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Upjohn Co. v. United States: The Attorney-Client Privilege in the Corporate Setting

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COMMENT

UPJOHN CO. v. UNITED STATES: THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE SETTING

In *Upjohn Co. v. United States,*[1] the Supreme Court took a significant step toward resolving the confusion which has surrounded the application of the attorney-client privilege in the corporate setting. The Court emphatically rejected the "control group" test which had been followed by the Third,[2] Sixth[3] and Tenth[4] Circuits. And while it did not specifically adopt the "subject matter" test in either its Seventh[5] or Eighth[6] Circuit formulations, the Court appeared to rely on the Eighth Circuit's modified approach in resolving the matter before it. Thus, the high court has provided a model for the circuits without locking them into a rigid "test."[7] Such flexibility affords the federal courts the opportunity to tie the application of the attorney-client privilege to its underlying purpose. This comment will examine that purpose, the conflicting case law that led to the *Upjohn* decision, the decision itself and its implications for the future.

I. THE PRIVILEGE AND ITS PURPOSE

Confidential attorney-client communications have been protected from forced disclosure since 1577.[8] The original jus-

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1. 449 U.S. 383 (1981).

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

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

4. Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968).

5. Harper & Row Publishers v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided court,* 400 U.S. 348 (1971).

6. Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978)(en banc).

7. The following circuits have relied on *Upjohn: In re* Coordinated Pretrial Proceedings, 658 F.2d 1355 (9th Cir. 1981); Permian Corp. v. United States, [current] FED. SEC. L. REP. (CCH) ¶ 98,280 (D.C. Cir. Sept. 9, 1981). However, the Illinois Supreme Court recently reaffirmed its adherence to the control group test in Consolidation Coal Co. v. Bucyrus-Erie Co., No. 54752 (Ill. Feb. 2, 1982).

8. 8 J. WIGMORE, EVIDENCE § 2290, at 542 (McNaughton rev. ed. 1961).

tification for such protection was the preservation of the attorney's oath and honor.[9] However, this theory fell into disrepute in the late eighteenth century, and was gradually replaced by the rationale that such protection was necessary to dispel the client's apprehensions of disclosure[10] and thereby to promote fully informed and effective legal counsel.[11] Implicit in this rationale is the belief that the benefits to society of full legal representation outweigh the detriment to the opposing party which results from withholding information.[12] However, because "[i]ts benefits are all indirect and speculative; its obstruction . . . plain and concrete,"[13] Wigmore states that the privilege should be strictly construed.[14] Such a construction comports with the modern trend toward liberal discovery.[15] It also has a certain logical appeal since, unlike the work-product immunity doctrine which can be defeated upon

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9. *Id.* at 543.

10. *Id.*

11. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 87, at 175 (2d ed. 1972). Dean McCormick suggests a further reason for the continued vitality of the privilege:

> A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosures regarding professional business. Loyalty and sentiment are silken threads, but they are hard to break.

Id. at 176.

12. *Id.* at 175; Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 425 (1970).

The Supreme Court in *Upjohn* stated it as follows:

> Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

449 U.S. at 389.

13. 8 J. WIGMORE, *supra* note 8, § 2291, at 554. As one commentator has noted there are two unverifiable assumptions: "first, that the existence of the privilege encourages communications between attorney and client that might be inhibited in its absence; and second, that the social benefit of encouraging this type of communication exceeds the harm of thwarting full disclosure in subsequent litigation." Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972) (footnotes omitted).

The only empirical study as to the first assumption appears inconclusive. *See* Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

14. 8 J. WIGMORE, *supra* note 8, § 2291, at 554.

15. "Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation." Hickman v. Taylor, 329 U.S. 495, 507 (1947).

a showing of substantial need and undue hardship,[16] the privilege, once it is found to apply, is absolute.[17]

Because of the conflicting policy considerations, the privilege attaches only when all the essential elements are present. Wigmore provides the following definition:

> (1) [w]here 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.[18]

While the application of this definition can be relatively straightforward in the case of an individual client, it can become quite uncertain when applied to a corporation. For example, in-house counsel may act as a businessman as well as an attorney. When is the advice protected as "legal?" And what of confidentiality when a low level employee reports certain conduct to the corporate attorney who in turn informs company executives? And, most significantly, who speaks for the corporate client — only members of the board of directors? — middle management as well? — any employee? An examination of the cases leading to *Upjohn* will demonstrate the varied ways in which the federal courts have responded to these questions and how their answers have related to the

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16. [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

FED. R. CIV. P. 26(b)(3). *See generally* Hickman v. Taylor, 329 U.S. 495 (1947).

17. Consistent with the court's desire to strictly construe the privilege, two exceptions to the protections of the privilege have been recognized. First, communications intended to further a crime or fraud, regardless of whether the attorney is aware of the client's ill-purpose, are not protected. United States v. Hodge & Zweig, 548 F.2d 1347 (9th Cir. 1977). Second, where an attorney had previously represented subsequently opposing parties on a matter of common or mutual interest, the prior communications between the attorney and the party or parties are admissible in the subsequent controversy. *See* Stover & Koesterer, *Attorney-Client Privilege in Wisconsin*, 59 MARQ. L. REV. 227, 234 (1976); Annot., 4 A.L.R. 4TH 765 (1981).

18. 8 J. WIGMORE, *supra* note 8, § 2292, at 554.

purpose underlying the privilege — promotion of candor between attorney and client.

