Buffalo Law Review

Volume 30
Number 1 *Thirtieth Anniversary Issue*

Article 7

1-1-1981

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UPJOHN: A NEW PRESCRIPTION FOR THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DEFENSES IN ADMINISTRATIVE INVESTIGATIONS

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INTRODUCTION

In *Upjohn Co. v. United States*,[1] the Supreme Court has settled an important controversy over the scope of the corporate attorney-client privilege, and has announced guidelines for the invocation of the work-product doctrine during an administrative investigation. The privilege dispute had split District Courts,[2] Circuit Courts of Appeals,[3] even the Supreme Court itself.[4] In

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1. 449 U.S. 383 (1981), *rev'g and remanding*, 600 F.2d 1223 (6th Cir. 1979).

2. *See, e.g.*, In re Ampicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978) (some discovery allowed based on the control group and subject matter tests); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977) (discovery allowed using control group test); Virginia Electric Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (E.D. Pa. 1975) (discovery allowed using control group test); Burlington Industries v. Exxon Corp. et. al., 65 F.R.D. 26 (D. Md. 1974) (special master appointed to review documents based on control group test); Duplan Corp. et. al. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974), *aff'd*, 540 F.2d 1215 (4th Cir. 1976) (some discovery allowed: both tests adopted); Sylgab Steel & Wire Corp. v. Imoco Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd*, 534 F.2d 330 (7th Cir. 1976) (discovery denied using subject matter test); Xerox Corp. v. International Business Machines Corp., 64 F.R.D. 367 (S.D.N.Y. 1974) (special master "inclined" to accept subject matter test); Hasso v. Retail Credit Corp., 58 F.R.D. 425 (E.D. Pa. 1973) (discovery denied based on subject matter test); Honeywell v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D. Pa. 1970) (discovery allowed: control group test adopted); Leve v. General Motors Corp., 43 F.R.D. 508 (S.D.N.Y. 1967) (discovery denied: control group test arguably adopted); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963) (control group test adopted). *See also* notes 7 & 8 *infra*.

3. *See, e.g.*, In re Grand Jury Investigation (Sun Company), 599 F.2d 1224 (3d Cir. 1979) (control group test adopted); In re Grand Jury Subpoena Dated December 19, 1978, 599 F.2d 504 (2d Cir. 1979) (court noted conflict between privilege tests); Diversified Industries v. Meredith, 572 F.2d 606 (8th Cir. 1978) (en banc), *rev'g* 527 F.2d 596 (8th Cir. 1977) (discovery denied using modified subject matter test); Sylgab Steel & Wire Corp. v. Imoco Gateway Corp., 534 F.2d 330 (7th Cir. 1976), *aff'g* 62 F.R.D. 454 (N.D. Ill. 1974) (affirming lower court which used subject matter test); Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968)

Upjohn, the Court announced two broad[5] doctrines: (1) the corporate attorney-client privilege[6] shelters the communications to lawyers not only of top management (the "control group"[7]), but also of any employee, if the communication concerns corporate duties[8]

(discovery allowed using control group test).

4. *See, e.g.*, Harper & Row Publishers v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided Court*, 400 U.S. 348 (1971) (discovery denied in part based on subject matter test).

5. Despite Mr. Justice Rehnquist's opening language, "[w]e decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area," 449 U.S. at 386, the implications of the opinion are indeed very broad, as the remainder of this article will show.

6. The attorney-client privilege has received many formulations. Probably the most famous is that of Judge Wyzanski in United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950):

> 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 purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. at 358-59.

See generally Kidston, *Privileged Communications*, 34 BUS. LAW 853 (1978); Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972). It is not surprising that an issue which affects the legal profession itself so deeply, as well as affecting numerous important corporate clients, would attract amicus briefs. Filing such briefs in the Supreme Court were the New England Legal Foundation, the American College of Trial Lawyers on behalf of itself and 33 law firms (brief by Dean Erwin N. Griswold), the Chamber of Commerce of the United States, and the Federal Bar Association. Every one of these amici argued for reversal.

7. The control group test was announced in City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom.*; General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963):

> [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 an 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.

210 F. Supp. at 485.

8. The "corporate duties" language derives from the subject matter test, which was first set forth in Harper & Row Publishers v. Decker, 423 F.2d 487:

> We conclude that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the

and the other standards of the privilege are met, and (2) the work-product doctrine applies in full force at the administrative level of an Internal Revenue Service investigation; only an extremely strong showing of need will overcome it.[9]

Bare recitation of these doctrines, however, cannot convey how greatly *Upjohn* departed from the holdings, and the tone, of precedent. On the same attorney-client privilege issue at least two present Justices of the Court (and possibly four) had voted to the contrary just ten years earlier.[10] Respectable arguments existed on both sides of the privilege issue,[11] yet only two of the arguments marshalled against the Court's position were discussed, in abbreviated fashion, in the unanimous opinion.[12] Past decisions, particularly in the tax enforcement field, had shown the Supreme Court to be hostile to many varieties of privilege claims, especially when made by corporations. The decision in *Upjohn* went at least as far as, if not farther than, Upjohn urged, to protect the attorney-client privilege in general, and a corporation's assertion of it in particu-

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> communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

Id. at 491-92. This pronouncement was a bold but unsupported step, since the test appears to have been crafted in the case out of thin air. There is no citation to authority, no discussion of the history, nature and purposes of the privilege, nor any analysis of how the new test would promote it.

> The difference between the two tests has been eloquently summarized as follows:
> The control group test treats those employees not vested with high decision making authority as third parties to the attorney-client relationship. The subject matter test, on the other hand, envisages protection for communications by those employees who have acquired information during the course of their employment, but excludes from its scope declarations by these same persons should they be mere witnesses.

Note, *Should Lawyers Serve as Directors of Corporations for which They Act as Counsel?*, 1978 UTAH L. REV. 711, 733-34 n.92 (1978).

It seems clear that the Supreme Court effectively endorsed the subject matter test in *Upjohn*; every one of that test's elements (and more) were present in the case. 449 U.S. at 394-95.

9. 449 U.S. at 397-402.

10. When *Harper & Row Publishers*, 423 F.2d 487, was decided, Justices Black, Douglas and Harlan were members of the Court. Justice Douglas did not take part in the decision. Thus, assuming Justices Black and Harlan had voted to reverse, it is mathematically certain that at least two, and possibly four, of the present members of the Court have reversed their positions by their votes in *Upjohn*.

11. *See* text accompanying notes 95-140.

12. 449 U.S. at 390, 395, 399.

lar. Past decisions had nurtured an atmosphere friendly to law enforcement; *Upjohn* ran counter to that trend, unexpectedly in the course of an Internal Revenue Service criminal tax investigation involving allegations of foreign bribery, where prosecution loomed, and where Upjohn had hampered the IRS' investigative efforts by forbidding its employees to cooperate fully in the investigation.

Despite contrary precedent, the Court may have elevated the work-product doctrine to the status of privilege with respect to one class of work product. It also erected what will likely prove to be insurmountable barriers to overcoming work-product protection. In so doing, the Court expanded the doctrine beyond either its original or later-developed confines, and beyond what was necessary to the result of the case.

In an earlier age, the attorney-client privilege was a simpler concept because it was clear who the client was.[13] The client, usually an individual, needed a privilege because he could not obtain effective legal advice without the unfettered discretion to reveal the full dimensions of a legal problem. He could have confidence that the lawyer's resulting advice would be predicated on his candor.[14] Our complex system of laws, which demands the expert assistance of a lawyer, would be jeopardized unless the client (includ-

13. *See generally* 8 WIGMORE, EVIDENCE §§ 2290-2399 (McNaughton rev. ed. 1961); 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL §§ 2017, 2021-28 (1970). Wigmore describes the privilege as dating from 1577, during the reign of Elizabeth I, where its existence was "unquestioned." Bird v. Lovelace, 21 Eng. Rep. 33 (Ch. 1577); Dennis v. Codrington, 21 Eng. Rep. 53 (Ch. 1580). It arose as a naturally-occurring exception to the then-novel right to compel everyone's testimony, and as an adjunct to the oath taken by attorneys and barristers to keep the secrets of their clients. This doctrine gradually lost ground, and was repudiated entirely by the last quarter of the eighteenth century. The original theory, which exempted the lawyer, not the client, from compelled testimony, was limited to communications generated after litigation had begun.

14. The Code of Professional Responsibility of the American Bar Association, ABA CANON No. 4, requires lawyers to preserve the confidences and secrets of a client. Ethical Consideration No. 4-1 [hereinafter cited as EC] describes the fiduciary relationship between lawyer and client, holding that the proper functioning of the legal system requires the preservation by the lawyer of the client's confidences and secrets. In terms reminiscent of the present justification for the attorney-client privilege, this canon notes that there must exist a freedom of consultation between lawyer and client, and that a lawyer must be fully informed of all the facts in order for the client to obtain full advantage of the legal system. However, EC 4-4 holds that the attorney-client privilege is narrower than the ethical duty to guard a client's secrets, since the latter exists "without regard to the nature or source of information or the fact that others share the knowledge." The ethical duty, like the privilege, survives the termination of the professional relationship. EC 4-6. *See* Baird v. Koerner, 279 F.2d 623, 634 nn.17, 18 (9th Cir. 1960).

ing a corporation)[15] is assured of a privilege which nurtures full freedom of communication. But who is the "client" when a modern corporation may employ over one million persons[16] and do business in dozens of foreign countries?[17] Should the "client" encompass all employees (the "subject matter" test), or merely top management who make the decisions based on legal advice (the "control group" test)? This was how the first issue was framed.

The work-product doctrine, although said to be of ancient origin,[18] was explicitly recognized by the Supreme Court in the 1947 decision, *Hickman v. Taylor*.[19] The work-product doctrine protects primarily the lawyer, not the client. Courts have recognized it over the years as a rule of procedure applicable when sharply adverse interests are set against each other in a lawsuit. Should it apply at all prior to such a setting? Do the features of an administrative investigation undercut, or override the dangers sought to be forestalled by the work-product doctrine? What should be the effect of the principle that in administrative agency inquiries, the law recognizes an imbalance of interests favoring disclosure? What quantum of need should be required to overcome work-product doctrine protection? Thus was the second problem posed.

The events which focused attention on these issues began as fallout from the Watergate era, when it was revealed that large multi-national corporations had engaged in a regular business practice and policy of bribing domestic and/or foreign persons and/or governmental officials in order to advance their business inter-

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15. It is now universally held that the privilege applies to corporations. Radiant Burners, Inc. v. American Gas Assoc., 320 F.2d 314 (7th Cir. 1963). *See also* United States v. Louisville & Nashville Railroad, 236 U.S. 318, 336 (1915); Natta v. Hogan, 392 F.2d 686, 691 (10th Cir. 1968) (patent suit involving Phillips Petroleum Corporation). This result was not always so clear. In *Radiant Burners*, Chief Judge Campbell cogently analyzed the privilege and its history, arriving at the conclusion that, like the privilege against self-incrimination, the attorney-client privilege was historically confined to individuals and ought to remain so. This decision, as could well be imagined, caused consternation in the legal and business community before it was reversed.

16. *See, e.g.*, Annual Report, American Telephone & Telegraph Corporation (1979), noting that in 1979, AT&T employed over one million people.

17. *Id.*; United States v. Upjohn Company, 600 F.2d at 1225. *See also* In re Grand Jury Investigation, 599 F.2d 1224, 1227 (3d Cir. 1979).

18. *See generally* Hickman v. Taylor, 329 U.S. 495, 510 n.19 (1947); 8 WIGMORE, *supra* note 13, § 2319; Annot., *The Development, Since Hickman v. Taylor, of the Attorney's "Work Product" Doctrine*, 35 A.L.R.3d 412 (1971).

19. Hickman v. Taylor, 329 U.S. 495 (1947); 8 WIGMORE, *supra* note 13, § 2319.

ests.[20] They made these payments (usually called "questionable payments") through fictitious accounts, or in cash (commonly known as "slush funds").[21] Anticipating (and often already under) administrative investigation by the Securities and Exchange Commission and the Internal Revenue Service as a result of these practices,[22] the corporations (and their lawyers) typically conducted their own internal investigations of these questionable payments practices. Government compulsory process and private litigation swiftly followed demanding production of the results. The corporations uniformly invoked as defenses the attorney-client privilege[23] and work-product doctrine.[24]

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20. Wall St. J., Dec. 10, 1976, at 1, col. 6 (Commissioner of Internal Revenue Alexander reveals that three hundred corporations had maintained "slush funds" for payment of bribes and kickbacks to foreign and domestic government officials). *See also* Alfred, *Corporate Slush Funds: The Deductibility of "Sensitive" Payments*, 4 J. CORP. TAX. 130 (1977); Note, *A Look at Questionable or Illegal Payments by American Corporations to Foreign Government Officials*, 8 CASE W. RES. J. INTL. L. 496 (1976).

21. Diversified Industries v. Meredith, 572 F.2d 596, 600 (8th Cir. 1978); Alfred, *supra* note 20. At trial, Upjohn's General Counsel described a slush fund as "a fund of money, usually in cash, usually off the books, that a company generates for improper or illegal purposes."

22. The Service's authority to conduct investigations of possible violations of the tax laws, whether civil or criminal, is contained in 26 U.S.C. § 7601 (1976). The Supreme Court has characterized this power as nearly plenary. Like other administrative agencies, the Service is empowered to inquire where the law has been violated or merely because it wants assurance that it has not. United States v. Bisceglia, 420 U.S. 141, 148 (1975); United States v. Powell, 379 U.S. 48, 57 (1964) (quoting United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950)). *See also* Donaldson v. United States, 400 U.S. 517, 523-24 (1971). The Service's power has often been analogized to that of a grand jury. United States v. Rosinsky, 547 F.2d 249, 252 (4th Cir. 1976); United States v. Widelski, 452 F.2d 1, 4 (6th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972); United States v. Foster, 265 F.2d 183, 186-87 (2d Cir. 1959), *cert. denied*, 360 U.S. 912 (1959). The power and authority of the SEC are similarly broad in the enforcement of the securities laws. 15 U.S.C. §§ 77s, 77t (1976). *See* Securities & Exchange Comm'n v. Arthur Young & Co., 584 F.2d 1018, 1023-24 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1978); Mines & Metal Corp. v. Securities & Exchange Comm'n, 200 F.2d 317, 319 n.1-3, 321 (9th Cir. 1952), *cert. denied*, 345 U.S. 941 (1953). *See also* Civil Aeronautics Board v. Hermann, 353 U.S. 322 (1957).

23. Unlike the work-product doctrine prior to *Upjohn*, there is no dispute that the attorney-client privilege is available as a defense to an IRS summons. Reisman v. Caplin, 375 U.S. 440, 449 (1964) (held that the summons may be contested on "any appropriate ground," and that the attorney-client privilege is one such ground). *Accord* United States v. Summe, 208 F. Supp. 925 (E.D. Ky. 1962).

24. The result was a spate of conflicting precedent. *See Harper & Row Publishers*, 423 F.2d 487, *aff'd by equally divided Court*, 400 U.S. 348 (1971), where the Supreme Court issued no decision in the case which first proposed the subject matter test. The conflict as a result of which certiorari was granted had generated significant appellate and district court litigation, in the context of both private litigation and governmental investigations. *See*

This article will explore the background of the issues the Court addressed in *Upjohn*, and how the decision is understandable, if not entirely defensible, in view of apparently conflicting precedent. Part II will discuss the strengths and weaknesses of the Court's privilege and work-product holdings, emphasizing the incompatibility of the Court's holdings with traditional concepts of privilege and work-product. Part III will analyze the impact of the ruling on other subdoctrines and requirements of the privilege, and the far-reaching, possibly dangerous implications they harbor for the judicial fact-finding process. Upjohn's important, but largely ignored, implications for lawyers' ethics and employees' constitutional rights will be treated in Part IV.

I. Background of Upjohn: Discovering the Skeletons

Upjohn Company is a major multi-national corporation engaged principally in the manufacture and distribution of pharmaceuticals. Its 1975 sales approached $900 million. Its general structure consists of a parent, foreign subsidiaries and foreign branches of United States subsidiaries. Upjohn operates in more than 150 foreign countries and files consolidated federal income tax returns.[25]

In January, 1976, Upjohn's independent auditors notified Gerard Thomas, Upjohn's general counsel, that one foreign subsidiary (Upjohn International, Inc.) had made direct or indirect payments to foreign government employees to secure additional business. Mr. Thomas brought this fact to the attention of R.T. Parfet, Jr., Chairman of the Board, and to the Board itself. The Board passed a resolution appointing Thomas to conduct a factual investigation with the help of outside counsel to determine the extent and scope

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notes 2-4 *supra*. It has also generated significant scholarly commentary. *See, e.g.*, Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953 (1956); Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. Ind. & Comm. L. Rev. 873 (1971); Note, *The Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 Harv. L. Rev. 424 (1970); Note, *The Attorney-Client Privilege: A Look at Its Effect on the Corporate Client and the Corporate Executive*, 55 Ind. L.J. 407 (1980); Note, *The Attorney-Client Privilege, the Self-Evaluative Report Privilege, and Diversified Industries v. Meredith*, 40 Ohio St. L.J. 699 (1979).

