Upjohn* cast some doubt on the precedential value of the decision. See *Baxter Travenol Laboratories, Inc. v. Lemay*, 89 F.R.D. 410, 413 (S.D. Ohio 1981) (criticizing *Upjohn* decision for failing to provide clear guidelines for applying attorney-client privilege in corporate context, but applying privilege because factors in *Upjohn* also found in the present case); *Marrriott Corp. v. American Academy of Psychotherapists, Inc.*, 277 S.E.2d 785, 792 (Ga. 1981) (citing *Upjohn* but adopting the *Diversified* subject matter test on different grounds); *Leer v. Chicago, St. P. & Pac. R.R.*, 308 N.W.2d 305, 309 n.8 (Minn. 1981) (court declines to apply privilege to communications between employee who witnessed accident and investigator-employee, noting vagueness of Supreme Court's deci-

## III. CONCLUSION

In *Upjohn Co. v. United States* the Supreme Court rejected the control group test for applying the attorney-client privilege to corporations and instead adopted the subject matter test as the prevailing standard. Balancing the long-revered tradition of attorney-client privilege against the needs of adversary discovery, the Court ruled that the specific facts of this case justified extending the privilege to all middle and lower-level employees. The *Upjohn* communications were made: (1) to the general counsel; (2) at the direction of corporate superiors in order to obtain legal advice from general counsel; (3) based upon a promise of confidentiality; and (4) concerning matters within the scope of the corporate employee's duties. While providing potential guidance in the dispute between advocates of the control group test and the subject matter test, the *Upjohn* decision is premised explicitly upon a specific set of factual occurrences. In light of the traditional judicial tendency to decide privilege cases on a case-by-case, fact-by-fact basis, the narrowness of the Court's holding ultimately may crown the *Upjohn* decision prince of the privilege, but ruler of one.

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sion in *Upjohn*). *But see In re LTV Sec. Litigation*, 89 F.R.D. 595, 601-02 (N.D. Tex. 1981) (privilege applied as in *Upjohn* on "analogous" facts); *SIPCA N. Am., Inc. v. Donaldson Enterprises, Inc.*, 430 A.2d 262, 264 (N.J. 1981) (*Upjohn* cited as controlling in a dictum, but decision based on contractual waiver of privilege).