II. JUDICIAL DEVELOPMENT OF CORPORATE ATTORNEY-CLIENT PRIVILEGE

Until 1962, the application of the attorney-client privilege to corporations was simply assumed by the federal courts.[19] In that year, however, the Federal District Court for the Northern District of Illinois, in *Radiant Burners, Inc. v. American Gas Association,*[20] held that a corporation was not entitled to claim the privilege.[21] The court recognized that no court had previously decided the issue. Notwithstanding prior judicial silence, the court set forth two arguments for its unique holding. First, the court reasoned that the privilege is historically and fundamentally personal in nature and so could only be claimed by natural persons, in the same way that the fifth amendment guarantee against self-incrimination is personal.[22] Second, Judge Campbell believed that it would be impossible to maintain the confidentiality of the communications (without which the privilege is lost) within a corporation where many individuals have access to records and files.[23] In addition, assuming that employees and shareholders as well as board members and officers would be covered by the privilege, he expressed a fear that the "zone of silence"[24] (the corporation's activities which would be insulated from discovery by funneling information through the corporate attorney) could

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19. *See, e.g.,* United States v. Louisville & N.R., 236 U.S. 318, 336 (1915).

20. 207 F. Supp. 771 (N.D. Ill. 1962), *rev'd,* 320 F.2d 314 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963).

21. *Id.* at 773.

22. *Id. See also* Gardner, *A Personal Privilege for Communications of Corporate Clients — Paradox or Public Policy?,* 40 U. DET. L.J. 299 (1963).

23. 207 F. Supp. at 773-75.

24. Where corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large. Few judges — or legislators either, for that matter — would long tolerate any common law privilege that allowed corporations to insulate all their activities by discussing them with legal advisers.

Simon, *The Attorney-Client Privilege As Applied to Corporations,* 65 YALE L.J. 953, 955-56 (1956). The term "zone of silence" which appears with some frequency in the cases dealing with corporate attorney-client privilege was apparently coined by Simon in this article.

grow quite large.[25]

Radiant Burners was reversed on appeal.[26] The appeals court held that the privilege existed to facilitate the workings of justice regardless of whether the client is a corporation or an individual.[27] Further, the court held that the question of confidentiality will vary depending upon the size and structure of the corporation and thus each case had to be examined on a case-by-case basis.[28]

After *Radiant Burners II* no one questioned whether a corporation could claim the privilege; however, the questions which the district court raised concerning the scope of the privilege remained. Prior to the *Radiant Burners* decisions, the applicable standard had been set forth in *United States v. United Shoe Machinery Corp.*[29] The court held that the privilege extended to "information furnished [to the attorney] by an officer or employee of the defendant [corporation] in confidence and without the presence of third persons."[30] While the court offered no explanation of why it extended such broad coverage, the argument can be made that the structure of the corporation itself dictates extensive protection if full disclosure is to be encouraged. Further, if all employees are included, there is a predictability in the application of the privilege which further encourages frank communication with

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25. 207 F. Supp. at 774-75.

26. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963), *rev'g* 207 F. Supp. 771 (N.D. Ill. 1962), *cert. denied,* 375 U.S. 929 (1963).

27. *Id.* at 322.

28. *Id.* at 323-24.

29. 89 F. Supp. 357 (D. Mass. 1950). *Accord* Zenith Radio Corp. v. RCA, 121 F. Supp. 792 (D. Del. 1954).

In *United Shoe,* Judge Wyzanski formulated an oft-quoted definition of the privilege:

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

89 F. Supp. at 358-59.

30. *Id.* at 359.

counsel.[31]

However, as Judge Campbell pointed out in *Radiant Burners I,* this broad approach is susceptible to the criticism of creating too broad a "zone of silence."[32] In addition, the *United Shoe* test appears to contradict the Supreme Court's dictum in *Hickman v. Taylor.*[33] That case, best known for its enunciation of the work-product immunity doctrine, arose out of an accident in which a tug boat, owned by a partnership, capsized, killing several of the crew members. The partnership retained counsel who interviewed the surviving crew members, who were employees of the partnership, in anticipation of impending litigation. Although the Court held that the memoranda which summarized the interviews were protected by work-product immunity, it noted that the documents were not covered by the attorney-client privilege. "[T]he protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation."[34] Since the witnesses here were employees, the Court seemed to say that not every communication from an employee will be privileged. Whether the *Hickman* Court would have limited the privilege in this case to the partners only or whether it withheld the privilege from employees because of their unique function as witnessess is unclear. In any case, the district court opinion in *Radiant Burners* set the stage for a reevaluation of the broad coverage the privilege afforded corporations. Two divergent lines of cases emerged, one espousing a narrow approach which has become known as the "control group" test and the other steering a middle path which is known as the "subject matter" test.

A. The Control Group Test

City of Philadelphia v. Westinghouse Electric Corp.[35] was

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31. Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 MICH. L. REV. 360, 369-70 (1970); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04], at 44-45 (1980).

32. *See supra* note 24.

33. 329 U.S. 495 (1947).

34. *Id.* at 508.

35. 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohib. denied sub nom.,* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3rd Cir. 1962), *cert. denied,* 372 U.S. 943

the seminal case in the formulation of the control group approach. Before turning to the central issue of the case — whether lower level employees' communications with the corporation's attorney are protected by the privilege — the court disposed of a preliminary issue worthy of note. The privilege was asserted on behalf of the individual employee involved as well as on behalf of the corporation.[36] The court summarily disposed of this claim because the attorney told the employee that if his disclosures constituted violations of company policy, they would be reported to company management.[37] Clearly, the required confidentiality did not exist between the attorney and the individual (as opposed to the corporate) client and, therefore, no privilege attached. That it is the corporation and not the employee who may claim and also waive the privilege becomes significant in later cases which argue against the subject matter test.[38]

The court then focused its inquiry on whether the corporation was seeking legal advice at the time that the challenged communication was made. It found that, if an employee was merely providing information so that the lawyer could *later* advise the client corporation, the employee was a mere witness and not privileged according to *Hickman*.[39] In determining whether the person making the communication was a client or a witness, the court rejected both rank and ability to incur liability on behalf of the corporation as criteria.[40] Instead, it formulated the following test:

> [I]f 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 authorized 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.[41]

(1963).