25. United States v. Upjohn Co., 78-1 U.S. Tax Cas. 83,597, 83,598 (Magistrate's Report and Recommendation), *aff'd*, 78-1 U.S. Tax Cas. 84,152 (W.D. Mich. 1978), *aff'd*, 600 F.2d 1123 (6th Cir. 1979), *rev'd and remanded*, 449 U.S. 383 (1981).

of these "questionable"[26] payments, and to be in a position to give legal advice with respect to the payments.[27] Thomas eventually discovered that Upjohn had been making payments at an average rate of $1 million per year from 1971 through 1974.[28]

Thomas conducted the internal investigation by mailing a written questionnaire under the authority of the Chairman of the Board to fifty-three foreign general and area managers of Upjohn, and by conducting interviews with the respondents and others.[29] In his transmittal letter accompanying each questionnaire, Chairman Parfet requested the respondent to cooperate completely and to answer all questions thoroughly.[30]

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26. The payments are "questionable" because of their dubious legality or deductibility. Bribery of foreign government officials is illegal under the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff. *See* Maurice, *Questionable Overseas Payments: Going Around One More Time*, 15 GONZAGA L. REV. 459 (1980).

The payments are not deductible as an ordinary and necessary business expense. 26 U.S.C. § 162(c) (1976). When they are deducted under a fictitous account, the act may constitute tax evasion (26 U.S.C. § 7201 (1976)) or the filing of a false return (26 U.S.C. § 7206 (1976)).

27. There appears to be no difference between house counsel's and outside counsel's privilege. Burlington Industries, Inc. v. Exxon, 65 F.R.D. 26, 36-37 (D. Md. 1974); Airshield v. Air Reduction, 46 F.R.D. 96, 97 (N.D. Ill. 1968); Malco Mfg. Co. v. Elco Corp., 45 F.R.D. 24, 26 (D. Minn. 1968); New York Underwriters Ins. Co. v. Union Construction Co., 285 F. Supp. 868, 869 (D. Kan. 1968); Paper Converting Machine Co. v. FMC Corp., 215 F. Supp. 249, 251 (E.D. Wis. 1963) (patent counsel); United States v. United Shoe Machinery, 89 F. Supp. 357, 360 (D. Mass. 1950). House counsel practices in a like manner as outside counsel, and while house counsel may have additional concerns regarding its role, especially ethical concerns, *see* Section III & accompanying notes, these should make no difference in the degree or applicability of the privilege. *See* Simon, *supra* note 24; Kobak, *The Uneven Application of the Attorney-Client Privilege*, *supra* note 6.

28. 78-1 U.S. Tax Cas. at 83,599.

29. *Id.* The interviews were conducted with a total of 86 persons either in person, by telephone, or both.

30. Respondents' Exhibit 3, attached to Affidavit of Gerard Thomas, introduced in evidence: "The subject matter [of Mr. Thomas' inquiry] must be treated as highly confidential and is not to be discussed with or disclosed to anyone other than Gerard Thomas or individuals he shall designate. . . . It is imperative that you be completely candid and cooperate fully in responding to questions and requests for information."

The importance of these interview notes and questionnaire responses to an IRS or SEC investigation can hardly be overstated. These agencies frequently begin their inquiries many years after the events involved. By then, memories have faded and records have been lost. Investigators also know that when the interviewee is questioned by his chairman of the board, and later by the corporation's lawyers, a far different attitude prevails than when the questioning is done by an IRS agent. The interviews and questionnaires generated by the corporation itself are highly likely to reveal the unvarnished truth. Even if the witness is available, the prior statements have obvious utility, at the very least for impeachment purposes.

On March 26, 1976, Upjohn filed a Form 8-K[31] with the Securities and Exchange Commission, disclosing that since January 1, 1971, it had made payments totalling $2.71 million in twenty-two foreign countries. Upjohn also sought refuge under the SEC's Voluntary Disclosure Program[32] by agreeing with the SEC to furnish such underlying data as the Commission might request to verify the 8-K revelations.[33] On July 26, 1976, Upjohn amended its earlier 8-K by disclosing additional payments; the new total reached $4.4 million. It sent copies of both reports to the Internal Revenue Service Audit Division[34] agents who were examining the company's 1972 and 1973 consolidated federal income tax returns. The agents referred the case to the Intelligence Division,[35] whose special

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31. Securities and Exchange Act of 1934, Section 13(a), 15 U.S.C. § 78m(a) (1970) requires corporations subject to the registration requirements of the Act to submit to the SEC periodic reports disclosing such information as the Commission may require. Form 8-K is used for current reports. SEC Rules and Regulations, 17 C.F.R. § 240.13a-11 (1980). It mandates disclosure of large acquisitions and dispositions of assets, declarations of bankruptcy or receivership, director resignations, and other major corporate events. 42 Fed. Reg. 4429 (1977). The filer must also disclose such additional information as will make the filing of the registration statement not misleading under the surrounding circumstances. SEC Rules and Regulations, 17 C.F.R. § 240.12b-20 (1981).

32. The Voluntary Disclosure Program was announced by the SEC on May 19, 1976. [1976] FED. SEC. L. REP. (CCH) ¶ 80,600. Its major features were that a corporation which had engaged in illegal or questionable payments could voluntarily submit a report (current on Form 8-K, annual on Form 10-K), together with a promise to disclose to the SEC the underlying details of the reported acts, and not face the SEC's enforcement powers. *See* SENATE BANKING, HOUSING AND URBAN AFFAIRS COMMITTEE, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON THE QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1972).

33. The Magistrate later saw that promise as a factor in his holding that Upjohn had waived whatever privilege it previously enjoyed. 78-1 U.S. Tax Cas. at 83,603.

34. The Audit Division is now the Examination Division. *See* United States v. LaSalle National Bank, 437 U.S. 298, 300 n.1 (1978) (citing IRS News Release, Feb. 6, 1978).

35. The Intelligence Division is now the Criminal Investigation Division. Such an investigation is initially aimed simply at obtaining the facts, but may have either or both civil or criminal outcomes. The investigation usually begins with an audit of a taxpayer's return (and did so in Upjohn's case) by one or more Revenue Agents of the Examination Division. While Revenue Agents are empowered to issue summonses, *see* DELEGATION ORDER No. 4 (Rev. 11), 1980-2 C.B. 752, there are usually few occasions to do so. If, during the course of an examination, the Revenue Agent discovers unexplained indications of fraud, he is required to suspend his audit and refer the case to the Criminal Investigation Division. *See* United States v. LaSalle National Bank, 437 U.S. 298, 300 n.1 (1978); United States v. Gilpin, 542 F.2d 38, 40-41 (7th Cir. 1976); United States v. Lockyear, 448 F.2d 417, 420 & n.2 (10th Cir. 1971); United States v. Crespo, 281 F. Supp. 928, 931-32 & nn.2-4 (D. Md. 1968). The Special Agents of the Criminal Investigation Division determine whether a taxpayer's alleged understatement of income or false statement warrants criminal prosecution. The outcome of an Examination Division examination is (1) no change, (2) a deficiency, or

agents are charged with investigating potential violations of the criminal provisions of the revenue laws, such as tax evasion,[36] filing a false return,[37] or making a false statement.[38]

Upjohn also furnished two schedules to the IRS. One summarized the component parts of $700,000 in payments which Upjohn made during 1971-76 and which it conceded affected the correctness of its returns for the investigated years. The other was a country-by-country summary of payments totalling $3.7 million made in connection with Upjohn's foreign operations, which payments Upjohn contended would have no effect on its tax liabilities or on the correctness of its tax returns.[39] In addition, and of significance to the District Court's work product discussion, Upjohn offered to make available to the IRS the employees whom Thomas had interviewed, but would not allow the special agent to examine them about transactions Upjohn deemed irrelevant to the tax investigation.

The assigned special agent requested the interview notes and questionnaire results of Upjohn's internal investigation, and when

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(3) a refund, together with applicable interest and penalties including the fraud penalty. I.R.C. § 6653(b). The outcome of a C.I.D. investigation could be a recommendation to the Examination Division for any one of these courses, or it could be a recommendation for criminal prosecution of the taxpayer. United States v. Crespo, 281 F. Supp. at 931-32 & nn.2-4.

36. I.R.C. § 7201.

37. I.R.C. § 7207.

38. I.R.C. § 7206.

39. This stance ripened in the litigation to the defense that the summoned data were not "relevant" to the IRS' investigation, and since relevance was one of the four standards for enforcement erected by United States v. Powell, 379 U.S. 48, 57-58 (1964), enforcement should be denied. The general standard of relevance is whether the data "might have thrown light upon the correctness of the taxpayer's returns" or the correct amount of his liabilities. United States v. Harrington, 388 F.2d 520, 523 (2d Cir. 1968) (quoting Foster v. United States, 265 F.2d 183 (2d Cir. 1959), *cert. denied*, 360 U.S. 912 (1960)). *Accord*, United States v. Noall, 587 F.2d 123, 125 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979). This liberal standard is a product of the following: the Service's power to inquire is broad; it cannot state the exact relevance of data it does not possess; deference should be given to the Service, at the administrative level, as to materials it may examine since the matter is not accusatory and may result in outcomes favorable to the taxpayer. *See* Federal Trade Comm'n v. Schreiber, 381 U.S. 279, 289-94 (1965); United States v. Brown, 349 F. Supp. 420, 430-33 (N.D. Ill. 1972), *aff'd*, 478 F.2d 1038 (7th Cir. 1973); United States v. Acker, 325 F. Supp. 857 (S.D.N.Y. 1971). The Magistrate eventually rejected Upjohn's contention on this point, 78-1 U.S. Tax Cas. 83,597 at 83,605-08 (W.D. Mich. 1978), as did the Court of Appeals. United States v. Upjohn Co., 600 F.2d 1223, 1228 n.13 (6th Cir. 1979), *aff'g in part*, 78-1 U.S. Tax Cas. 84,152 (W.D. Mich. 1978).

he was refused, issued a summons[40] to Upjohn and Gerard Thomas, Upjohn's general counsel, for these notes and questionnaire results. Upjohn refused to comply with the summons, and the government brought an enforcement action.[41] Upjohn raised the attorney-client privilege and work-product doctrine as affirmative defenses.[42]

The Magistrate (to whom the case had been referred for a recommended decision)[43] squarely faced a choice between the two

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40. I.R.C. § 7602 provides:

§ 7602. Examination of Books and Witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

41. Jurisdiction to enforce an IRS summons is granted to the district courts by I.R.C. § 7402(b) and § 7604(a). A summons enforcement proceeding, though not a plenary lawsuit, is an adversary proceeding entitling the summoned party or any proper intervenor the opportunity to challenge the summons on any appropriate ground, including the attorney-client privilege. Reisman v. Caplin, 375 U.S. 440, 449 (1964).

42. Upjohn also alleged that the data were irrelevant and were sought for an improper criminal purpose. *See* note 39 *supra,* with respect to the rejection of the relevance claim. The criminal purpose argument derives from a line of cases culminating in United States v. LaSalle National Bank, 437 U.S. 298, in which the "sole criminal purpose" doctrine has been developed. Donaldson v. United States, 400 U.S. 517 (1971); Reisman v. Caplin, 375 U.S. 440 (dictum); Boren v. Tucker, 239 F.2d 767 (9th Cir. 1956); United States v. O'Conner, 118 F. Supp. 248 (D. Mass 1953). This doctrine holds that if a summons is issued solely to further a criminal prosecution of a taxpayer, and serves no civil function (i.e., no I.R.C. § 7602 purpose), the summons is unenforceable. The contention was not pressed with vigor at the district court level and was abandoned on appeal.

43. A magistrate's authority to enforce an IRS summons has been the subject of considerable controversy. Prior to 1964, it was believed that I.R.C. § 7604(b) might provide a sufficient grant of jurisdiction. That statute facially grants jurisdiction to United States Commissioners (now magistrates) to issue contempt orders and arrest warrants if a person neglects or refuses to obey a summons. Reisman v. Caplin, 375 U.S. 440, however, made it clear that § 7604(b) was confined to situations in which the summoned party "wholly made

predominant federal law tests for discerning who is the "client" for purposes of the corporate attorney-client privilege.[44] Upjohn con-

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default or contumaciously refused to comply." *Id.* at 448-49.

Under the law pertaining to federal magistrates in effect in 1977, the magistrate had jurisdiction to perform non-decision-making functions in order to assist the district judge in handling his caseload. 28 U.S.C. § 636(b) (1976). Matters could be delegated to the magistrate regardless of the parties' consent and the magistrate could be delegated "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). This meant that where a case was assigned to a magistrate for hearing, the most he could do was to make a report and recommendation to the district court, who would then make a *de novo* review and, if able, enter a final judgment. 28 U.S.C. § 636(b)(1)(C) and concluding paragraph. The magistrate was not authorized to enter a final order. Horton v. State Street Bank & Trust Co., 590 F.2d 403, 403-04 (1st Cir. 1979); United States v. Wisnowski, 580 F.2d 149, 150 (5th Cir. 1978); Flowers v. Crouch-Walker Corp., 507 F.2d 1378, 1379-80 (7th Cir. 1974); Dye v. Cowan, 472 F.2d 1206, 1206 n.1 (6th Cir. 1972). However, the *de novo* review of the district court did not require the taking of new evidence. United States v. Miller, 609 F.2d 336, 339-40 (8th Cir. 1979).

The act was amended by the Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979). Now, under 28 U.S.C. § 636(c)(1) (1979), the parties may consent to full adjudication of a case by the magistrate, including the entry of a final judgment. The constitutionality of this statute has not yet been tested.

44. While the court had to choose between two federal tests, it did not have to face the tantalizing but difficult choice of law (state or federal) problems in the privilege area. The solution to this problem was suggested in Couch v. United States, 409 U.S. 322, 335-36 (1973) (no accountant's privilege recognized in federal law and no such state privilege applied in federal courts) and apparently set forth in Fisher v. United States, 425 U.S. 391 (1976):

> Federal Rule Evid. 501, effective January 2, 1975, provides that with respect to privileges the United States district courts "shall be governed by the principles of the common law . . . interpreted . . . in the light of reason and experience." Thus, whether or not Rule 501 applies to this case, the attorney-client privilege issue is governed by the principles and authorities discussed and cited *infra*. Fed. Rule Crim. Proc. 26.