36. *Id.* at 484.

37. *Id.*

38. *See, e.g., In re* Grand Jury Investigation, 599 F.2d 1224, 1236 (3d Cir. 1979).

39. 210 F. Supp. at 485.

40. *Id.*

41. *Id.*

In very general terms, this test limited the privilege to a control group such as the board of directors and chief officers while excluding middle management and lower level employees.

Proponents of the test cite two primary justifications for such a restriction. First, it alleviates what might otherwise be an inordinate burden on discovery.[42] Unlike information about an individual client, which is readily available from a single source, information about a corporation must be gathered from a potentially large number of employees who may be widely scattered geographically. The litigant's burden is greatly reduced if much of the necessary information has already been conveyed to the corporate attorney and such communications are not sheltered by the attorney-client privilege. In fact, this may be the litigant's only source of information if a particular employee can no longer recall the specific information that is needed or has died. In addition, if no privilege exists between the attorney and lower level employees who lack decision making ability on legal matters, there is no temptation to funnel routine documents through counsel in hopes of protecting them from discovery.

Second, in many cases information is provided to the attorney for mixed business and legal reasons and would have to be directed to his office even in the absence of any privilege.[43] Thus, affording the privilege to the communication may not provide any inducement to communicate. In addition, confidentiality is far more difficult to maintain within a corporation than between an individual client and his attorney. To say that secrecy is intended when the communication is made simply may not be true, particularly for the lower level employee. He is probably well aware that information may pass through many hands before it reaches the attorney and that other employees may later have access to files in which it is stored.[44] More fundamental, perhaps, is whether the lower level employee is actually motivated by the premise that information he discloses to the attorney will be sheltered from

42. *See, e.g.*, Note, *supra* note 12, at 427; Note, *The Corporate Attorney-Client Privilege: Culpable Employees, Attorney Ethics, and the Joint Defense Doctrine*, 58 TEX. L. REV. 809, 825 (1980).

43. *See* Note, *supra* note 12, at 428.

44. *Id.* at 427-28.

sources outside the corporation. If he has a limited appreciation of the overall workings of the corporation, he may not know what information is detrimental and what beneficial.[45] Even if he does know, this may be of no particular concern to him because his interests are not as closely tied to the corporation's as are those of the control group members.[46] In fact, a lower level employee's primary motivation for providing information to the attorney is probably his superior's directive. Any apprehension he may feel at revealing information likely to displease his superiors is in no way alleviated by the existence of the privilege. Therefore, the privilege can scarcely be said to be an inducement to communication outside the control group.

Although a substantial number of the federal courts adopted the control group test,[47] it has been attacked on several fronts. First, critics denounce the test for failing to recognize the obvious difference between the individual and the corporate client. While the former can both provide the attorney with information and act on his advice, the latter must often rely on one group of individuals to be the information givers and another group to be the decision makers. Thus, under the control group test, the attorney is confronted with a "Hobson's choice." If he refrains from interviewing lower level employees with relevant information for fear that these com-

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45. *Id.* at 428-29.

46. It is the office of these men to fear for the well-being of the corporation just as an individual fears for his own well-being, and absent the privilege, corporate agents would doubtless be reluctant to disclose facts which might work against the corporation if disclosed. Indeed, the privilege may fulfill its function more effectively when corporate officers are involved, since these officers are more likely than the average private litigant to know of its existence.

Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 NW. U.L. REV. 235, 241 (1961).

47. *See, e.g.*, United States v. Upjohn, 600 F.2d 1223, 1225 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981); *In re* Grand Jury Investigation, 559 F.2d 1224, 1237 (3d Cir. 1979); Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968); Herbert v. Lando, 73 F.R.D. 387, 400 (S.D.N.Y.), *remanded on other grounds*, 568 F.2d 974, 984 (2d Cir. 1977); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 35-36 (D. Md. 1974); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117, 119 (M.D. Pa. 1970); Congoleum Indus. v. GAF Corp., 49 F.R.D. 82, 84 (E.D. Pa. 1969), *aff'd without opinion*, 478 F.2d 1398 (3rd Cir. 1973); Garrison v. General Motors Corp., 213 F. Supp. 515, 520 (S.D. Cal. 1963); American Cyanamid Co. v. Hercules Power Co., 211 F. Supp. 85, 89 (D. Del. 1962).

munications will be subject to disclosure, he lacks the necessary facts with which to advise the decision makers who are protected.[48] Rather than encouraging informed legal counsel, the application of the privilege in this fashion seems to have exactly the opposite effect. In addition, it ignores that in today's corporation many decisions are made by middle-level managers whose recommendations are simply reviewed by the top corporate officers.[49]

It is also argued that the control group test fails to ensure predictability.[50] If a corporation is unsure who the court will classify as a decision maker on a particular issue, it will be unable to predict in advance to whom the privilege will extend. Without such assurance, the privilege can hardly fulfill its purpose of eliminating apprehensions of disclosure.

Despite these criticisms, the test formulated by the *Westinghouse* court achieved sufficient following to be included in the first draft of the Proposed Rules of Evidence in 1969.[51] Before the rule was adopted by Congress, however, a far more liberal "subject matter" test was announced in *Harper & Row Publishers v. Decker*.[52] Thereafter, the rule embodying the attorney-client privilege formulation was dropped from the rules and further development in this area was left to case law.[53]

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48. *See, e.g.*, Burnham, *Confidentiality and the Corporate Lawyer*, 56 ILL. B.J. 542, 547 (1968); Note, *supra* note 31, at 374; Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COM. L. REV. 873, 876 (1971).

49. Note, *supra* note 31, at 373; Weinschel, *supra* note 48, at 876.

50. *See, e.g.*, Congoleum Indus. v. GAF Corp., 49 F.R.D. 82, 83-85 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3d Cir. 1973) (control group includes only division and corporate vice-presidents, and not two directors of research and vice-president for production and research); Kobak, *supra* note 13, at 368; Note, *supra* note 31, at 373. *But see* Note, *supra* note 12, at 430-31.

51. COMM. 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).

52. 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971).

53. Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in

B. The Subject Matter Test

The first federal court to steer a middle course between unlimited extension of the privilege in *United Shoe* and the narrow approach of *Westinghouse* was *Harper & Row Publishers v. Decker*.[54] Petitioners sought mandamus to vacate a lower court's order that Harper & Row produce debriefing memoranda prepared by its attorneys after a number of its lower echelon employees had testified before a grand jury in an antitrust matter. Finding that the control group test, employed by the district court to deny the attorney-client privilege, was "not wholly adequate,"[55] the court of appeals formulated its own test. It held that an employee's communications were privileged if made at the direction of his superiors and if the communications concerned matters within the scope of the employee's duties.[56] The court was careful to point out, however, that the case did not deal "with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses."[57] The court thus avoided any conflict with the *Hickman* dictum.

The primary advantage of the *Harper* approach is that it recognizes the reality of the corporate structure. There are bound to be employees who possess information which is vital to effective legal counsel yet who lack decision making authority. There are others with the authority to direct the corporation's activity on a legal matter who do not independently possess all the necessary information. In order to truly encourage the seeking of legal advice, both sides of this communication process must be protected. In addition, it is possible that, lacking such protection, corporations might be reluctant to undertake internal investigations fearing that information collected would simply ease the burden for the opposing liti-

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the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

54. 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971). One state court had adopted such a modified approach in D.I. Chadbourne, Inc. v. Superior Ct., 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964).

55. 423 F.2d at 491.

56. *Id.* at 491-92.

57. *Id.* at 491.

gant.[58] Therefore, the liberal *Harper* test actually encourages compliance with the law and advances the interests of justice — and thus comports with the underlying purpose of the privilege. The subject matter test also seems to lend itself to a greater degree of predictability than the control group test and thus further encourages full disclosure.

On the negative side, the *Harper* test revives the fear originally expressed by Judge Campbell in *Radiant Burners I*[59] that such a broad application of the privilege would create too large a "zone of silence." While it may encourage internal investigations by the corporate counsel, it may also make the burden of discovery on the opposing litigant almost insurmountable. The question then becomes whether the wide availability of the privilege is truly serving the ends of justice. Clearly, they are not served if the privilege is abused and documents are simply funneled through the attorney to make them immune from discovery. A second criticism that can be leveled at the subject matter test is that the availability of the privilege does not motivate employees outside the control group to communicate candidly with the attorney. Their motivation to communicate candidly is more likely to be fear of disciplinary action if they fail to do so. And if the lower level employee's conduct is an infraction of company policy or the law, the privilege provides him with little assurance that his communication will go no further than the corporate attorney. Indeed, it could even be revealed outside the corporation if the corporation chose to waive the privilege which it alone holds.[60]

It appeared that the controversy between the two divergent schools of thought would be resolved when the Supreme Court granted certiorari to review the *Harper* decision. But the affirmance of the case without opinion, by an equally divided Court,[61] was without precedential effect. Therefore, the circuits were still free to espouse either the *Westinghouse* or

58. Note, *supra* note 12, at 431. Even if the privilege is broadly applied, privileged communications may be subject to disclosure in a shareholder's derivative suit. *See* Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971).

59. 207 F. Supp. at 774.

60. *See, e.g., In re* Grand Jury Investigation, 599 F.2d 1224, 1236 (3d Cir. 1979).

61. Decker v. Harper & Row Publishers, 400 U.S. 348 (1971).

the *Harper* approach.

Thereafter, the Eighth Circuit formulated what has been called a "modified subject matter" test in *Diversified Industries v. Meredith.*[62] Weatherhead, a corporation that had done business with Diversified, sued alleging that Diversified employees had bribed Weatherhead purchasing agents to accept inferior grades of copper. Weatherhead sought discovery of memoranda prepared by an outside law firm which had been retained by Diversified to conduct an investigation of its employees' conduct.[63] In holding the memoranda to be privileged, the court rejected the predominant control group test.[64] It praised the subject matter test for encouraging the free flow of information by "focusing upon why an attorney was consulted, rather than with whom the attorney communicated."[65] But because it recognized the very real potential for abuse which existed under the *Harper* test, the court adopted instead a five-part modification which had been suggested by Judge Weinstein:[66]

> [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.[67]

After noting that the corporation bears the burden of demonstrating that all the elements of the test have been met, the court summarily concluded that Diversified had met its burden and that the documents were privileged.[68]

The *Diversified* test maintains the greatest advantage of the *Harper* test: promoting the fullest possible disclosure by

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62. 572 F.2d 596 (8th Cir. 1978)(en banc).
63. *Id.* at 607.
64. *Id.* at 609.
65. *Id.*
66. 2 J. WEINSTEIN & M. BERGER, *supra* note 31, at 45-49.
67. 572 F.2d at 609.
68. *Id.* at 610.

protecting both information givers and decision makers, while guarding against its shortcomings. Elements (1) and (3) guarantee that routine reports or communications necessary for purely business reasons cannot be protected by funneling them through the hands of the attorney. Element (5) provides an elucidation of the traditional confidentiality requirement,[69] which is particularly well suited to the corporate client. While the individual employee knows that his disclosures may not stop with the corporate attorney, he is also assured that the information will not be carelessly disseminated throughout the corporation.[70] Therefore, a certain element of predictability on the confidentiality issue is introduced which was lacking in the *Harper* test; arguably, this advances the purpose of the privilege — to eliminate client apprehension about disclosure. As with the *Harper* test, element (4) precludes application of the privilege to a fortuitous witness and so avoids conflict with the *Hickman* dictum. Element (2) restates the *Harper* requirement that the communication be at the direction of a corporate superior. Some confusion may arise regarding the definition of "superior."[71] Judge Weinstein's treatise, upon which the *Diversified* court relied for the formulation of its test, defines a superior as "one who is in a position to initiate a request for legal advice and whose actions indicate that his purpose in directing disclosure to the attorney was in contemplation of the rendition of legal services."[72]

While the subject matter variations of *Harper* and *Diversified* attempted to answer the criticisms of the control group approach, other circuits remained unconvinced. Both the Third and the Sixth Circuits rejected the subject matter approach even after its suggested modification in *Diversified.*

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69. *See supra* text accompanying note 18.