Id. at 402 n.8. The Court reaffirmed the primacy of federal law in the determination of testimonial privilege in federal courts in Trammel v. United States, 445 U.S. 40, 47 (1980), where it interpreted Rule 501 of the Federal Rules of Evidence as acknowledging the authority of the federal courts to continue the evolutionary development of testimonial privileges. *See generally* Kobak, *supra* note 6, suggesting that the Federal Rules of Civil Procedure, including Rule 43, do not expressly permit federal courts to fashion rules of privilege, and that the Tenth Amendment may well be a bar to intrusion into a state-created relationship. *Id.* at 339-44. Kobak believes that in diversity cases, under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), federal courts would be required to adhere to state-created privileges. Kobak, *supra* note 6, at 344-47. Even in federal question cases, where state interests are subordinated, Kobak suggests that absent an affirmative act by Congress, the field is in fact left to the states. *Id.* at 347-52. McLaughlin, in *The Treatment of the Attorney-Client and Related Privileges in the Proposed Rules of Evidence for the United States District Courts*, 26 REC. A.B. CITY N.Y. 30 (1971), suggests that Rule 501 of the Federal Rules of Evidence abrogates state-created privileges which, up until its enactment, were considered substantive under *Erie*. Baird v. Koerner, 279 F.2d 623, 627-29 (9th Cir. 1960) and United States v. Falsone, 205 F.2d 734, 741-42 (5th Cir. 1953), *cert. denied*, 346 U.S.

tended that its counsel's privilege encompassed all employees of the company (including present and former interviewees) whose duties reasonably related to the subject matter of their communications to the lawyers. This was the "subject matter" test first announced in *Harper & Row Publishers v. Decker.*[45] The government contended that the only privileged communications — if any at all — were those between the lawyers and Upjohn's "control group," that is, those individuals who had the power to control, or take a substantial part in, the decisions about actions the corporation might take on the advice of an attorney.[46]

Guided by the law's predisposition to construe privileges narrowly, and by a perceived potential for abuse of the privilege inherent in the subject matter test,[47] the Magistrate held the control group test to be the law. He reasoned that the facts that the lower-level employees had communicated were important to the corporation, but that these interviewees would have little role to play in the corporation's legal decisions about those facts. Mr. Thomas had concerned himself with potential securities laws violations, tax consequences, currency regulations, and the like, all of which are matters consigned to the highest level of management and hardly the domain of the interviewees. Therefore, the latter were not

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864 (1953), gave rise to an apparent conflict over the applicability of state, as opposed to federal, law at the administrative and enforcement levels with respect to IRS summonses. *See* Peterson, *Attorney-Client Privilege in Internal Revenue Service Investigations,* 54 MINN. L. REV. 67 (1969); Note, *Privileged Communications Before Federal Administrative Agencies: The Law Applied in the District Courts,* 31 U. CHI. L. REV. 395, esp. notes 1 & 2 (1964). *See also* United States v. Threlkeld, 241 F. Supp. 324, 326 (W.D. Tenn. 1965) (federal law governs privilege issue in federal tax investigations); United States v. Ladner, 238 F. Supp. 895, 896 (S.D. Miss. 1965) (there is no federal common law of privilege, state law governs); In re Bretto, 231 F. Supp. 529, 531 (D. Minn. 1964) (parties agree Minnesota law controls). *Compare* McMann v. Securities & Exchange Comm'n, 87 F.2d 377 (2d Cir. 1937), *cert. denied,* 301 U.S. 684 (1937) *with* Civil Aeronautics Board v. Air Transp. Ass'n of America, 201 F. Supp. 318 (D.D.C. 1961) (attorney-client privilege applies in CAB proceedings) *and* United States v. Hodge and Zweig, 548 F.2d 1347 (9th Cir. 1977) (Rule 501 requires federal common law of attorney-client privilege in IRS summons enforcement cases).

45. *See* note 4 *supra.*

46. Regarding the "control group" test, *see* note 7 *supra.*

47. 78-1 U.S. Tax Cas. at 83,602. The Magistrate also alluded to, but gave uncertain weight to, the Supreme Court's decision in Hickman v. Taylor, 329 U.S. 495 (1947), by observing that the notes of witness interviews were held not privileged, the Court appearing silently to treat the interviewees as mere witnesses rather than "clients." However, the Magistrate was more concerned about the "dark veil of secrecy over all the pertinent facts," 329 U.S. at 506, which a corporation could enjoy if a broad privilege were upheld.

"clients" and their statements were not privileged.[48]

Upjohn won a battle when the Magistrate found the interviews to be attorney work-product, but lost the war when he found it had been overcome by a showing of sufficient need. He held the standard of need to be less onerous than that governing civil litigation because of the public policies favoring vigorous and swift enforcement of the revenue laws at the administrative level.[49] The Government had met that standard by proving that (1) Upjohn had refused to allow its employees to be interviewed about topics Upjohn did not consider pertinent to the IRS' investigation, effectively thwarting a full inquiry, (2) some interviewees, located in foreign countries, were not subject to compulsory process, and (3) even if available, the witness would likely show hesitancy or hostility because the interrogator was employed by the IRS. The Magistrate recommended full enforcement of the summons, and on April 29, 1978, Chief Judge Noel Fox adopted the Magistrate's recommendation and ordered compliance.[50]

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48. However, the privilege promotes the rendition of legal, not business, advice, and has never protected business or financial advice given by a lawyer. United States v. Vehicular Parking Ltd., 52 F. Supp. 751, 753 (D. Del. 1943). *See generally* Simon, *supra* note 24, at 947 n.65.

For example, ordinary business documents (closing statements, real estate sales contracts, etc.) which a client intends to divulge to third parties in the ordinary course of business are not privileged. United States v. McDonald, 313 F.2d 832, 835 (2d Cir. 1963). The same is true for other documents intended to be disclosed outside the two-way stream of attorney-client communications. United States v. Judson, 322 F.2d 460, 462-63 (9th Cir. 1963) (privilege for net worth statements but not for checks); United States v. Bank of California, 424 F. Supp. 220, 225-27 (N.D. Cal. 1976) (client intends a check he writes to be seen by strangers); Kellog v. Simon, 62-1 U.S. Tax Cas. 83,882 (S.D. Cal. 1962) (no privilege as to fact that lawyer drew deed); 8 WIGMORE, EVIDENCE, *supra* note 13, § 2311 ("The reason for prohibiting disclosure . . . ceases when the client does not appear to have been desirous of secrecy.").

49. Today, courts nearly universally recognize that there is no such thing as purely legal or purely business advice, and in practice the requirement that legal advice be sought has been liberally interpreted. *See, e.g.*, Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794 (D. Del. 1954) (a lawyer's role includes the "whole orbit of legal functions"); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 359 (D. Mass. 1950). *But see* Diversified Industries Inc. v. Meredith, 572 F.2d 596, 600-03 (8th Cir. 1977). *See also* 8 WIGMORE, EVIDENCE, *supra* note 13, §§ 2294, 2300; Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978); Note, 31 VAND. L. REV. 667 (1978).

50. The Magistrate issued his Report and Recommendation on February 23, 1978. Earlier that month, the Eighth Circuit, sitting *en banc*, decided Diversified Industries, Inc. v. Meredith, 572 F.2d 604 (8th Cir. 1978). Upjohn requested leave to file an additional brief, which was granted. On March 7, 1978, in a letter-amendment to the Report and Recommendation, the Magistrate noted the decision of the Eighth Circuit and stated that he was un-

The Court of Appeals sustained the District Court's holding that the control group test measured the proper limits of the attorney-client privilege,[51] affirmed the decision in other respects,[52] but reversed and remanded for a determination of which interviewees qualified as members of Upjohn's control group.[53] In a cryptic footnote,[54] the court held that the work-product doctrine simply did not apply as a defense to an IRS summons.[55] The Sixth Circuit

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persuaded, since the modified subject matter test adopted there was subject to the same infirmities as the original version. Upjohn promptly moved for reconsideration, which the Magistrate denied by a letter-ruling of March 13, 1978. Chief Judge Fox also considered *Diversified*, but ordered enforcement on the strength of the Magistrate's ruling, on April 29, 1978. United States v. Upjohn, 78-1 U.S. Tax Cas. 84,152 (W.D. Mich. 1978), *aff'd*, 600 F.2d 1223 (1979).

The Government did not oppose a stay pending appeal. Nor did the United States oppose the petition for a writ of certiorari. Had it done so and been successful, the issue might have been mooted. United States v. Arthur Andersen & Co., 623 F.2d 720 (1st Cir. 1980), *cert. denied*, 449 U.S. 1021 (1980). *Compare* United States v. Friedman, 532 F.2d 928 (3d Cir. 1976) *with* United States v. First Nat'l State Bank of N.J., 616 F.2d 668 (3d Cir. 1980), *cert. denied sub nom.* Levey v. United States, 447 U.S. 905 (1980).

51. United States v. Upjohn, 600 F.2d 1223, 1226-27 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

52. *Id.* at 1228 n.13.

53. The reversal was not clearly required. As the party claiming the privilege, Upjohn bore the burden of proving which employees should be included in the control group. Even if its theory was that the subject matter test was the law, it was still obligated to show that its interviewees were members of the control group if that test were to be adopted. Thus, its failure to do so could have been viewed simply as a failure of proof by the party with the burden, requiring no remand.

54. 600 F.2d at 1228 n.13.

55. The court held in part:

> Upjohn's other arguments that the work-product doctrine and principles of relevancy shield it from disclosure are not well founded. The work-product doctrine of *Hickman v. Taylor, supra* note 7, and Fed. R. Civ. P. 26(b)(3) is not applicable to administrative summonses issued under 26 U.S.C. § 7602. The IRS simply must show that the inquiry is relevant to a good faith investigation conducted pursuant to a legitimate purpose, that the information sought is not in the IRS' possession and that proper administrative procedures have been followed.

Id. at 1228 n.13 (citations omitted).

If the court's holding is that proof of the applicability of the work-product protection in a particular case is not part of the settled, well-known, four-part prima facie case announced in *Powell* which the government must show to obtain enforcement, the court's statement is correct as a matter of summons law. However, the footnote entirely misses the point that the work-product doctrine is a matter of a *defense* to a summons (like improper purpose, attorney-client privilege, Fifth Amendment privilege, etc.) and has nothing to do with the government's prima facie case for enforcement. In this sense, the court's holding that the work-product protection is not available is a nonsequitur. Fortunately for the government, the effect of this brief holding was to frame the issue of whether the work-product doctrine

decision in *Upjohn* followed three other appellate decisions which helped to frame the dimensions of the debate. All three involved internal corporate "slush fund" investigations, and two were prompted by the issuance of grand jury subpoenas.

The Third Circuit, in *In re Grand Jury Investigation (Sun Company, Inc.),*[56] dealt with the validity of a federal grand jury subpoena to Sun Company, Inc. (Sun) for documents, including the results of questionnaires and lawyer-generated interview notes. Both allegedly contained a litany of Sun's questionable payments in connection with its foreign operations. An "Audit Committee" of the Board of Directors had supervised the inquiry, and Sun's vice-president and general counsel had retained a law firm to advise Sun about its legal obligations flowing from the payments and from the filing of an 8-K Report with the SEC.[57] Sun resisted the

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is a defense to a summons, and not whether proof of its inapplicability is part of the government's enforcement case. The parties had indeed so framed the issue. Brief for Petitioners, at i, 44-63.

56. 599 F.2d 1224 (3d Cir. 1979).

57. The formulation of these investigations was accomplished by a resolution of the Board of Directors of Sun Company, Inc. The resolution adopted by Diversified Industries, Inc., is typical of such resolutions:

> RESOLVED, that, as this Board of Directors deems it to be in the best interests of this Corporation and its stockholders, the General Counsel of the Corporation be and he hereby is authorized, in behalf of this Board of Directors, to engage the services of Wilmer, Cutler & Pickering, Washington, D.C. to conduct an investigation and inquiry into the matters disclosed and discussed in this regard at this meeting for the purposes of eliciting facts, making certain findings, and providing to the Board of Directors of this Corporation a report possibly containing recommendations as to course of action, so that the Board of Directors of this Corporation may properly discharge its duties, and, further RESOLVED, that Wilmer, Cutler & Pickering be and they hereby are authorized to procure assistance as may be reasonably required, in the above-designated inquiry, from accounting firms and others to conclude in a prompt and diligent manner the above commissioned inquiry and investigation, and, further RESOLVED, that this Board of Directors hereby delegates to the Audit Committee of this Board the power and authority to review this matter in detail with Wilmer, Cutler & Pickering and, where necessary and appropriate, to provide to that firm any necessary interim authorizations or advice as may be necessary or desirable for the efficient handling and conclusion of the above mentioned inquiry and investigation, and, further RESOLVED, that the officers and directors of this Corporation be and they hereby are directed to cooperate fully, and to ensure that all employees of this Corporation cooperate fully with Wilmer, Cutler & Pickering and such other persons as Wilmer, Cutler & Pickering may retain in the foregoing matters.

Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 607 (8th Cir. 1978) (en banc) (quoting Resolution of Board of Directors of Diversified Industries, Inc.).

subpoena by invoking the attorney-client privilege and work-product doctrine. The Court of Appeals rejected the first defense but sustained the second. The attorney-client privilege defense failed because the court adopted the control group test and Sun had conceded that the interviewees were not members of Sun's control group.[58]

The court sustained the work-product defense[59] because the Government had made no effort to subpoena the Sun interviewees (whose identities were known) before the grand jury and therefore could not show, as one element of substantial need, that they would be unavailable or unwilling to testify. The court rejected the Government's second allegation of need, Sun's alleged coverup of its payments practices, as unsupported. The third, the need to test the interviewees' credibility once they were subpoenaed before the grand jury, caused the court to distinguish between the interview notes and questionnaire results. The interview notes demanded a higher degree of protection since they were inevitably the product of an attorney's mental sifting and arranging of the facts.[60] Questionnaire results were less the product of an attorney's thought

58. 599 F.2d at 1233-37.

59. The court was required to confront several preliminary hurdles before passing on the Government's claim of need. One was its ruling that the data was generated in anticipation of litigation, 599 F.2d at 1229. The factors in this ruling were that the investigation concerned suspected criminal violations, some evidence of which had already been uncovered when the law firm entered the case. Some litigation was "almost inevitable" if other illicit payments were revealed. *Id.* Finally, the prospect of litigation was intensified because Sun was legally obligated to disclose its activities to shareholders and government agencies. This requirement poses some potentially difficult issues. For example, when does an attorney anticipate litigation? Whose anticipation counts? Does the answer depend on whether the *client* or *attorney* actually engaged in litigation, or whether the objective factors showed a reasonable prospect of litigation? *See* Miller, *infra* note 128. In practice, however, courts are not usually disposed to deny a reasonably well-supported "anticipation" claim. The Third and other circuits have taken a relatively liberal view of the anticipation of litigation requirement. *Sun Company,* 599 F.2d 1224; Kent Corp. v. National Labor Relations Bd., 530 F.2d 612, 623-24 (5th Cir. 1976), *cert. denied,* 429 U.S. 920 (1976) (work-product doctrine does not depend on litigation taking place, but rather on actual possibility of litigation); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd by an equally divided Court,* 400 U.S. 348 (per curiam), *reh. denied,* 401 U.S. 950 (1971) (memoranda of attorney is work-product though attorney functioned as investigator). Although the Eighth Circuit's *en banc* ruling in *Diversified Industries, Inc.*, left intact the three-judge panel's earlier decision that the Diversified investigation was not carried out in anticipation of litigation, it was technically unnecessary for the full court to disturb (or reach) that point, since it reversed on the privilege issue. 572 F.2d at 610-11.

60. For that reason the court held that they would never be discoverable if the only suggestion of need was to test a witness' credibility.

power or an attorney's work and therefore required correspondingly less protection. The court ruled that here the Government might be entitled to the questionnaire results, even if testing credibility were the only justification, but not where it had made no effort to subpoena the witnesses.[61] Thus the court affirmed the quashing of the grand jury subpoena.

Diversified Industries, Inc. v. Meredith[62] presented the questionable payments issue in the context of private litigation, specifically the alleged bribery of a Diversified competitor's salesmen. The Securities and Exchange Commission had investigated the charge; the result had been a suit for an injunction and a consent decree. Alerted by the SEC probe, Diversified's Board of Directors instituted an investigation by its outside counsel which resulted in a report to the Board.

The appellate panel which first heard the case recognized the split of authority on the issue of the identity of the client, but found it unnecessary to take sides. It found that outside counsel had not been hired to provide legal services or advice, but merely to investigate the facts and make business recommendations as to Diversified's future conduct.[63] Moreover, the panel held that the law firm did not generate work in anticipation of litigation; therefore, the work-product doctrine did not apply.

The court, sitting *en banc*, reversed, holding the lawyer-gener-

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61. Why the questionnaires should be entitled to less protection is not clear. There is authority to the effect that questionnaire forms, when shown to be the result of a lawyer's thinking and analysis, would certainly be entitled to work-product protection. Cornaglia v. Ricciardi, 63 F.R.D. 416, 419 (E.D. Pa. 1974). An interview, particularly one which *follows up* a questionnaire (as in *Sun Company, Upjohn* and the other questionable payments cases), is the product of relatively more spontaneous thought by the lawyer. To be sure, the lawyer who prepared well for an interview will undoubtedly have a list of questions in hand, but by its nature an interview contemplates a give-and-take, which is spontaneous (or at least more spontaneous than a questionnaire). Accordingly, not only may a questionnaire be work-product, but it also may be more the fruit of careful legal analysis—more the work-product—of a lawyer than its interview counterpart. One possible explanation for the court's opposite ruling is that Sun may have failed to prove the work-product nature of the interviews. Another is that the questionnaire may have been composed by non-lawyers, that is, by accountants or the Audit Committee itself. If so, the court does not so state.

62. 572 F.2d 596 (8th Cir. 1977), *rev'd en banc*, 572 F.2d 606 (8th Cir. 1978).

63. "The work that Law Firm was employed to perform could have been performed just as readily by non-lawyers aided to the extent necessary by a firm of public accountants." 572 F.2d at 603. The court further noted that the interviewees had been requested to be fully cooperative and to surrender to the lawyers all requested records.

ated data to be privileged under a modified subject matter test.[64] It discarded the control group test; in the court's view, that test failed to account for "the realities of corporate life;"[65] specifically, it did not recognize that any large corporation must glean legally significant factual data from middle management and non-management employees. The investigating lawyer faced an intolerable dilemma under the control group test: his interviews of the knowledgeable non-management employees would not be privileged; his failure to interview them because of the lack of privilege would result in incomplete data. The court therefore thought the control group test inhibited the free flow of information to a legal advisor, defeating the purpose of the privilege, and discouraged communications made in a good faith effort to promote compliance with the complex laws governing corporate activity.

On the other hand, the court acknowledged the strong likelihood that the subject matter test would result in shielding damaging data from discovery by channelling communications through attorneys. Accordingly, it modified the subject matter test by adding the requirements that (1) the communication be made for the purpose of securing legal advice; (2) the employer's superior make the request so that the corporation could secure legal advice; and (3) the communication not be dissemminated beyond those persons who, because of the corporate structure, needed to know its contents.[66] The court believed that this version would properly open to discovery most routine intra-corporate reports and the statements of fortuitous witnesses. Finding that Diversified had met all requirements of the modified test, the court held the reports to be privileged.

Finally, in *In re Grand Jury Subpoena Dated December 19, 1978*,[67] a federal grand jury issued a subpoena to the general coun-

64. 572 F.2d 606 (8th Cir. 1978). The modifications were those suggested by Judge Jack B. Weinstein, 2 J. WEINSTEIN & M. BERGER, EVIDENCE § 503(b) [04] (1975) [hereinafter cited as WEINSTEIN].

65. 572 F.2d at 608.

66. The first two of these extra ingredients appear to be identical. In addition, they appear to add nothing to the formula which was not already present in Judge Wysanski's decision in *United States v. United Shoe Machinery*; to be privileged, *every* communication must be generated for the purpose of securing legal advice. Judge Weinstein's third element is somewhat difficult to apply. It is a quasi-confidentiality requirement, but appears based on business need rather than legal need. If so, it would be contrary to the classical formulation of the privilege, which protects only communications made to secure legal advice.

67. 599 F.2d 504 (2d Cir. 1979).

sel of John Doe, Inc.,[68] demanding production of five categories of documents, including the results of an investigation that John Doe's outside law firm had conducted into the corporation's illicit foreign payments practices. Hoping to take advantage of the Securities and Exchange Commission's Voluntary Disclosure Program and thereby avert securities litigation, the corporation had filed an 8-K report and divulged additional details in later meetings with SEC representatives.[69] Later, it filed a second 8-K report. Shareholders also filed a derivative suit, and the Internal Revenue Service's Intelligence Division began an investigation. That probe ripened into a grand jury investigation which resulted in the contested subpoena.

The Court of Appeals denied the attorney-client privilege to the results of the initial investigation that John Doe's management had conducted, but sustained the claim of work product as to the law firm's subsequent investigation. In the court's view, prospects of amended corporate tax returns and civil and/or criminal liability had prompted the second investigation; the corporation had undertaken the investigation for the purpose of securing legal advice. The interviewing lawyers took notes and made memoranda from them; these were prima facie subject to the work-product shield. Unlike the Third Circuit in *Sun Company,* the Second Circuit did not distinguish between questionnaire results and interview notes in terms of the degree of "need" required to overcome the protection; it held that the government's asserted "need" to identify potentially immunizable witnesses was insufficient.

The Supreme Court has resolved the split among the circuits by firmly rejecting the control group test. In the Supreme Court's view, that test failed to grasp that modern corporations are compelled to investigate themselves (usually through lawyers) from time to time to assure compliance with a myriad of laws, and that mid-level employees often possess data pertinent to such investigations. Moreover, corporations "constantly" go to lawyers to find

68. All parties requested that the identity of the corporation and the individuals involved not be disclosed. 599 F.2d at 506 n.1.

69. The fact pattern was typical: independent auditors notified management of payments. Management conducted preliminary investigation. Lawyers followed with later inquiry. "Employees of the company were instructed to cooperate fully and to disclose whatever knowledge each had of questionable payments while in the company's employ." 599 F.2d at 507.

out how to obey the law. Noting that the life of the privilege depends upon full freedom to disclose facts, the Court believed the control group test would frustrate the purpose of the privilege by discouraging employees from communicating relevant information. The result is likely to be inferior legal advice and a diminished opportunity for corporate counsel to ensure the corporation's compliance with the complicated array of regulatory legislation confronting the modern corporation. Moreover, the control group test was difficult to apply in practice because of the shifting identities of the control group members. Where the communications concerning questionable payments were made by corporate employees to corporate counsel, so that counsel could give legal advice, the Court was not prepared to deny the privilege. After all, that privilege protects not only legal advice but the communication of underlying facts as well.

The Court not only held the work-product doctrine applicable as a defense to an IRS summons (i.e., at the administrative stage of an agency investigation), but also found that the Government's proof that Upjohn had blocked access to employees and had forbidden others to testify about matters the company considered irrelevant was insufficient to overcome that protection. It strongly suggested that no quantum of proof could ever pierce the work-product shield with respect to lawyers' notes of oral interviews. With respect to other work product, a far greater showing of need than that adduced by the Government was required. Since the quantum of such need was uncertain, and since the Court was reluctant to lay down a rule, it remanded this portion of the decision.

Prior to *Upjohn,* the Supreme Court had often viewed broad assertions of privilege and expansive allegations of rights of privacy with skepticism. It had all but eliminated the spousal privilege,[70] narrowly construed the Fifth Amendment privilege in a summons case involving a criminal tax investigation,[71] declared that there was no federal accountant-client privilege, nor any justification for one,[72] and even strictly interpreted the attorney-client privilege.[73] The Court had refused to review many other decisions in which

70. Trammel v. United States, 445 U.S. 40 (1980).

71. Fisher v. United States, 425 U.S. 391 (1976); Couch v. United States, 409 U.S. 322 (1973).

72. 409 U.S. 322, 335.

73. 425 U.S. 391.

privileges of one variety or another had been interposed as defenses to IRS criminal tax investigative efforts.[74] In *Trammel v. United States,*[75] the Court had declared what has usually been understood to be the guiding credo in the interpretation of privilege claims:

> Testimonial exclusionary rules and privileges contravene the fundamental principle that "the public . . . has a right to every man's evidence." *United States v. Bryan,* 339 U.S. 323, 331 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." . . . Accord, *United States v. Nixon,* 418 U.S. 683, 709-710 (1974).[76]

In *Fisher v. United States,* in language fully consistent with its denial of privilege, the Court noted the settled principle that "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where *necessary* to achieve its purpose. Accordingly, it protects only those disclosures — necessary to obtain informed legal advice — which might not have been made absent the privilege."[77]

Yet in *Upjohn,* the Court, citing *Fisher* itself, where the privilege had been so recently confined, declared that the attorney-client privilege "has long been recognized" and founded in necessity.[78] It cited *Trammel* for the principle that the attorney-client privilege protects not only the giving of professional advice, but also the underlying information used to formulate that advice. However, in *Trammel,* the Court took pains to *confine* the spousal privilege, which it deemed to be more expansive than other privileges such as the attorney-client or physician-patient privilege.

The courts which had denied claims of privilege had usually done so based upon two governing standards: (1) privileges are not

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74. United States v. Noall, 587 F.2d 123 (2d Cir. 1978), *cert. denied,* 441 U.S. 923 (1979), arguably involving conflict with United States v. Coopers & Lybrand, 550 F.2d 615 (10th Cir. 1977); United States v. First Nat'l St. Bank of N.J., 616 F.2d 668, involving interpretation of United States v. LaSalle National Bank, 437 U.S. 298 (1978).

75. 445 U.S. 40 (1980).

76. *Id.* at 50-51.

77. 425 U.S. at 403 (emphasis added). In *Fisher,* the Court denied the privilege as to documents surrendered to an attorney which would not have been protected in the hands of the client. The Court has rarely favored evidentiary privileges. *See* Trammel v. United States, 445 U.S. 40; Herbert v. Lando, 441 U.S. 153 (1979).

78. 449 U.S. at 389.

favored in the law because they hide the truth, and, therefore, (2) the courts should construe any assertion of privilege within the narrowest permissible limits consistent with the purposes of the privilege.[79] In *Upjohn*, these settled principles have been shaken.[80] The Court appears to have accepted, mostly uncritically, all arguments advanced by the corporate petitioner, and to have brushed aside most of the arguments presented by the Government. For example, the Court accepted Upjohn's assertion that because the control group test created a "Hobson's choice" for corporate counsel, it therefore frustrated the purpose of the privilege by discouraging communication of facts. This conclusion does not necessarily follow from the premise and appears to be contradicted by the work-product section of the opinion. Moreover, the reverse may be closer to the truth; even if a Hobson's choice exists, other sources may generate sufficient compulsion to ensure that communications still take place.[81] The Court criticized the control group test as being difficult to apply and unpredictable, requiring case-by-case analysis. Nowhere does the decision elucidate why that feature is a

79. 8 WIGMORE, EVIDENCE § 2291 (MCNAUGHTON rev. ed. 1961). *See also* United States v. Nixon, 418 U.S. 683, 705-07 (1974). The protection afforded by this privilege is quite narrow. *See* United States v. United Shoe Machinery Corp., 89 F. Supp. 357. This grudging attitude has resulted in quite narrow constructions of the several elements of the privilege. For example, every element must be proved, and the burden is on the proponent of the privilege. Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962); United States v. Schmidt, 360 F. Supp. 339, 346 (M.D. Pa. 1972). The identity of the client, fee data and the general nature of services performed are not privileged. United States v. Tratner, 511 F.2d 248, 252-53 (7th Cir. 1975) (identity of clients); United States v. Cromer, 483 F.2d 99, 101 (9th Cir. 1973) (fee data); Colton v. United States, 306 F.2d at 638 (fee data, general services). *But see* Baird v. Koerner, 279 F.2d 623, 631-32 (9th Cir. 1960). Legal, not accounting, business, or financial advice must be sought. 360 F. Supp. at 346-47; United States v. Heiberger, 76-1 U.S. Tax Cas. 83,940 (D. Conn. 1976). Documents and data which pre-date the establishment of the relationship are not privileged. United States v. McKay, 372 F.2d 174, 176 (5th Cir. 1967) (appraisal report); Bouschor v. United States, 316 F.2d 451, 453, 456-57 (8th Cir. 1963) (accountant's work papers); Colton v. United States, 306 F.2d at 639; United States v. Player, 78-2 U.S. Tax Cas. 85,988 (N.D. Ga. 1978) (client's business records); United States v. Summe, 208 F. Supp. 925, 928 (E.D. Ky. 1962) (client's own records delivered to attorney). Records which are required by law to be maintained are not privileged. United States v. Shapiro, 335 U.S. 1, 32-36 (1948); United States v. Peden, 70-2 U.S. Tax Cas. 84,152 (W.D. Ky. 1970). Public or quasi-public documents cannot be privileged. Kelley v. Simon, 62-1 U.S. Tax Cas. 83,882 (S.D. Cal. 1962) (deed). Of course, the presence of an attorney, or the transfer to an attorney of records, will not create a privilege where none had existed. 316 F.2d at 457; United States v. Falsone, 205 F.2d 734, 739 (5th Cir. 1953).

80. *See* Brief for Appellees at 18-20.

81. *See* Sec. II *infra*.

drawback, or why a certain degree of individual treatment, even considering the attendant difficulties in each case, should logically compel or contribute to the adoption of a contrary across-the-board rule. Simplicity alone should not control what standard is adopted. Indeed, the control group test's requirement of case-by-case analysis—a method endorsed in *Upjohn* itself[82]—may well be more faithful to the tenets underlying the attorney-client privilege.

The Court did address, in a footnote,[83] the Government's suggestion that even under the control group test, the corporation would still feel a compulsion to seek legal advice. It assumed the truth of this suggestion, but rejected its implications by concluding that the "depth and quality"[84] of that advice would suffer. The Court's reasoning failed to address its own prior statements that the privilege rule should be fashioned narrowly,[85] and failed to adduce any evidence for its conclusion that internal investigations would suffer from a strict interpretation of the privilege.

The Court also rejected the Government's "zone of silence" argument—that a broad rule of privilege will encourage creation of a wide zone of undiscoverable matter—by stating that such a rule places the Government in no worse position than if the communications had never taken place. The underlying "facts" are still available. However, this conclusion is not responsive to the privilege issue presented and appears to disregard the reality of an IRS investigation which takes place years after the events involved. In a fraud investigation, the central issue may be "what did the corporation know and when did it know it?" The Court's "no worse position" language somewhat cavalierly sanctions the shielding of potentially highly probative, and often unique, evidence on these issues.

Finally, the Court invoked Ethical Canon 4-1 of the American Bar Association's Code of Professional Responsibility to bolster its view of the necessity for lawyer fact-gathering. In doing so, the Court may have been seeking to elevate its rejection of the control group test to the status of an ethical imperative. However, the ethical rules, read against *Upjohn's* endorsement of the subject matter test, create intolerable ethical dilemmas that the control group

82. 449 U.S. at 386, 396-97.
83. *Id.* at 393 n.2.
84. *Id.*
85. *See Fisher*, 425 U.S. at 403 (citing 8 WIGMORE, *supra* note 79).

test does not.[86]

These problems and inconsistencies carry forward to the Court's statements on the work-product doctrine. These will be discussed below.[87] The other conspicuous departure of the decision is its tone. For at least the last seventy years, contrary to its rulings on individuals' rights in the non-tax area, the Court had held the view that corporations involved in regulatory and tax disputes with agencies were by their nature subject to the "broad visitorial power" of the state.[88] For example, it had sustained a Federal Trade Commission subpoena which required a corporation to *create* highly detailed and particularized reports to demonstrate compliance with a cease and desist order.[89]

More recently, the Court had been hostile toward expansive readings of alleged rights of privacy, including such allegations in IRS and other criminal investigations.[90] In *Couch v. United States*,[91] the Court concluded its opinion with the words: "[i]t is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws and collection of the revenue."[92] The tone of *Upjohn* reversed this pattern and is perhaps best characterized in a portion of the decision itself:

> [The narrow control group test] not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. . . .
>
> 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

86. *See* Sec. IV *infra*.

87. *See* Sec. V *infra*.

88. Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186, 204 (1946).

89. United States v. Morton Salt Co., 338 U.S. 632 (1950).

90. *See* United States v. Euge, 444 U.S. 707 (1980); Smith v. Maryland, 442 U.S. 735 (1979); United States v. LaSalle National Bank, 437 U.S. 298 (1978); United States v. New York Telephone Co., 434 U.S. 159 (1977); United States v. Miller, 425 U.S. 435 (1976) (depositor has no Fourth or Fifth Amendment rights in bank records); California Bankers Association v. Schultz, 416 U.S. 21 (1974) (Bank Secrecy Act upheld over Fourth Amendment challenge; Act requires disclosure of certain checks to IRS); Couch v. United States, 409 U.S. 322 (1973) (no accountant-client privilege).

91. 409 U.S. 322 (1973).

92. *Id.* at 336.

> secure legal advice for counsel. . . . 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. The communications concerned matters within the scope of the employees' corporate duties. . . . The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation." It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." . . . Pursuant 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. Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.[93]

The Court's dramatically altered stance may reflect the following nonlegal factors: (1) society today is considerably more friendly to the exercise of corporate prerogatives than at earlier times, and (2) the *lawyers'* own privilege for their more important clients was at stake.

In short, the Upjohn company—now perhaps perceived to be a representative of an unfairly maligned group—was just trying to clean house. To such a sympathetic litigant the Supreme Court was not prepared to deny a privilege which, by its lights, was necessary to insure that the sanitizing would continue.

Upjohn thus leaves the distinct impression that the Court knew the result it wanted to reach and proceeded to construct a one-sided syllogism to get there.[94] A more critical and thorough analysis of the issues and arguments involved might have led to a different conclusion. That analysis is contained in the following Section (II).

Moreover, as Part IV shows, the Court's broad language may liberalize the application of other sub-doctrines which form the rules for the attorney-client privilege. The application of *Upjohn* to those sub-doctrines, as well as the specific rules laid down in the decision, may compel some measure of retreat as later cases begin to demonstrate hidden dangers in the *Upjohn* ruling.

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93. 449 U.S. 392, 394-95.

94. One writer has stated: "In these times of increasing demand for regulatory reform, the Court's decision is most assuredly consistent with the latest election returns." Pitt, *The Upjohn Decision*, Legal Times of Washington, Jan. 26, 1981, at 20, col. 1.

II. ARGUMENTS PRO AND CON

Prior to *Upjohn*, the Third, Sixth and Tenth Circuits had adopted the control group test; the Seventh and Eighth, the subject matter test.[95] This nearly even split demonstrates the difficulties of the choice and the respectability of arguments on both sides.