70. *See supra* text accompanying note 44.

71. *See* Note, *Application of the Attorney-Client Privilege to Corporations: New Directions and a Proposed Solution,* 20 B.C. L. REV. 953, 965 (1979); 11 CONN. L. REV. 94, 103 (1978).

72. 2 J. WEINSTEIN & M. BERGER, *supra* note 31, at 48-49. This section continues,

> At times, depending upon the structure of the corporation and the nature of the communication, a communication which a rather low level employee made on his own initiative may be privileged if the court can find that the employee consciously divulged his information for the purpose of obtaining legal advice which would benefit the corporation.

Id.

C. *The Third Circuit Reaffirmation of the Control Group Test*

In *In re Grand Jury Investigation*,[73] the Third Circuit adopted the control group test which had been formulated in *Westinghouse*. A grand jury subpoenaed certain questionnaires and memoranda which had been prepared by a law firm retained by the corporation to investigate questionable foreign payments. After holding that some of the documents were not protected by work-product immunity, the court of appeals addressed the question of attorney-client privilege and resolved it against the corporation.

Noting as generally accepted principles that the privilege should be narrowly construed and that application should be predictable, the court stated that the control group test met these basic criteria.[74] The court then asserted that the communications protected by that narrow standard were the minimum which it was "socially desirable to protect."[75] Any extension beyond that minimum "should depend upon whether a broader rule would serve the policy of full communication."[76]

The court then turned to an examination of the arguments urged for such an extension. First, the court rejected the claim that the existence of the privilege encourages lower echelon employees to be candid with the corporate attorney. The employee with nothing to hide has no reason to disregard his superior's directives. The employee who faces personal civil or criminal liability is afforded only illusory protection since the privilege belongs to the corporation and it is only the corporation which can assert or waive it.[77] Concluding that the extension of the privilege would have no effect on inducing lower level employees to full disclosure, the inquiry turned to whether lack of the privilege would inhibit counsel in the search for relevant information on a particular matter. The court pointed out that the information gathered in anticipation of litigation would in all likelihood be protected by the

73. 599 F.2d 1224 (3d Cir. 1979).
74. *Id.* at 1235.
75. *Id.*
76. *Id.*
77. *Id.* at 1236.

Hickman work-product doctrine. And if there is not likely to be litigation, privilege or lack of it has no significance.[78] The court also responded to commentators[79] who had suggested that corporations will be discouraged from undertaking internal investigations into possible wrongdoing if the privilege does not extend to lower echelon employees. The court's answer was that corporations have no choice but to police themselves in view of the penalties that can be imposed for failure to comply with the laws governing corporate activity.[80] The court concluded that the "control-group test is both broad enough and flexible enough to accommodate the needs of a corporate client."[81]

With the Third Circuit's strong opinion in *Grand Jury* and the Sixth Circuit's similar result in *United States v. Upjohn Co.*[82] just a few weeks later, it became clear that the circuits were not likely to fall in line behind the proposed subject matter tests of the Seventh and Eighth Circuits. Thus, the matter was ripe for consideration by the Supreme Court.

III. THE *Upjohn* DECISION

A. *The Factual Setting*

Upjohn manufactures and sells pharmaceuticals in the United States and 136 foreign countries.[83] An audit of one of its foreign subsidiaries revealed possible illegal payments to

78. *Id.* at 1236-37.

79. *See, e.g.*, Brodsky, *"Zone of Darkness": Special Counsel Investigations and the Attorney-Client Privilege*, 8 SEC. REG. L.J. 123, 136-37 (1980).

80. 599 F.2d at 1237.

81. *Id.*

82. 600 F.2d 1223 (6th Cir. 1979).

83. This summary relies on the Supreme Court opinion's statement of the facts which is more detailed than that provided by the court of appeals. Not surprisingly, in view of the opposite holdings, there are some differences in emphasis. For example, the Supreme Court opinion specifies that the questionnaires were sent to "all foreign general and area managers" while the court of appeals simply says that "officers and employees" were questioned. The Supreme Court also notes that responses to the questionnaire were to be sent directly to the General Counsel while the lower court omits this except perhaps by implication. The court of appeals also states that of $4,400,000 in questionable payments, Upjohn provided the IRS with detailed information on only $700,000 of this amount and with less detailed information on the remainder. The Supreme Court opinion omits the figures entirely. And while the Supreme Court opinion points out that Upjohn provided the IRS with a list of the employees who received questionnaires and were interviewed, it does not mention, as does the court of appeals, that the company refused to permit the employees to be

foreign government officials. When informed, the General Counsel consulted with outside counsel and the Chairman of the Board. They decided that the General Counsel, along with outside counsel, would undertake an internal investigation. A detailed questionnaire was sent to "all foreign general and area managers" along with a letter from the Chairman of the Board indicating that illegal activity might be involved and that all responses should be sent directly to the General Counsel. The Chairman's letter urged the managers to be candid, to treat the investigation as highly confidential and "not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information."[84] General and outside counsel also interviewed other officers and employees and made notes and memoranda describing these interviews.[85]

The company filed a report with the SEC disclosing some of the questionable payments. The report was also made available to the IRS which immediately began an investigation of possible tax implications. The IRS issued a summons for the " 'written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memoranda or notes of the interviews conducted in the United States and abroad with officers and employees . . . .' "[86] The company declined to produce the documents, claiming work-product immunity and attorney-client privilege. It did, however, provide the IRS with a list of all persons who had been interviewed or had responded to questionnaires.[87] Upon the finding of a magistrate that the privilege had been waived, the District Court for the Western District of Michigan ordered the summons enforced under 26 U.S.C. §§ 7402(b) and 7604(a). Upjohn appealed.[88]

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questioned about $3,700,000 of the $4,400,000 in questionable payments. 600 F.2d 1224-25 and 449 U.S. at 386-89.