The case law[96] may be distilled into the following list of arguments respecting each test.

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95. For a definition of the subject matter test, *see* note 8 *supra*. Besides the two present tests, some writers have suggested yet a third approach to the problem—a balancing test which would be applied in the context of each piece of litigation in which the privilege is asserted. *See* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977); Herzel & Hagan, *Do Corporations Really Have an Attorney-Client Privilege?*, 59 CHI. BAR. REC. 296 (1978). *But see* Note, *The Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970); Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360 (1970). The balancing approach was given perhaps its first judicial approval in Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), which held that the attorney-client privilege was an available corporate defense to discovery in a shareholder derivative suit, but that it was subject to the right of the shareholders to show why it should not be invoked in the particular case, depending on a number of factors. Those factors included: the number of shareholders and the percentage of outstanding stock they owned, the bona fides of the shareholder, the nature of the claim and whether it was colorable, the availability of the information from alternative sources, whether the corporate wrongdoing was also potentially criminal, whether the communication related to past or prospective actions, whether the communication regarded the litigation itself, whether the communication sought was specifically identified, and the risk of revealing trade secrets.

The *Garner* approach, or any balancing approach, presents numerous problems. It effectively means that the privilege can be pierced by a showing of good cause (like the work-product doctrine) and that it therefore ceases to be a true privilege. In one sense, of course, the present formulation of the privilege is itself the product of balancing numerous factors. But it is one thing to balance generally in arriving—over many years—at a fixed formula, easily applied to particular cases or to guide conduct; most rules of law do that much. It is quite another to balance on a case-by-case basis. A balancing approach would likely make corporate legal life disastrously uncertain. It is likely that corporations' insatiable need for legal advice would have the effect of maintaining the flow of communications, but this circumstance does not argue in *favor* of a balancing approach any more than any other approach. The salient point is that under either the subject matter test or control group test of "client," a relatively fixed set of rules would exist to guide the profession and its clients. Under a balancing approach, it would likely be impossible to predict with any confidence whether particular communications would be privileged. It is therefore difficult to perceive how a balancing approach could be justified.

96. United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981); In re Grand Jury Investigation (Sun Company), 599 F.2d 1224 (3d Cir. 1979); Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978); Harper & Row Publishers v. Decker, 423 F.2d 487 (7th Cir. 1970).

Subject Matter Test

Pro

1. Encourages intra-corporate communication.[97]
2. Encourages self-policing by corporations.[98]
3. Limits the availability of the privilege by denying it to corporate bystander witnesses.[99]

Con

1. Creates a broad "zone of silence" subject to easy abuse.[100]
2. Funnels sensitive information through corporate counsel, hampering discovery.[101]
3. Encourages senior managers to ignore important information.[102]
4. Operates to hide the truth.[103]

Control Group Test

Pro

1. Limits the availability of the privilege to those who are true corporate decision makers.[104]
2. Guards against limitations on discovery of evidence.[105]
3. Provides sufficient protection combined with the attorney work-product defense to foster self-policing.[106]
4. Draws a bright, easily comprehended line demarcating the boundaries of the privilege.[107]

Con

1. Inhibits intra-corporate communication by presenting a Hob-

97. *Contra, Sun Company*, 599 F.2d at 1236-37; *Diversified Industries*, 572 F.2d at 609.
98. *Diversified Industries*, 572 F.2d at 609.
99. *Cf. Harper & Row Publishers*, 423 F.2d 487, 491; *Diversified Industries*, 572 F.2d at 609.
100. *Upjohn*, 600 F.2d at 1227. *Cf. Diversified Industries*, 572 F.2d at 609.
101. 600 F.2d at 1227; 572 F.2d at 609.
102. 600 F.2d at 1227.
103. *See Upjohn*, 600 F.2d at 1227; *Sun Company*, 599 F.2d at 1235.
104. *Sun Company*, 599 F.2d at 1236.
105. *Upjohn*, 600 F.2d at 1227.
106. *Id. Sun Company*, 599 F.2d at 1235-37.
107. *Sun Company*, 599 F.2d at 1235.

son's choice.[108]
2. Discourages self-policing by corporations.[109]

A. *The Subject Matter Test—Positive Considerations*

1. *Encourages intra-corporate communication.* The major justification for the subject matter test is that it permits or encourages a freer flow of information between upper, middle and lower management levels of the corporation. Without this broad test, communication of factual data or legal advice would be severely crippled or rendered ineffective altogether.[110]

To test this proposition, one must first ask whether it is logically consistent with the policies underlying the privilege and, second, from a behavioral perspective, whether an expansive conception of "client" in fact promotes the policies of the privilege.

The first perspective may be summarized as follows: (1) the attorney-client privilege exists to foster full disclosure between lawyer and client so that our adversary system may work. (2) The subject matter test of "client" promotes *freer* communication than the control group test. (3) Therefore, that test should be the definition of client. However, any formulation of privilege wider in scope than, for example, one which would protect only the chairman of the board, may be said to encourage the loquacity of those within it. A privilege which includes the control group is broader than one confined to the board chairman. A privilege which protects *customers* or *agents* of the corporation would encourage a freer flow of data than even the subject matter test. A test which encourages freer disclosure than the next narrower test does not, by that fact, compel the conclusion that such a test ought to define the limits of "client." If the privilege is to be confined within the narrowest limits consistent with the logic of its principle, the proper inquiry is:

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108. *Diversified Industries,* 572 F.2d at 509. This choice is essentially one between the need to obtain information from middle management versus the prospect of disclosure in the context of litigation.

109. *Id.*

110. *Sun Company,* 599 F.2d at 1236; *Diversified Industries,* 572 F.2d at 609. "The privilege is now seen to rest on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously, and that these benefits outweigh the risks posed by barring full revelation in court." 2 WEINSTEIN, *supra* note 64, ¶ 503[02]. This rationale was the linchpin of the *Upjohn* decision in the Supreme Court. The Court's rejection of the control group test, and its adoption, in effect, of the subject matter test, was dependent on the validity of this premise alone.

How much of a shield is necessary—at a bare minimum—to accomplish the job of effectively guiding corporate legal decision-making?[111] This is a question the Supreme Court did not address in *Upjohn.*

A second aspect of the logic of the privilege focuses on its intended beneficiaries. One must ask: For whom is the privilege intended? In questionable payments cases, the major (in *Upjohn,* the only) consumer of intra-corporate legal advice is clearly top management. Management initiates the factual and legal inquiry; it seeks counsel and determines the legal steps the corporation will take as a result of the lawyers' investigation. Employees—fact sources—would not ordinarily believe *they* are seeking personal legal advice when the chairman of the board orders them to bare their souls to the investigating lawyer. They will normally have no part in deciding what action the corporation will take on the lawyers' advice. They do not seek, desire, benefit by, nor formulate, the legal advice the lawyer eventually gives; yet the subject matter test would grant (and the Supreme Court has granted) privileged status to their communications. Thus the subject matter test appears at odds with a basic element of the privilege, that legal advice be sought *by the same client*[112] who communicates facts to his

111. The inquiry should be framed this way because of the settled law that "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." Fisher v. United States, 425 U.S. 391, 403 (1976). Therefore, the privilege should protect only those communications which would not have been made absent the privilege. The courts should confine the privilege strictly "within the narrowest limits consistent with the logic of its principle." In re Horowitz, 482 F.2d 72, 81 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973) (quoting 8 WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961)); Trammel v. United States, 445 U.S. 40, 50-51 (1980). The practical result of judicial hostility to the privilege is that the asserter not only bears the burden of proof to demonstrate its applicability, but also carries the burden with respect to each element of privilege and each datum of contested material. A blanket claim of privilege should be rejected. United States v. Davis, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981); Matter of Walsh, 623 F.2d 489, 493 (7th Cir. 1980). *See also* United States v. Hodgson, 492 F.2d 1175, 1177 (10th Cir. 1974) (asserter must normally raise the privilege as to each record sought so the court can rule with specificity).

112. As originally proposed, the Federal Rules of Evidence took a position very much in line with this reasoning. *See* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969). Proposed Rule 5-03(a)(1) defined "client" as a "person, public officer, or corporation . . . who is rendered professional legal services by a lawyer or who consults a lawyer . . . ." *Id.* at 249-50. Proposed Rule 5-03(a)(3) defined "representative of a client" as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." *Id.* at 250. Strong opposition developed in the non-government bar to this apparent

lawyer.

The subject matter test therefore hinges on the availability of the attorney-client privilege on the gratuitous fact of employment. Let us suppose that a corporation engages in an illegal practice —for example, payment of a bribe to a foreign government official to secure a contract. If the actual payor is an employee, the subject matter test would shield his communications to the corporation's lawyers about the bribe. If, however, the payor is a mere agent (i.e., an independent contractor), the privilege would not obtain. In both examples, however, the corporation's desire to investigate, its need for the information, its investigators, and its sources of facts, are identical. The same desirability exists to encourage corporate fact-gathering; yet the employee's communications would be privileged and the independent agent's would not. Non-control group personnel are thus, at bottom, mere fact witnesses, and therefore can not personify the corporation.

Indeed, the foci of the two tests are entirely different. The control group test focuses on the *people,* and their *powers,* who can commit the corporation to action based on legal advice. It answers the question: For whom should the privilege exist? Who needs it and asks for it? Who, in all the corporate universe, should enjoy it? For what purpose? In short, *who* is to be protected? By contrast, the subject matter test focuses almost exclusively on *acts* about which communications are made. It answers the questions: What *acts* of employees should be protected? Is the *subject matter* one which concerns the duties of employment? In short, *what* is to be protected?

Seen in this light, the subject matter test departs from the traditional concept of the attorney-client privilege. After all, the privilege traditionally protects *clients,* not *actions* or subject matters. By contrast, the control group test adheres more closely to the line of inquiry suggested in the several elements of the privilege itself.

The second aspect of the "freer communications" argument is the suggestion that, as a matter of predictable behavior, employees will be less likely to show candor, (and managers less likely to de-

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adoption of the control group test, and, due to this and the troublesome aspects of other portions of the rule, the entire idea of an enumerated set of privileges was abandoned, leaving Rule 501. *See generally* 2 WEINSTEIN, *supra* note 64, ¶ 503[01].

mand it) if the privilege is not extended to them by means of the subject matter test. Although some writers have characterized this proposition as untestable,[113] the *Upjohn* Court accepted it without question or support.[114] Incomplete but suggestive empirical evidence, and logic, permit inquiry into the likelihood of this proposition.

The empirical evidence derives in part from the questionable payments cases themselves. In each, the board chairman or other executive officer sent a questionnaire to key employees, requesting that they complete it in a spirit of total candor and cooperation. The cases, as reported, do not show that the questionnaire or its transmittal letter were privileged, but rather merely confidential. Yet from all appearances the employees cooperated fully. Although the conditions of the actual interviews are less clear, the cases do not suggest the corporations and their lawyers made an outright promise of confidentiality or privilege. It is likely that these interviews, conducted on the heels of the chairman's questionnaire, carried forward the persuasive force of his authority. Again, the cases demonstrate no apparent reluctance on the part of the employees to speak truthfully.

Other empirical data appear to indicate that the applicability of the attorney-client privilege is not widely known, or when known, is not an overwhelmingly decisive factor in encouraging candor.[115] For example, in one survey, 55 of the 108 laymen in the sample stated that, without the privilege, they would make less than full disclosure to the attorney. But a majority also believed attorneys would maintain confidences of clients outside the courtroom, aside from considerations of privilege.[116]

A witness' reluctance or desire to speak freely may depend greatly on the ground rules for the interview. For example, a corporation's lawyer may give the following prefatory remarks to an interviewee:

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113. Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970); 2 WEINSTEIN, *supra* note 64, ¶ 503[02].

114. In *Upjohn*, 449 U.S. at 393, the Court states flatly that the "depth and quality of the internal investigation will suffer" if a broad test is not adopted. *Id.* at n.2. This unsupported proposition is beside the point if the issue was that minimum protection necessary to ensure the continuation of such an investigation.

115. Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implication for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

116. *Id.* at 1262.

> We are here to interview you in an effort to determine the extent to which our corporation has engaged in illegal or questionable payments. We have identified you as one of the persons who may have been involved. Before we begin, however, we must tell you that under the law, I am not your lawyer; I am the corporation's. While what you say can be privileged, the corporation may later have to disclose it, in whole or in part, voluntarily or by government compulsion. If voluntary, the decision to disclose will not be yours, but will be the company's. If what you say is incriminating to you, it will still be disclosable because the corporation has no Fifth Amendment privilege. Now, let us begin.[117]

The lawyer prefacing the interview with such remarks should expect less than total candor in return. It is, therefore, unlikely that such an alienating (but probably appropriate) preface would be given. More likely, the cases hint that the Chief Executive Officer politely but firmly asks for total candor and cooperation. The employee then fills out the questionnaire in a spirit of complete fealty. Later, the lawyers request time to "follow up" the questionnaire or "verify" the responses with an interview. They may give no extensive explanation of the purposes of the interview, do not suggest separate counsel for the employee, state nothing about the attorney-client privilege, and perhaps little or nothing about the confidentiality of his responses. The dominant impetus is, and remains, the employee's loyalty to his corporation. The interviewee is very likely to be a middle or upper-level manager with years' tenure, pension rights, seniority and other accoutrements of a vested career position. In contrast, the privilege is a theoretical and little-used concept. The corporation is not likely in these circumstances to restrict the interviewee's candor, and it is equally unlikely that he would do so himself.

Thus the cases which speak of the control group test as disregarding "the realities of corporate life," themselves disregard the reality. Employees will freely complete questionnaires and submit to interviews, regardless of which test of "client" is adopted. In-

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117. As this hypothetical preface suggests, the lawyer and his client may well be legal antagonists, even if they do not articulate fully their sets of interests at the start of their relationship. Since the company lawyer effectively substitutes for the SEC's investigator, the entire investigative process takes on a "wolf-in-sheep's clothing" aspect. The lawyer in reality will give no advice of constitutional rights, though the interviewee may well be about to incriminate himself, and though the governmental investigator may have been so obliged or instructed. The interviewee may wish (or need) his own counsel under these circumstances, but the offer of separate counsel is conspicuously absent from the questionable payments cases. The entire situation is fraught with ethical problems. *See* Sec. IV *infra*.

deed, such appears to have been the case in *Sun Company,*[118] where the corporation was subject to the control group standard,[119] and in the other cases where the governing test was unsettled.

2. *Encourages self-policing by corporations.* The Supreme Court in *Upjohn* believed that the subject matter test would encourage corporations to ferret out unpleasant or even illegal behavior, by diminishing the fear of compelled disclosure of the discovered data. The only evidence on this hypothesis comes from the cases themselves. The announcement of the control group test in 1962[120] (applied to a grand jury subpoena issued in the Eastern District of Pennsylvania), appears not to have impeded Sun Company from conducting its investigation in the same district. Indeed, during 1970-1976 when many internal investigations were conducted,[121] the subject matter test applied only in the Seventh Circuit. None of the reported questionable payments investigations took place, nor were subpoenas or summonses issued in the states in that Circuit; yet corporations elsewhere seem not to have been *discouraged* by the uncertain availability of the privilege.

The questionable payments cases, including *Upjohn,* show that, rather than privileges, potential exposure to securities and tax law violations, derivative suits, charges of currency violations, and other independent business reasons provided the impetus. For example, in *Upjohn,* the company's briefs and testimony at trial[122]

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

119. City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483. The *Sun Company* decision itself does not specify where the interviews took place. However, Sun, its law firm, and the grand jury were all located in the Eastern District of Pennsylvania.

120. *See* note 7 *supra.*

121. The decisions indicate the investigations focused on the following time periods: United States v. Upjohn Co., 78-1 U.S. Tax Cas. at 83,598 (W.D. Mich. 1978) (1971-1975); In re Grand Jury Investigation (Sun Company), 599 F.2d 1224 (3d Cir. 1979) (unspecified); In re Grand Jury Subpoena (John Doe, Inc.), 599 F.2d 504, 507 (2d Cir. 1979) (1970-1975). By the time the investigations commenced, the control group test had been widely adopted. Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); United States v. International Business Machines Corp., 66 F.R.D. 154 (S.D.N.Y. 1974); Virginia Electric Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975).