84. 449 U.S. at 387.

85. *Id.*

86. *Id.* at 387-88.

87. The attorney-client privilege does not shield the *names* of employees who may have relevant information from discovery. *See* United States v. Amerada Hess Corp., 619 F.2d 980 (3d Cir. 1980).

88. 449 U.S. at 388.

B. *The Sixth Circuit Court of Appeals Decision*

The Sixth Circuit began its consideration of the *Upjohn* case by noting two principles which underlie the attorney-client privilege when applied to natural persons — fostering loyalty[89] and encouraging full disclosure.[90] But like other courts,[91] the Sixth Circuit had conceptual difficulty in applying such principles to the inanimate corporation.[92] Noting how compartmentalized corporate employees and their functions tended to be, the court concluded that "[i]t is only the senior management, guiding and integrating the several operations, which can be said to possess an identity analogous to the corporation as a whole."[93] It therefore adopted the control group test.

In rejecting the subject matter approach, the court advanced two arguments. First, the court mentioned that broad application of the privilege to cover the communications of lower level employees encourages "purposeful ignorance" on the part of senior managers.[94] That is, once management becomes dimly aware of misconduct, it can simply instruct employees to give full information to the corporate attorney who then becomes the "exclusive repository of unpleasant facts."[95] The court said that such abdication of responsibility by upper management (acting upon the attorney's advice without a detailed understanding of the underlying facts) would be detrimental both to the stockholders and to the interests of moral corporate conduct.[96] Second, the court said this scenario would impose an undue burden on discovery.[97] The attorney would be the only person with all the facts, and the facts would be protected from disclosure by the privilege. With top management largely ignorant of the relevant information, an

89. 600 F.2d at 1225 (citing the passage from Dean McCormick quoted *supra* at note 11).

90. *Id.* at 1226.

91. *See supra* note 47.

92. 600 F.2d at 1226.

93. *Id.*

94. *Id.* at 1227.

95. *Id.*

96. *Id.*

97. *Id.*

opposing litigant could be forced to interview large numbers of employees in widely scattered locations.

While there can be little question that the subject matter test places a greater burden on discovery than the control group test does, the court's vision of the corporate attorney as the exclusive repository of unpleasant facts may be inaccurate, at least under the modified subject matter approach. According to the *Diversified* test, a lower level employee's communication would remain privileged as long as it was not disseminated beyond those in the corporation with a need to know it.[98] It seems clear that if the attorney revealed this information to a member of top management, this communication would likewise be privileged. Therefore, there would be no reason for senior managers to ignore unpleasant facts.

The soundness of the Sixth Circuit's reasoning, however, was destined to become a moot point. The court of appeals remanded the case to the district court to determine whether any of the communications in question had been made by control group members.[99] But before this determination could be made, the Supreme Court granted certiorari to consider the attorney-client privilege question and the applicability of the work-product doctrine in proceedings to enforce tax summonses.[100]

C. *The Supreme Court Decision*

While the Supreme Court's decision in *Upjohn Co. v. United States*[101] is clearly a defeat for proponents of the control group test, it is not necessarily a complete victory for adherents of the subject matter test. It appears instead to recog-

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98. *See supra* text accompanying note 67.

99. 600 F.2d at 1227-28.

100. 449 U.S. at 386. The work-product issue is beyond the scope of this Comment. The court of appeals had disposed of Upjohn's argument on this question by stating in a footnote that the work-product doctrine is not applicable to administrative summonses. 600 F.2d at 1228 n.13. The Supreme Court reversed on this point, finding that tax summonses are subject to the doctrine. It further held that work-product revealing an attorney's mental processes (such as the notes based on oral statements of employees in this case) cannot be disclosed simply on a showing of substantial need and inability to acquire the information without undue hardship. Since the magistrate, on whose opinion the district court relied in finding that the government had overcome the work-product rule, had applied "too lenient" a standard, the Court remanded this issue to the court of appeals. 449 U.S. at 397-402.

101. 449 U.S. 383 (1981).

nize that only by rejecting rigid formulas in favor of case-by-case review can the application of the attorney-client privilege in the corporate setting remain tied to its underlying purposes.[102]

Justice Rehnquist, writing for an eight-man majority, began the opinion by specifically declining to adopt a particular "test," stating that it was the Court's function to decide only the case before it.[103] After a review of case law pronouncements on the purpose of the privilege,[104] the Court marshalled a series of arguments which demonstrated the weaknesses of the control group test. First, the Court took issue with the court of appeals' conclusion (which is drawn directly from *Westinghouse*) that the privilege should extend only to members of the control group because only these individuals can be said to "personify" the corporation.[105] Anticipating the information giver/decision maker dichotomy, the Supreme Court responded, "Such a view . . . overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it *but also the giving of information to the lawyer to enable him to give sound and informed advice.*"[106] Standing alone, this statement implies that if an individual can provide relevant information to the attorney, he necessarily personifies the client and his communications are privileged. Clearly this would be an erroneous basis on which to find that a personal attorney-client relationship had been established. The Court, however, held that it was a proper basis on which to find an attorney-client relationship (that is, a privileged relationship) in the corporate setting. After pointing out that lower and middle level employees often possess information that is vital to the attorney in providing informed advice and that these employees can embroil the corporation in legal difficulties, the Court summarily concluded that the control group test "frustrates the very purpose of the privilege by discouraging the communication of

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102. *See, e.g.*, Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977); Kobak, *supra* note 13, at 362-74.