122. Mr. Thomas testified as follows:

Q. Was that on your mind when you went to [outside counsel]?

A. SEC was one of the things, of course.

Q. What else was on your mind?

A. Tax problems, a possible problem in foreign countries, evasion of foreign laws, possible currency restrictions—there were really a whole string of legal problems that flow out of these—

Q. But the one that you had paramount in your mind was SEC when you went

demonstrated its eagerness to take shelter under the SEC's Voluntary Disclosure Program.[123] Upjohn may also have been concerned about shareholder suits; indeed, the work-product defense depended entirely on its ability to convince the Court that it con-

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to see [outside counsel]?
A. No, I think the primary thing in my mind was the whole problem growing out of a company doing these kind of things, and I continued to think of it in terms of that kind of a problem.
Q. All right, but when you went to see [outside counsel], what suggestions were there then of the SEC problem that were entailed by this discovery?
A. Well, I think in talking with him and his partners, and in view of the publicity about other companies, it appeared that in order of time SEC problem might be first, because we obviously have an obligation to disclose to the SEC and our stockholders anything that is important.
Q. The publicity in the newspapers and elsewhere and talk about other companies dealt with what aspect of the SEC and its program with respect to these items?
A. The disclosure the companies were making to the SEC, and hence to the public.
Q. And they were making them, were they not, under some sort of assurance or suggestion from the SEC that if you came clean, while you wouldn't get immunity, you might be well treated?
A. That's correct.
Q. So when you started this investigation, in a sense, and went to see [outside counsel], it was with the understanding, was it not, that there was going to be a disclosure to the SEC?
A. Oh, not at all. I had no idea at this time that the problem was great enough to require an SEC disclosure.
Q. Well, you had enough of an inclination or enough of an indication to know that if you ascertained a larger problem you were going to have to disclose it to the SEC; didn't you know enough at that time to know it?
A. At that time I certainly did not know enough to know that an SEC disclosure would be required. And I think to be quite candid, we were hopeful that we would not have to make a disclosure.
Q. Why were you hopeful that you would not have to have to—you were hopeful what, that one episode would not be enough to justify a disclosure?
A. Yes. It was an isolated uncontrolled incident.
Q. But you were certainly going to say if you found out a large series of questionable payments, some of which you have candidly suggested might well be illegal, you were going to have to make a disclosure, weren't you? You intended to make a disclosure, you wanted to come clean, didn't you, with the SEC?
A. Well, no; we wanted to get the information on which I would make the decision whether there would be a disclosure, what kind there would, how it would be made—all those things.

Proceedings on Petition to Enforce Internal Revenue Service Summons at 80-82.

123. *Supra* note 32. The Voluntary Disclosure Program contemplates revelation of possibly criminal acts on the part of subordinate employees in exchange for lenient treatment of the corporation. The ethical implications of this conflict of interest are discussed in Sec. IV *infra*.

ducted the interviews and distributed the questionnaires in anticipation of litigation of these and other varieties.[124] Thus, Upjohn may well not have investigated itself *but for* perceived potential legal liabilities wholly divorced from considerations of privilege. In short, Upjohn *had* to conduct the investigation or face potentially worse consequences. Similar considerations appear in each of the other cases.[125]

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124. Litigation arising from foreign payments abounds, so the fear of shareholder suits is a real one. Abbey v. Control Data Corp., 603 F.2d 724, 726 (8th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980) (Control Data, charged criminally and civilly, paid approximately $1.4 million in fines for foreign payments); Securities & Exchange Comm'n v. International Tel. & Tel. Corp., [1979] FED. SEC. L. REP. (CCH) ¶ 96,948 (D.D.C. 1979) (ITT charged with and enjoined from making foreign and domestic payments and falsely accounting for same; special "Review Person" appointed to monitor ITT's compliance); Rosengarten v. International Tel. & Tel. Corp., 466 F. Supp. 817, 820-22 (S.D.N.Y. 1979) (shareholder suits alleging fraud, waste, violation of fiduciary duties, as result of ITT payments between 1971-75); Securities & Exchange Comm'n v. Lockheed Aircraft Corp., [1975-76] FED. SEC. L. REP. (CCH) ¶ 95,509 (D.D.C. Apr. 13, 1976) (consent judgment and injunction entered; Lockheed and officers charged with secret payments to foreign officials, maintaining and falsely accounting for a secret fund, lack of adequate records); Gall v. Exxon Corp., 418 F. Supp. 508, 509-12 (S.D.N.Y. 1976) (shareholder derivative suit resulting from Exxon's payments, from 1963-1972, of millions of dollars to Italian political parties).

125. At trial, Upjohn's general counsel further explained his corporation's motivation as follows:

> A. And I understand that I won't refer to the specific advice, "Do this, don't do this, you should do this," but I think the areas in which legal problems arise and legal counsel is desired, growing out of these payments, are several. I am not sure I can even remember all of them, but a couple that come to mind, one of course we have talked already about, "Does this violate the SEC laws? Are there any actions that you are required to take because of the SEC laws? Are there any obligations, legal obligations to advise your stockholder, the investigating public?" That would be just starters in the SEC area. The obvious tax area, "Are there any U.S. Tax Laws that you could be violating? Are there any adjustments that the law requires in your tax return?" There are all sorts of currency controls. These are not important in the U.S., but in foreign countries, there are many currency controls, and these kinds of payments could involve those.
>
> I think another legal area is the—and maybe this is more in the area of potential litigation. Out of these payments, a great many stockholders suits have grown up, and I think it was part of my advice and opinion to the Company of how we should best act in order to avoid creating situations where stockholders could bring action against us.
>
> I think also—and I don't hold myself out as a foreign attorney, but we may have more foreign than U.S. legal problems growing out of this. And certainly we talked about some of those problems. I think the currency control would be an illustration of that kind of thing. Obviously some of these payments that have been disclosed violate the laws of the foreign countries.
>
> So there are a whole myriad of legal problems growing out of this.

Proceedings on Petition to Enforce Internal Revenue Service Summons at 108-09.

The *Upjohn* facts highlight an inconsistency between the Supreme Court's treatment of the subject matter test and the work-product doctrine. The latter quasi-privilege depends for its validity on proof that potential litigation over securities, taxes, violations of fiduciary duties, and the like prompted the internal investigation. In short, the corporation investigated *because* it feared litigation. At the same time, the *Upjohn* Court reasoned that application of the control group test would eviscerate the same investigation. The work-product doctrine thus posits strong, independent reasons for the investigation, reasons which are unlikely to be disturbed (and in fact were not disturbed) by a narrow construction of the attorney-client privilege.

3. *Limits the availability of the privilege by denying it to corporate bystander witnesses.* Proponents of the subject matter test argue that it will not shield the communications of a true "bystander" witness since by definition, such a witness is not acting within the scope of his employment when he performs the acts or observes the events recited in the communication. However, this consideration has never been a factor in demarcating the bounds of the attorney-client privilege; the bystander would enjoy no privilege under the control group test either. *Hickman v. Taylor*[126] illustrates the point. In *Hickman,* a damage action resulting from the sinking of a tugboat, the lawyer defending the boat owners took statements from eyewitness survivors among the crew. The plaintiff's lawyer sought discovery of the statements. The Supreme Court held that such statements were not privileged because they

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In *John Doe, Inc.*, the Court of Appeals adopted the district court's finding of fact that:

> The objective of this investigation was not merely to ascertain the amount, if any, of illicit foreign payments made during this period, but also for the purpose of preparing an 8-K report which was to be submitted to the Securities and Exchange Commission. By submitting such a report John Doe hoped to participate in the SEC's Voluntary Disclosure Program and thereby avoid federal securities litigation. A third purpose of the investigation was to prepare for possible government criminal and tax actions as well as shareholder derivative suit.

599 F.2d at 506. *See also* In re Grand Jury Investigation (Sun Company), 599 F.2d 1224 (3d Cir. 1977); Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 600 (8th Cir. 1977). In *Sun Company* the court stated: "We do not doubt that the ability to conduct a confidential investigation would make compliance with the complex laws governing corporate activity more palatable . . . ; we doubt, however, that a corporation would risk civil or criminal liability under those complex laws by foregoing introspection." *Id.* at 1237 (citation omitted). *See also* United States v. Amerada Hess Corp., 619 F.2d 980 (3d Cir. 1980).

126. 329 U.S. 495 (1947).

were not communications between lawyer and "client," but between lawyer and witness. Thus, at a minimum the "mere witness" cannot take shelter under a lawyer's privilege. This purported advantage of the subject matter test is a truism, but one shared by the control group test as well.[127]

B. *Subject Matter Test—Negative Considerations*

1. *Creates a broad "zone of silence."* Opponents of the subject matter test argued that it would encompass potentially *all* corporate employees, no matter how high or low their rank. While this test also requires that the communications involved be within the subject matter of the employee's duties, this is not a severe restriction. The corporation would not likely care if an employee communicates about a matter that has nothing to do with his job. Therefore, there is simply no employee, and no subject matter of a nature significant to the corporation, which would not be privileged under this test.

In effect, there would be no such thing as a *material* non-privileged communication. Such a zone of silence, encompassing "large number[s] of agents, masses of documents, and frequent dealings with lawyers"[128] is indeed large. Its breadth is an open invitation to

127. 329 U.S. 495 at 508. The Supreme Court's holding in this portion of *Hickman* is somewhat cryptic. The persons interviewed by defendant's lawyer were clearly employees of the partnership which owned the tug, yet the Court appears to have leaped to the conclusion that they could not be shielded by the attorney-client privilege. It could be argued that the Court thereby silently adopted the control group test, since the employees' statements would have undoubtedly qualified for the privilege under the subject matter test but not the control group test. Obviously it would be unusual to announce a doctrine of such importance by unexpressed assumption. Nevertheless the Court, to reach the result, must have believed the employees not to be sufficiently identified with the litigant-defendant to be the client as well.

128. Simon, *supra* note 24, at 955-56. However, one writer has contended that the zone of silence will be small or non-existent. Miller, *The Corporate Attorney-Client Privilege and Work Product Doctrine: Protection from Compelled Disclosure in Criminal Investigation of a Corporation*, 12 U.S.F.L. REV. 569 (1978). This is said to result from the fact that corporate records and personnel are still available for inspection and testimony, and that in practice, it is difficult for a corporation to funnel all sensitive communication through counsel since that rerouting would interfere with effective corporate management. Those considerations, if valid in any instance, do not hold in the case of a sensitive payments investigation. The importance of the data would likely overcome any corporate business inconvenience. While records and personnel may be available, the latter's memories have likely faded, and the witnesses would be far less candid with a governmental investigator who appears in an adversary role. Moreover, it is often crucial to have, together, documents and the candid testimony of those who authored or worked with them. Such a combination

corporations to attempt to bring as much data as possible within the privilege. The zone is therefore subject to abuse. Cautious and far-sighted corporate managers foresaw securities law, tax law, and other violations and their legal consequences and commenced the reported internal questionable payments investigations. They were little motivated or encouraged by notions of privilege, and having, in some cases, intended the body of data to be disclosed, they turned their attention to the privilege when the results were subpoenaed or summoned, in later hope that an expansive interpretation would be available. As one writer has pointed out, the privilege is often used to conceal legally dubious transactions; it is "a device for cover-ups."[129]

2. *Funnels sensitive information through corporate counsel, hampering discovery.* And 3. *Encourages senior managers to ignore important data.* The subject matter test may encourage corporations to direct the flow of, and manage information in a fashion different from that dictated by purely business needs. Ordinarily, the normal lines of business communication need not be altered merely because some data might later on turn out to have unanticipated legal significance. However, careful management officials would have an incentive to structure the flow of data differently if they knew from the outset that highly important or sensitive data were about to be generated, such as, for example, in a sensitive payments investigation, or patent-related data, or data with anti-trust, securities, or other implications. If under *Upjohn* and *John Doe, Inc.* a communication made directly to the corporation's top management would not be privileged, but a communication directed to the corporation's lawyers would, management would have an incentive to order that all important communications take place directly to and through counsel.[130] Indeed, there is

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is unlikely to be available under the subject matter test.

129. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1062 (1978).

130. This danger caused the *Diversified Industries* court to propose a modification of the subject matter test which would require that the employee's corporate superior request the employee to communicate with the lawyer to secure legal advice. 572 F.2d at 609. However, this "extra" requirement merely restates a necessary element of the privilege: the communication must be made for the purpose of securing legal advice. If the requirement is interpreted to mean that the specific communications must be specifically directed, potential for abuse still exists. At the first sign of a legal problem, management could simply direct that all data flow through the lawyer, with comparatively little inconvenience accompanying such a course. In fact, in the questionable payments cases (except for the first stage

very little to recommend any other course. If management desired to know the details of the inquiry, it would need only ask the lawyers and *those* communications would also be privileged.[131] This course of dealing has three advantages for management. First, it is easy to administer, requiring only a directive or executive order (or series of the same) naming the topics or communications to be redirected.

Second, it shields the data by inhibiting discovery by any adverse party.[132] The data are contained in the files of lawyers (where it is privileged) and the memories of witnesses. Witnesses may be inaccessible or reluctant; they may no longer be employed by the company at the time their knowledge is sought. The civil litigant may not have the resources required to assemble these data from primary sources. For a governmental agency or other corporate adversary the task is at least a great burden. All of these effects would be permissible within the context of discovery rules whose spirit is theoretically one of liberality and disclosure, or in the context of an administrative agency investigation where the agency's inquisitorial powers may be even greater than those of the ordinary civil litigant.

Third, the subject matter test permits top management to adopt a policy of purposeful ignorance of the details of unpleasant or even illegal transactions.[133] In addition to sensitive payments practices, top management may need to gather additional facts from lower corporate levels. Some of these facts and topics might result in conclusions serious enough to warrant internal corrective action, or even the filing of public documents such as 8-K reports,

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of John Doe's investigation), that is what happened. *See, e.g., Upjohn Co.*, 600 F.2d at 1227 (investigation taken over by counsel after non-lawyer auditors discovered potential improper payments); In re Grand Jury Subpoena, 599 F.2d 504 (2d Cir. 1979) (second of two internal investigations conducted entirely by lawyers). *See also* United States v. Schmidt, 360 F. Supp. 339 (M.D. Pa. 1973) (accountant hired, paid and directed by attorneys; explicit employment agreement indicated that all records were property of attorneys, all billing was to law firm and all information was to be held confidential).

131. Communications by a lawyer to his client are privileged only insofar as they reveal or implicate the client's confidential communications to the lawyer. 8 WIGMORE, *supra* note 13, §§ 2290-2399.

132. United States v. Upjohn Co., 600 F.2d at 1227; Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 40 U. DET. L.J. 299 (1963); Note, *The Attorney-Client Privilege for Corporate Clients: The Control Group Test*, *supra* note 24.

133. *Upjohn Co.*, 600 F.2d at 1227.

amended tax returns, environmental impact statements, etc. The subject matter text effectively adopted in *Upjohn* would encourage ignoring issues which preliminary inquiry (by the lawyer directly of lower level management and employees) has shown to be relatively minor. The preliminary data safe in the lawyer's hands, no further concern need be entertained. Thus the expanded privilege may discourage corporate self-policing, rather than the reverse.[134]

The *Upjohn* test potentially undercuts a second pillar of the privilege, that of nurturing more open communications between lawyer and client. To the extent top management has an incentive to ignore data generated by its lawyers, it will see less need to take action, so long as the lawyers assure it that the data present no legal dangers. Thus, the policy-making branch of the "client" may communicate less, not more, with its lawyers on some topics, simply because the sanctity of underlying data creates a disincentive to act.[135] The privilege was clearly not meant to encourage such a result.

4. *Operates to hide the truth.* There is little disagreement with the general proposition that the attorney-client privilege stands as an obstacle to discovery of the truth. Wigmore notes that "[n]evertheless, the privilege remains an exception to the general duty to disclose. Its benefits are indirect and speculative; its obstruction is plain and concrete."[136] The *Upjohn* Court, however, chose not to acknowledge or discuss this characteristic of the privilege. Although this characteristic does not weigh the specific advantages and disadvantages of the two tests, it ought to inform that weighing process. It should operate to foster a skeptical eye toward attempts to broaden the privilege; and make more probable the estimate of the likely abuses of a broader privilege. It should

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134. *See Diversified Industries*, 572 F.2d at 609.

135. This analysis continues to assume that the data are not of such legal or business significance that action by top management is required. For example, an investigation may reveal a pattern of questionable or sensitive payments which are not material enough to warrant disclosure to the SEC or the IRS. Another investigation by corporate lawyers might reveal that the company's oil tanker committed a technical, non-reportable violation of environmental regulations. In all of these, if the lawyers, after culling the facts, inform top management in a general way that there has been a problem of a tax, environmental, securities, or other nature, but that their investigation has revealed nothing of such significance that corporate action is necessary, the matter will probably end there. The corporation need have no fear that a hostile litigant or prying administrative agency will later discover the same data and come to a contrary conclusion.

136. 8 WIGMORE, *supra* note 13, § 2294.

foster a general hostility toward extensions of the privilege, particularly to vast numbers of individual employees who are outside its original, historical scope.[137]

The discussion above recites incentives which have impelled corporations to conduct internal investigations, even when the applicable law was the control group test. These investigations were in fact carried out. Since the privilege must be framed by criteria no more expansive than those minimally necessary to accomplish its purposes, the subject matter concept is simply not needed.

C. *Control Group Test—Positive Considerations*

The drawbacks of the *Upjohn* test, in mirror image, point up many of the advantages of the control group test. For example, the control group test does not in fact restrict a witness' desire to communicate with corporate lawyers or officials, and it may encourage corporations to learn the details of the acts which may expose the corporation to liability. The control group test does not create a potential zone of silence. It distinguishes clearly between the mere bystander witness and the true client—the consumer of legal advice.

1. *Limits the availability of the privilege to those who are true corporate decisionmakers.* The proper limit of the attorney-client privilege is that bare minimum shield which preserves freedom of communication and action (not the maximum which will encourage the freest communication within the corporation). The control group test recognizes that the attorney-client privilege exists for the benefit of those top-level decisionmakers whose job it is to act on the facts communicated to them in confidence. Anyone else is a legal bystander and has no part in the second half of the decisionmaking process which the privilege was designed to fos-

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137. Last term, in Trammel v. United States, 445 U.S. 40 (1980), the Court struck down the spousal privilege as a bar to one spouse's testimony, given under a grant of immunity. The Court stated:

> Testimonal exclusionary rules and privileges contravene the fundamental principle that "the public . . . has a right to every man's evidence." United States v. Bryan, 339 U.S. 323, 331 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

445 U.S. at 50.

ter—the making of the decision itself.[138]

2. *Guards against limitations on discovery of evidence.* The control group test encourages centralized fact-gathering by forcing the flow of the data to and through those small number of individuals who have the power to take any suggested corrective action on behalf of the corporation. It thus enables adverse parties to know where facts are likely to be located, thereby aiding the swift and economical discovery of those facts in litigation.

3. *Provides sufficient protection combined with the attorney work-product defense to foster self-policing.* Corporations have an incentive to conduct internal investigations under the control group test because of supervening legal requirements, exposure to liability, and the corporate instinct for self-preservation. Under this test, the corporation may structure the investigations differently (depending on the imagination of the lawyers), and they may be a less pleasant task, but they will go on. The case law shows that investigations did in fact take place, even in those jurisdictions where the control group test was actually or arguably the law.

4. *Draws a bright, easily comprehended line demarcating the boundaries of the privilege.* Proponents of the control group test err in asserting that it is easily administered. To determine who is includable within the control group, requires at least some minimal factual development in terms of title and functions.[139] By contrast, under the subject matter test *all* employees are covered so long as the subject matter of the communication is reasonably related to the employee's duties. (That determination is easily made, since an employee's duties will usually be obvious or not subject to serious dispute.) Moreover, in many cases, the composition of a corporation's control group is not easily determinable or fixed. For example, suppose an employee—a vice-president for sales—sat in on board meetings frequently, but could not vote, yet the Board solic-

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138. The first step in the resolution of this legal problem is sifting through the facts with an eye to those that are legally relevant.

139. *See also* Note, *Privileged Communications—Who Can Speak For the Corporate Client?*, 44 MISSOURI L. REV. 350, 355 n.26 (1979) (citing Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968) (dep't manager and assistant held to be control group members, research chemist and research and development dep't group leaders were not); Congoleum v. GAF, 49 F.R.D. 82 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3d Cir. 1973) (corporate and divisional directors of research held on facts not control group members); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963) (divisional manager and chief engineer held to be control group members, two employees reporting to chief engineer were not)).

ited and respected his advice. Whether such a person fits the definition is by no means clear.

The Supreme Court in *Upjohn* believed that the necessity for case-by-case analysis of the control group's makeup was a disadvantage. However, as the opinion itself observes, questions of privilege (even the very one before the Court) sometimes must be addressed on a case-by-case basis. In *Upjohn*, the Court's adoption of the subject matter test means that case-by-case analysis is effectively no longer necessary. Every employee is covered by the privilege so long as the communication concerns his employment.

The traditional attorney-client privilege has never reached that far. Persons could be "clients" when they sought legal advice and non-clients at other times and for other purposes. *Upjohn* eviscerates this measure or restraint of the privilege. The Court had declared that in part since the narrow test is harder to apply, the broader, easier test should be adopted.

D. *Control Group Test—Negative Considerations*

1. *Inhibits intra-corporate communication by presenting a Hobson's choice.* And 2. *Discourages self-policing by corporations.* Opponents of the control group test urge that it confronts the corporation with a Hobson's choice—the need to obtain the data from middle management versus the prospect of disclosure, thereby chilling the free flow of information.[140]

However, the existence of a choice between competing alternatives—even a difficult choice—does no logically compel the conclusion that some other solution should be adopted. The issue ought not to depend on the fact that unpleasant consequences accompany some acts. The control group test may not discourage the free flow of information. The perhaps painful consequences of the control group test's narrow construction of the term "client" may be an acceptable price for conducting business subject to securities, tax and other legal consequences.

III. The Wider Implications of *Upjohn*

The breadth of the *Upjohn* doctrine mandates a closer look at

140. *Upjohn Co.*, 449 U.S. at 391-92; *Diversified Industries*, 572 F.2d at 608-09 (quoting Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. Ind. Comm. L. Rev. 873, 876 (1970).

its wider implications and potential dangers to the evidence-gathering process. These implications and dangers may be grouped into two related categories: (a) the impact on corporate behavior and the creative use of *Upjohn* by corporate counsel in the conduct of corporate business including internal investigations, and (b) the impact of *Upjohn* on satellite rules which govern the availability or applicability of the attorney-client privilege.[141]

A. *Creative Use of the Broadened Privilege by Corporate Counsel*

The foregoing discussion hints at the potential impact on corporate-legal behavior the *Upjohn* rules have sanctioned. As with all such procedural rules, lawyers and clients will naturally try to fashion their behavior to conform to a salutary rule or avoid the effect of a detrimental one.

Upjohn has considerably simplified that task. The decision has created the potential for shielding a large field of corporate behavior. The Court has sanctioned the zone of silence; it remains only for the zone to be occupied. That occupation will likely take two forms.

First, corporations will continue to fulfill their obligations to conduct internal investigations where warranted or appropriate. After *Upjohn*, there is greater assurance that the results of careful investigations designed and conducted to bolster the claim of privilege, will indeed be privileged. For example, lawyers will insure that they completely dominate the conduct of the investigation, where non-lawyers occasionally intruded before (e.g., *Diversified, In re Grand Jury Subpoena (John Doe, Inc.)*). They will structure the inquiry so that they become the focus of all significant communications,[142] from or to the Board or Special Committee, ancillary

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141. The problems posed by the work-product aspects of *Upjohn* are treated in Section V *infra*. A comprehensive summary of the law relating to other sub-doctrines within the attorney-client privilege appears in Brunner, Lesser and Fellner, Background Materials Concerning the Application of the Attorney-Client Privilege in the Corporate Setting, Part III, Georgetown Seminar, copyright 1981 by Wald, Harkrader & Ross [hereinafter cited as Brunner]. The following analysis of the impact of *Upjohn* on these sub-doctrines relies in part on the Brunner format and scholarship; however, its conclusions are solely the responsibility of the present author.

142. *Upjohn* has given impetus to seminars devoted in part to the "how to's" of structuring the privilege for corporate counsel. *See generally* Corporate Counsel and Client Confidences, published by Georgetown University Law Center Continuing Legal Education

personnel or specialists hired for the investigation, or the employees who are the subjects of the inquiry. The investigation will begin with a memorandum or resolution from the Board to the corporate attorney reciting words to this effect: "The corporation requests your legal advice and assistance in the following problem." The memorandum or Board resolution will empower the lawyer to employ—at the lawyer's expense—necessary specialized or ancillary assistance.[143] The Board will expressly state its fear or anticipation of named legal consequences, suits, etc. (so as to fulfill the "anticipation of litigation" requirement of the work-product doctrine). It will identify as much as possible the exact legal issues involved, or potentially involved. The lawyers or top management will mark all documents involved in the investigation "Privileged and Confidential."[144] They will segregate the documents into separate files,[145] access to which will be restricted to those who "need to know."[146] They will clearly mark all communications to and from counsel so as to reveal their origin in or destination to a lawyer,[147] and to show that the employee is acting within his duties.[148] The lawyer, and only the lawyer, will conduct all interviews.[149] He will take non-verbatim notes and preface any typewritten summary with words to this effect: "The following are non-verbatim notes taken by the undersigned and reflect his impressions and conclusions as to the legally significant facts recited by the witness under the undersigned's questioning." At this stage and at others the lawyer will create paper trails positively evidencing the confidential and legal character of the investigation. In short, the lawyers will carefully carefully and demonstrably tailor the investigation to the *Upjohn* facts (and to other requirements of the privilege).

Division, April 23-24, 1981 (hereinafter, Georgetown Seminar), and in particular, Martin, Administering the Attorney-Client Privilege Within Corporations, Part V, Georgetown Seminar [hereinafter cited as Martin]; Haft, Special Counsel and Special Review Committees, Part VI, Georgetown Seminar [hereinafter cited as Haft].

143. Martin, *supra* note 142, at 6; Haft, *supra* note 142, at 5.

144. Martin, *supra* note 142, at 1, 2; Haft, *supra* note 142, at 6.

145. For an example of problems resulting from failure to segregate privileged communications, *see* United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954); Martin, *supra* note 142, at 5.

146. Martin, *supra* note 142, at 2; *Diversified Industries, Inc.*, 572 F.2d at 609.

147. Martin, *supra* note 142, at 1-2.

148. Martin, *id.* at 1.

149. Haft, *supra* note 142, at 6.

The second major area for the creative use of *Upjohn* lies in the unexplored field of business operations. An internal investigation of business practices is clearly a legal matter, but many business decisions are at most quasi-legal in origin or effect. Moreover, many business decisions have no apparent present or future legal significance. Nevertheless, the corporation may simply desire to keep them secret. To the extent *Upjohn* elevates the corporate lawyer's role, future cases may see the lawyer intrude more and more into the once exclusive province of business decisions in order to extend the privilege, even if the immediate need for such protection is not apparent. *Upjohn* itself appears to sanction this intrusion. The Court noted with approval that "corporations constantly go to lawyers to find out how to obey the law."[150] In view of the "vast and complicated array of regulatory legislation confronting the modern corporation,"[151] and of the "watchdog" or public protection aspects of the lawyer's role which the Court found in part to justify the privilege, lawyers can imbue almost any business decision with legal significance. Therefore, a corporation which desires to shield business decisions or practices that harbor, for example, potential antitrust implications, *i.e.*, marketing decisions, corporate expansion plans, new product line acquisitions, would begin by consulting its lawyers and consigning the matter to them for legal advice. Properly managed, facts, communications and decisions which are filtered through a lawyer, have a greater chance of maintaining the claim of privilege than those which the businessman alone handles.

Moreover, after *Upjohn*, the careful corporate chief will have an incentive to request legal advice where only business judgments appear to him to be involved (and where the chief would not have done so before) for fear the facts would later be compelled in private or Governmental litigation. This incentive to "bring in the lawyers" for important business (as contrasted with purely legal) matters has no downside risks. The corporation is likely to obtain protection as to most sensitive business matters, such as pricing policies, some contracts with customers or suppliers, mergers, acquisitions, or relationships with subsidiaries, whether or not it has

150. 449 U.S. at 392 (quoting Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901, 913 (1969)).

151. *Id.*

good reason to obtain privileged status.[152] These sensitive matters are the ones most likely to be protectable under *Upjohn*, simply because *Upjohn* shows how to construct a case to erect the privilege and approves its expansive use.

In sum, by sanctioning a broad privilege, *Upjohn* permits the privilege to be asserted not only in legal affairs, where it was meant to apply, but also in business affairs of major, or, if the corporation desires, minor importance. The cost to the truth-finding process in the lower courts may be substantial.

B. *Application to Other Principles of the Privilege*

1. *The requirement of intened and unbreached confidentiality.* The confidentiality doctrine—that a communication cannot be privileged unless it was made in confidence and that confidence was never breached[153]—is untouched in *Upjohn*, at least on the surface. The Court's silence is troublesome not only because the government devoted its lead argument to this theory,[154] but also because the government had argued the issue in the Court of Appeals (which rejected it)[155] and in the District Court (which accepted it).[156] The Supreme Court's silence stands in the face of the following circumstances: (1) Upjohn's general counsel knew at the outset that SEC public reporting requirements, currency law, and tax law reporting requirements loomed, depending on the facts uncovered; (2) Upjohn in fact filed publicly required reports[157] with the SEC (copy to IRS); (3) those reports disclosed to the SEC, shareholders and the public the general subject matter of the privileged communications, the dollar totals of foreign payments and the countries involved; (4) Upjohn's general counsel had an under-

152. *See, e.g.*, the facts of *Diversified Industries*, 572 F.2d 596 (8th Cir. 1978).

153. United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954); United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950).

154. Brief for Appellees, at 21-26. This doctrine is a cousin of the waiver argument. The confidentiality requirement means a communication must be confidential to be privileged. If a communication is privileged, any breach of the confidentiality *after* acquisition of the privilege is a waiver.

155. United States v. Upjohn Co., 600 F.2d 1224, 1227 n.12 (6th Cir. 1979).

156. United States v. Upjohn Co., 78-1 U.S. Tax Cas. 83,597, 83,602-03 (1978).

157. An 8-K report was filed with the Securities and Exchange Commission pursuant to Rule 13a-11. This disclosure document reports "material" changes in the reporting company in such areas as change of control, bankruptcy, resignation of a director because of disagreement with the company's operations, policies or practices. *See also* note 31 *supra*.

standing with the SEC that the Commission could demand to see additional and presumably privileged background facts, this option being a salient feature of the Voluntary Disclosure Program; (5) the Special Committee had been authorized to engage admittedly independent outside certified public accountants to assist it; their independence was noted several times in the Board's authorizing resolution; (6) the Chairman encouraged potential interviewees to reveal facts upon request to the outside accountants; and (7) the corporation actually revealed—to the SEC, IRS and shareholders in publicly filed documents—the general nature of the payments, their gross amount, the countries involved, and other data. In spite of these facts, the Supreme Court found no lack or breach of confidentiality. This part of the Court's decision has two aspects. The first deals with the traditional lack of confidentiality argument that the Government made. The second deals with *Upjohn's* "consumer protection" flavor in which the Court appears to undercut the confidentiality requirement by justifying the expanded privilege.

In simplest terms, the Government argued that the above facts showed that the privilege never existed because Upjohn never intended the data it gathered to be confidential. If, however, it did so intend, once the corporation decided to reveal those data in summary fashion, it waived the privilege, or, alternatively, it was estopped from asserting it. The rationale underlying this concept of "intention to disclose" derives from several cases in the law of summons enforcement and finds support in other fields. In *United States v. Merrell*,[158] a special agent of the Internal Revenue Service's Criminal Investigation Division investigated two taxpayers for possible criminal tax law violations. One taxpayer had retained Merrell, a lawyer, to prepare the taxpayers' federal income tax returns from various workpapers and records the taxpayers provided. The special agent issued a summons to the lawyer to appear and produce retained copies of the returns, summaries of income and expenses used to prepare the returns, and workpapers and schedules used in their preparation. Upon the attorney's failure to comply with the summons, the government brought an enforcement suit.[159] The lawyer then invoked the attorney-client privilege. The

158. 303 F. Supp. 490 (N.D.N.Y. 1969).
159. *See* 26 U.S.C. §§ 7402(b), 7604(a).

district court rejected the claim on the theory that the summoned data consisted of information that the client did not intend to be confidential. Retained copies of income tax returns were not confidential since the material revealed on them was intended to be disclosed to third parties, namely, the Internal Revenue Service. The court reasoned the same to be true for the underlying data, consisting of income and expense summaries that the lawyer gathered or prepared for the purpose of including the information (as sifted, analyzed, and arranged by the accountant) on the return. The court ruled that, by definition, the accountant's workpapers consisted of information which the client and lawyer intended to be transcribed onto the non-confidential return.[160]

In *United States v. Cote*,[161] the court in a similar factual setting[162] rejected the claim of privilege as to amended tax returns and such underlying data as the return itself reasonably disclosed. The court framed its holding in terms of waiver; by filing the amended returns, the taxpayers communicated in part the substance of the information on them to the government and therefore could not withhold the underlying data. The initial disclosure waived whatever privilege may have been available. The court stated that it was "well established that communications between an attorney and his client, though made privately, are not privileged if it was understood that the information communicated . . . was to be conveyed to others."[163]

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160. 303 F. Supp. at 493. *Accord,* Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962), *cert. denied,* 371 U.S. 951 (1963) (recognizing that a great deal of information given to lawyers is in fact intended to be disclosed).