103. 449 U.S. at 386.

104. *Id.* at 389-90.

105. *Id.* at 390.

106. *Id.* (emphasis added).

relevant information by employees of the client . . . ."[107] The Court simply *assumed* that lower level employees would be inhibited by lack of the privilege. It made no response to the numerous critics who argue that the privilege is illusory as far as the individual employee is concerned and that his primary motivation is the order from his supervisor to speak with the attorney.[108]

The Court next pointed out that it is often noncontrol group members who actually need and act on the legal advice that the control group has sanctioned.[109] The Court argued that, under the control group test, the attorney is inhibited from giving full and frank legal advice to middle managers. Since no attorney-client relationship exists, providing legal advice to a middle manager may conflict with the interests of the corporate client. In addition, the disclosure of a privileged communication from a member of the control group to a middle manager would act as a waiver of the privilege.

Having examined the problems the control group test presents for dealing with specific legal issues, the Court asserted that such a narrow application of the privilege also "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[110] Citing the complexity of legislation regulating corporate activity, the Court implied that without a privilege extending to employees outside the control group, corporations would be less willing to police themselves. On this point, the Court did respond to critics who argue that stiff penalties for regulatory violations are sufficient incentive for self-examination. In a footnote, the Court answered that the "depth and quality" of such examinations were likely to suffer in the absence of the privilege.[111] Drawing an analogy between the corporate and personal privileges, the Court pointed out that an individual also has incen-

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107. *Id.* at 392.

108. *See supra* note 13 and text accompanying notes 13, 43-45 and 76.

109. 449 U.S. at 392. The Court cites Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D. S.C. 1974) for this proposition. *Duplan* proposed a hybrid control group/subject matter test. It required that (1) the corporation must speak through a control group member and (2) the communication must be incident to a request for legal advice. 397 F. Supp. at 1163-65.

110. 449 U.S. at 392.

111. *Id.* at 393 n.2.

tives to disclose information to his lawyer but the law has recognized the advantage of further facilitating these communications by extending the privilege.[112]

The Court's final reason for rejecting the control group test was the uncertainty of its results. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[113] A privilege can hardly dispel apprehensions about disclosure if the client does not know in advance whether it will attach. As case law has demonstrated and commentators have pointed out,[114] determining who is a member of a control group on any particular matter is an imprecise science at best. The parties' briefs illustrate that the argument is difficult to refute. The petitioner levels the charge of unpredictability and uncertainty against the control group test[115] and the respondent's brief makes no reply. But while unpredictability is one of the reasons the Court rejected the narrow test, its own final decision to leave development of this area to future case law contains at least a modicum of uncertainty.

After leveling its arguments at the control group test, the Court proceeded to examine the facts of the case for a determination of whether the privilege should apply. Although the Court purported not to adopt a particular "test" for the determination of this issue,[116] the facts are presented in such a way that it is clear that the elements of the five-part modified subject matter test of *Diversified*[117] have been met. "The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel."[118] This first sentence demonstrates that elements (1), (2) and (3) have

112. *Id.*

113. *Id.* at 393.

114. *See supra* note 50.

115. Brief for Petitioner at 40-44, Upjohn Co. v. United States, 449 U.S. 383 (1981).

116. 449 U.S. at 386.

117. *See supra* text accompanying note 67.

118. 449 U.S. at 394 (footnote omitted). In a footnote to this sentence, the Court declined to decide the issue of whether the interviews which Upjohn had conducted with *former* employees would be privileged because the lower courts had not addressed the issue. *Id.* at 394 n.3. The test which Chief Justice Burger proposes in his concurrence would extend the privilege to former employees. *Id.* at 403.

been met; the employee acted at the direction of his superior and the communication was made for the purpose of securing legal (not business) advice. The legal nature of the advice and the fact that the communicating employees were fully informed of this fact was stressed repeatedly by the Court.[119]

Next, the Court stated that "[t]he communications concerned matters within the scope of the employees' corporate duties . . . ."[120] This statement satisfies element (4) of the *Diversified* test: the subject matter of the communication was within the scope of the employees' duties. The employees were not, therefore, mere bystander witnesses, and so no conflict with the *Hickman* dictum arises.

Finally, the Court pointed out that "[p]ursuant to explicit instructions from the Chairman of the Board, the communications were considered 'highly confidential' when made, . . . and have been kept confidential by the company."[121] The Court adds in a footnote that the magistrate's opinion found that the questionnaires and the notes of the interviews had not been disclosed to anyone except the General Counsel and outside counsel.[122] Clearly, element (5) of the *Diversified* test, that the communication not be disseminated beyond those in the corporation with a need to know, had been met. The footnote comment, in fact, raises the question of whether the Court set a more stringent standard for confidentiality than *Diversified* did; that is, strictly between the communicating employee and attorney rather than among employee, attorney

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119. As the magistrate found,

"Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the company with respect to the payments." . . . Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. . . . [T]he employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. . . . A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. . . . This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews.

449 U.S. at 394-95.

120. *Id.* at 394.

121. *Id.* at 395.

122. *Id.* at 395 n.5.

and those within the corporation with a need to know. While this interpretation is possible, it seems unlikely in view of the Court's movement away from the narrow control group test to something much broader. It would be a contradiction to extend the privilege to a greater number of employees in hopes of achieving fuller disclosure and then to keep the information from senior managers who most need it to plan their legal course. In sum, while the Court never referred explicitly to the *Diversified* test, it seems to have used it as a guide when it evaluated the facts before it and held the communications to be privileged.

Before concluding its coverage of the attorney-client privilege issue, the Court responded to the most serious indictment of the subject matter approach — that it creates too broad a zone of silence over corporate affairs.[123] The Court maintained that this criticism was baseless because it is only the *communication* between attorney and client that is protected from disclosure, not the underlying information possessed by the client.[124] The government was still free to depose the employees who responded to the questionnaires or interviews. Mere convenience to the opposing litigants cannot "overcome the policies served by the attorney-client privilege."[125] The Court apparently rejected the contention that as time passes it becomes more difficult for employees to recall detailed information and easier for them to understand what should not be revealed.[126]

Justice Rehnquist concluded by reiterating his opening statement that the Court was not adopting a particular test with this opinion.[127] Rather, in conformity with Federal Rule of Evidence 501,[128] development in the area of privileges must be on a case-by-case basis.

> While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group

123. *Id.* at 395.
124. *Id.*
125. *Id.* at 396.
126. Note, *supra* note 12, at 427.
127. 449 U.S. at 396.
128. *See supra* note 53.

> test" . . . cannot . . . govern the development of the law in this area.[129]

Although Chief Justice Burger concurred in the result and agreed with the majority's rejection of the control group test, he wrote a concurrence proposing a fixed test because he felt such a standard was vital to insure predictability.[130] Unfortunately, his purposes might have been better served if he had made the Court's holding unanimous in supporting, at least by implication, the familiar elements of the *Diversified* test. By proposing yet another formula, he introduced more uncertainty than he dispelled. For example, he proposed to include former employees under the privilege,[131] while the majority declined to address this issue.[132] His formulation requires that the employee speak and the attorney inquire at the direction of "management."[133] Does "management" have a different meaning than does "superior"? Does his formulation reintroduce the notion of a control group? And finally, the test enumerates three, but admittedly not all, situations in which a communication would be for legal purposes and therefore protected.[134] But do these specifications really relieve the burden of the trial court judge in assessing in a particular situation whether the communication was for a business or a legal purpose? It is not likely. By proposing the test, while the majority specifically declined to adopt the one on which it apparently relies, the Chief Justice appears only to have given the circuit courts more fodder for diversity.

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129. 449 U.S. at 396-97.

130. He proposed the following test:

> [A] communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (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.

Id. at 403.

131. *Id.*

132. *See supra* note 118.

133. 449 U.S. at 403.

134. *Id.*

IV. IMPLICATIONS FOR THE FUTURE

Upjohn Co. v. United States answers the question of who speaks for the corporation. It is not only members of a control group but it is also any employee who communicates concerning matters within the scope of his duties at the direction of a superior in order to secure legal advice from counsel.[135] While the Court specifically declined to lay this down as a fixed rule, it can hardly be doubted that this formulation points the way for federal courts in the future. Implicit in this holding is that the privilege is being extended to encourage the corporation as an entity to seek legal counsel. The existence of the privilege may not be a motivating factor for an individual employee, but it can clearly be a strong motivation for the decision making arm of the corporation. Assured of such protection, a corporation is more likely to seek assistance of counsel in efforts to comply with regulatory legislation and to conduct internal investigations. The Court clearly weighed such interests of justice against the impediments to opposing litigants and found the scales tipped in favor of the former.

Just as the Court gave the lower federal courts a clear outline to follow in determining who speaks for the corporation, it also provided signposts for the determination of whether a communication is for legal purposes. The specificity in the Court's statement of facts and in the body of its opinion on all the ways in which Upjohn informed its employees of the legal nature of their communications[136] suggests that courts may require a high degree of documentation in the future. The Court's outline may cause attorneys to reconsider the common practice of sitting on boards of directors and assuming that many of their communications will be privileged. *Upjohn* establishes a high standard for demonstrating the legal nature of communications.

One area of ambiguity in the opinion which could present problems for future courts is the matter of confidentiality. Although the Court followed four of the elements of the *Diversified* test quite closely, it made no reference to the fact that confidentiality may be maintained even if information is disseminated beyond the attorney to those in the corporation

135. *Id.* at 394-95.
136. *See supra* note 119.

with a need to know.[137] Therefore, a stricter standard could be imposed by lower courts and still be consistent with the *Upjohn* opinion. This hardly seems a likely development, however, in view of the liberal trend in application which *Upjohn* adopts.

Finally, on the question of predictability, the Court made progress despite the suggestion of the Chief Justice's concurrence. The corporation which may be subject to suit in a number of geographic areas will no longer be confronted with the sharp difference in standards between the control group and the subject matter jurisdictions.[138] While the Court adopted no fixed rule, it did set forth guidelines by implication which closely resemble those in *Diversified.* These guidelines give both corporations and courts a reasonably clear idea of which communications will be privileged. But in spite of this degree of certainty, the *Upjohn* decision does not totally foreclose a lower court from weighing, on a case-by-case basis, the social benefits of protecting a particular communication against the burdens placed upon discovery. In view of the Supreme Court's broad application of the privilege, however, it is unlikely that a lower court will find the benefits of the privilege outweighed.

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137. *See supra* text accompanying notes 121 and 122.

138. The subject matter approach seems to be the prevailing rule in state courts as well. *See, e.g., In re* Hyde, 149 Ohio St. 407, 79 N.E.2d 224 (1948).

In the federal courts, state rules of privilege apply in diversity cases. Federal rules generally apply in federal question cases but there are exceptions. *See* FED. R. EVID. 501, *supra* note 53; 2 J. WEINSTEIN & M. BERGER, *supra* note 31, at ¶ 501[01].