161. 326 F. Supp. 444 (D. Minn. 1971), *aff'd,* 456 F.2d 142 (8th Cir. 1972).

162. The taxpayers had for several years employed Donald Cote, an accountant, to prepare their federal tax returns. Cote used summaries of the books and records of the taxpayers for this purpose. Their 1967 return came under audit, and the accountant referred the matter to a lawyer, who retained the accountant to conduct an audit of the taxpayers' books and records. The results of the audit induced the lawyer to advise the taxpayers to file amended returns for 1966, 1967 and 1968, which they did. The amended returns revealed, without explanation, additional income. A special agent of the Internal Revenue Service then summoned both the lawyer and accountant to appear and produce all workpapers used to prepare the original and amended returns. The accountant claimed the papers were in the lawyer's possession. The lawyer produced the original 1967 tax return but otherwise claimed the attorney-client privilege. *See* United States v. Tellier, 255 F.2d 441, 447 (2d Cir. 1958).

163. Whether phrased in terms of waiver or intent to disclose, the doctrine is the same. Anything but an accidental waiver is also indicative of an intention to disclose. This concept of waiver has had a mixed judicial reception. Even in *Cote,* the court warned that "[t]oo

Closely allied to the *Merrell-Cote* rationales are the public policy considerations in *United States v. Couch.*[164] An IRS agent summoned a taxpayer's accountant for the accountant's records pertinent to the investigation of the taxpayer. The intervening taxpayer defended in part by raising the claim of accountant-client privilege. The Court rejected the claim, noting that no federal law sanctioned an accountant's privilege, and no state law adopting such a privilege had been recognized in federal cases. The Court further stated: "Nor is there justification for such a privilege where records relevant to income tax returns are involved in a criminal investigation or prosecution."[165] The Court would not recognize a privilege where the taxpayer handed records to an accountant and knew in advance that mandatory disclosure of "much of the information therein" would be required in an income tax return. Second, the data to be disclosed were largely in the accountant's dis-

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broad an application of the rule of waiver requiring unlimited disclosure by reason of filing an income tax return might tend to destroy the salutary purposes of the privilege which invite confidentiality between the attorney and his client." 456 F.2d at 145 n.4 (citations omitted). The Court of Appeals in *Upjohn* rejected the Government's suggestion of waiver, holding that the extent of waiver is measured by that which is actually disclosed. 600 F.2d at 1227 n.12, *rev'd,* 449 U.S. 383 (1981). *See also* Matter of Fishel, 557 F.2d 209 (9th Cir. 1977) (no waiver as to data underlying revealed worksheets); United States v. Schlegel, 313 F. Supp. 177, 179 (D. Neb. 1970); International Business Machines Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 (D. Del. 1968).

The Supreme Court has held that waiver may be express or implied. Blackburn v. Crawfords, 70 U.S. 175 (1865). *See also* United States v. Schoeberlein, 335 F. Supp. 1048, 1057 (D. Md. 1971) (checks stubs were intended to be disclosed since taxpayer had given them to accountant for preparation of return); B&C Trucking Co. v. Holmes & Narver, Inc., 39 F.R.D. 317, 319-20 (D. Hawaii 1966) (waiver by filing application with regulatory agency); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464-65 (E.D. Mich. 1954) (documents not intended to be confidential where they had been mixed indiscriminately with routine documents in company files).

It may be possible for the lawyer to avoid these dangers by effectively making the accountant his creature. Ancillary or subordinate personnel (such as paralegals and secretaries) often partake of the lawyer's privilege. United States v. Schmidt, 360 F. Supp. 339 (M.D. Pa. 1973) (lawyer hired accountant, whose services were rendered to facilitate accurate and complete legal consultation); Bauer v. Orser, 258 F. Supp. 338 (D.N.D. 1966) (taxpayer's lawyer hired, paid and instructed accountant). *Compare* United States v. De Castro, West & Chodorow, Inc., 75-2 U.S. Tax Cas. 87,563 (C.D. Cal. 1975) *with* Falsone v. United States, 205 F.2d 734 (5th Cir. 1953). The claim of privilege will be sustained as to an accountant where the lawyer can prove that the assistance of an accountant is "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961). The line, however, is a fine one.

164. 409 U.S. 322 (1973).

165. *Id.* at 335.

cretion, not the client's. Third, an accountant himself would risk prosecution if he assisted in preparation of a false return.[166] The accountant's need for self-protection would often require that he have the right to disclose the information upon demand. Thus the Court rejected the concept of a legitimate expectation of privacy (closely akin to the concept of privacy which forms part of the attorney-client privilege) where other laws mandated expectations and obligations of disclosure and where the Court thought the principle of disclosure to be essential for the system of self-reporting to survive.

These factors find an analogy in the questionable payments cases, where the corporation, through a special committee assisted by lawyers, generates factual data and summarizes them in a report to the Board of Directors. The summarized data reveal the corporation's questionable payment practices and frequently include examples of payments[167] (with the names of participants omitted), summaries of total payments, recipient countries,[168] and the like.[169] These summarized disclosures are likely to be more detailed than the bare revelations made in the tax returns described in *Merrell* and *Cote*. The corporation knows at the start that there may be securities, tax, and perhaps other legal implications to the data to be generated, e.g., 8-K statements and/or amended tax returns. Thus the corporation's intention from the start includes, if necessary, the revelation of at least summaries of the questionable payments data to the SEC or the IRS, or both (hence the name, Voluntary *Disclosure* Program). This pre-existing intention to disclose, we now know, was later carried through in at least one instance,[170] and likely with a greater degree of specificity than that found in the usual corporate tax return.

Like the taxpayer in *Couch,* the corporation which investigates

166. 26 U.S.C. § 7206(2).

167. 78-1 U.S. Tax Cas. at 83,599.

168. *Id.*

169. In re Grand Jury Investigation (Sun Company, Inc.), 599 F.2d 1224 (3d Cir. 1979) (Audit Committee report discussed payment of $235,000 to foreign representative during renegotiation of contract with an entity of foreign government); In re Grand Jury Subpoena (John Doe, Inc.), 599 F.2d 504 (2d Cir. 1979) (subsidiary of John Doe used money to bribe Mexican officials).

170. In re Grand Jury Subpoena (John Doe, Inc.), 599 F.2d at 506, 512 (SEC given specific details from Form 8-K, John Doe employees identified, recipient countries identified, amounts and purposes of payments set forth).

itself often intends the data to be disclosed in summary fashion. Like the accountant, the corporation (and perhaps, the lawyers) face exposure to liability if false statements are made. Under these circumstances, it is not unreasonable to conclude that the corporation had never intended the data to be confidential. The corporation which chooses to participate in the Voluntary Disclosure Program, or which generates internal investigative data because it fears private shareholder suits and wishes to forestall them by a required public disclosure or by application of the business judgment rule,[171] effectively demonstrates its intention that the data not be confidential under all circumstances. Until *Upjohn*, even if its subjective intent is to the contrary, *Couch* implied that such an intent is not one which public policy would endorse, since the circumstances are charged with such a high degree of public interest. Since the attorney-client privilege attaches to the substance of a communication and not the particular words used,[172] the corporation which has slightly opened the door should not be able to prevent complete disclosure.

The Supreme Court justified its holding in part by reasoning that corporations constantly go to their lawyers to find out how to obey a vast and complicated array of public regulations. This notion of the lawyer as public "ombudsman," strongly implied in *Upjohn*, is made explicit in other cases. For example, in *United States v. Handler*,[173] the district court firmly endorsed its own equity powers to require the appointment of special counsel under an SEC consent decree. Special counsel had discharged his duty to monitor the offender's compliance with the securities laws by conducting an investigation which included interviews with corporate officers. On the basis of his report, certain officers were indicted for securities law violations. The court was unsympathetic to the interviewee-officers' claims that they and special counsel enjoyed a privileged relationship which should have precluded revelation of special counsel's notes. "Self-policing of internal corporate affairs is a

171. *See* United Copper Sec. Co. v. Amalgamated Copper Co., 244 U.S. 261, 263-64 (1917); Rosengarten v. International Tel. & Tel., 466 F. Supp. 817, 823-34 (S.D.N.Y. 1979); Gall v. Exxon Corp., 418 F. Supp. 508, 515-16 (S.D.N.Y. 1976); Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 225-26 (D. Del. 1970) (waiver by testimony on general subject matter of privileged material).

172. United States v. Tellier, 255 F.2d 441, 448 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958).

173. [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,519 (C.D. Cal. Aug. 3, 1978).

desirable and economical practice."[174] Thus, where the very purpose of counsel's appointment was to report to the SEC and to the public, no confidentiality was intended and no privilege obtained.

In *Securities and Exchange Comm'n v. Canadian Javelin, Ltd.*,[175] the SEC sought to compel discovery of the notes of a lawyer who had been appointed special counsel to the corporation under an earlier consent decree. The decree had enjoined Canadian Javelin from making false or misleading statements, and had required it to establish a standing committee to review all information to be disseminated to the public. A special independent counsel, who "shall have no business or professional relationship with Javelin other than the performance of the functions set forth herein,"[176] was to monitor compliance. The court held the special counsel's investigation not to be privileged. His obligations ran to the court "*and to the American public.* Furthermore, [special counsel] was obliged to make certain public disclosures with respect to Javelin's activities. Thus there could be no legitimate expectation of confidentiality in connection with any information divulged to [special counsel] and accordingly such information is not privileged."[177]

The objective roles and functions of these special counsel do not differ materially from those of *Upjohn*-type Special Committees and their lawyers even if the principal's subjective expectations may differ. In both circumstances, the purpose of the investigation is to monitor compliance with the law and report the results to the SEC under the Voluntary Disclosure Program, to shareholders, etc. In both, there is an explicit public protection aspect, whether voluntarily assumed or court-imposed.

Yet the Supreme Court's silence on these points is deceptive. The Court appears to endorse, perhaps for the first time, the idea that the attorney-client privilege is justifiable at least in part to promote quasi-public purposes, that is, concerns and constituencies broader than those of the individual or corporate client. *Upjohn's* privilege has a distinct, explicit, quasi-public, quasi-independent flavor of shareholder and public protection. The privi-

174. *Id.* at 94,024.

175. 451 F. Supp. 594 (D.D.C. 1978).

176. *Id.* at 596.

177. *Id. See also* Bird v. Penn Central Co., 61 F.R.D. 43 (E.D. Pa. 1973) (waiver by disclosure to SEC).

lege exists, the Court would have us believe, to assist corporations in complying with "the vast and complicated array of regulatory legislation"[178] confronting them.

But by sanctioning the privilege for such broader, non-private purposes, the Court erodes the strictness of the confidentiality requirement. By extolling the virtues of special committees and internal investigations for these quasi-public purposes, the Court may have also gone a long way toward elevating those purposes, and their constituencies, *i.e.*, public, shareholders, environmental groups, to protected or protectable status. The lawyer who investigates a corporation may be seen to do so in part for the benefit of persons who cannot possibly be clients.[179] Thus the "public purpose" aspect of the decision, which is supposed to require a privilege, in fact undercuts its own rationale for confidentiality. In the name of protecting the attorney-client privilege, *Upjohn* may come to be seen to have done the reverse.

2. *Attorney-to-client communications and intra-corporate contacts.* The law is generally divided on the issue whether the privilege protects the attorney's communication *to* the client as well as the reverse. Some courts narrowly construe the privilege to include the lawyer's communication only where it would explicitly or inferentially reveal the facts the client had told to the lawyer.[180] Others believe the advice itself to be within the privilege, regardless of content.[181] *Upjohn* is strongly allied with the latter view: "the privilege exists to protect . . . professional advice to those who can act on it . . . ," [182] regardless of the circumstances necessitating the advice. The Court faulted the control group test for making it difficult for the corporate attorney to formulate sound advice and for limiting "the valuable efforts of corporate counsel to

178. 449 U.S. at 392.

179. Query: What if these new constituencies begin to demand the results?

180. *See generally* Brunner, *supra* note 141, at 13-24, and cases cited therein: Federal Trade Comm'n v. TRW, Inc., 479 F. Supp. 160, 164 (D.D.C. 1979), *aff'd on other grounds*, 628 F.2d 207 (D.C. Cir. 1980); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 522 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976); Bird v. Penn Central Co., 61 F.R.D. 43, 45-46 (E.D. Pa. 1973); United States v. United Shoe Mach., 89 F. Supp. 357, 359 (D. Mass. 1950).

181. *See* Brunner, *supra* note 141, at 13-24, and cases cited therein: United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1968); Natta v. Hogan, 392 F.2d 686, 692-93 (10th Cir. 1968); Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971).

182. 449 U.S. at 390.

ensure their client's compliance with the law."[183] It thus implied that the lawyer's communications *to* the client are also privileged. The *Upjohn* Court clearly wished to protect the entire two-way process of communication because it believed that advice was of great significance to non-control group personnel as well as to top management, and because in *Upjohn*, the result of the legal advice was a worldwide company policy against bribery.

Assuming such two-way protection, non-legal personnel must communicate *with each other* in order to respond to the corporate attorney's inquiries. Generally, such communications among non-lawyers are not privileged, but exceptions do exist.[184] *Upjohn* may afford greater protection to such communications. On its facts, the decision sustained the privilege for communications based on inquiries Upjohn's managers had made with "employees who might be helpful in providing the requested information."[185] The Court set no limit on the number of lower-level employees whom the lawyer could consult. At the very least, the Court extended the privilege to communications from lower-level employees to each other if they had made the communication in response to counsel.

Potential difficulties accompany these two related aspects of the privilege. To the extent that *Upjohn* gives wider protection to both attorney-to-client advice and to intra-personnel communications, the corporation will have an incentive to channel inquiries of a sensitive nature (particularly those not directly involving top management) through its attorneys. The danger that the control group test anticipated becomes real: the zone of silence is expanded by management's purposeful ignorance of important facts or by the transformation of ordinary business decisions into legal decisions.

3. *Ancillary personnel.* Authorities are divided on whether, and under what circumstances, the privilege may cover non-legal personnel who assist the lawyer in his duties.[186] Courts have recognized that even beyond ministerial employees (secretaries, clerks, etc.), lawyers need the help of specialists in order to do their job well. Where the specialist does not have independent contractor

183. *Id.* at 392.

184. Brunner, *supra* note 141, at 24-26, and cases cited in Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 39 (E.D.N.Y. 1973).

185. 449 U.S. at 387.

186. *See generally* Brunner, *supra* note 141, at 39-47.

status, there are no fixed rules. The decisions run the following range: (1) no privilege except for ministerial agents;[187] (2) no privilege if the engagement of the specialist preceded the hiring of the lawyer, or if the specialist rendered advice at the behest of the client rather than the lawyer;[188] (3) no privilege unless the specialist was essential to the lawyer's performance of legal services;[189] (4) the privilege applies where the specialist's help is "necessary, or at least highly useful," for the consultation the privilege is designed to permit;[190] and (5) the privilege applies where the specialist was engaged, paid, or directed by the lawyer.[191]

Upjohn implies that there will be greater protection for such ancillary specialists. The Special Committee in *Upjohn*, after all, was empowered to, and did, engage independent accountants to assist it in interpreting the results of the investigation. The privilege was not lost due to this fact. Moreover, the Court's reference to the vast array of regulations governing modern corporations implies that it would sanction the use of specialists in regulatory compliance matters and protect their work product. This wider availability of the privilege for ancillary personnel appeared in questionable payments cases prior to *Upjohn*.[192] Carefully structured, the claim of privilege or work product for such specialists will likely survive future challenges.

4. *Attorney as businessman.* The rule that an attorney who acts as a businessman enjoys no privilege for such activity has always been easier to state than to apply. Many tests appear to have been articulated.[193] *Upjohn* appears to utilize parts of several tests,

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187. Federal Trade Comm'n v. TRW, Inc., 479 F. Supp. 160 (1979); or immediate subordinates, *e.g.*, Zenith Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794 (D. Del. 1954).

188. Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); United States v. Clark, 74-2 U.S. Tax Cas. 84,764 (D.C. Idaho 1974).

189. Burlington v. Exxon Corp., 65 F.R.D. 26 (D.C. Md. 1974).

190. United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961).

191. United States v. Schmidt, 360 F. Supp. 339 (M.D. Pa. 1973).

192. United States v. Arthur Young & Co., 498 F. Supp. 1152 (S.D.N.Y. 1980) (privilege applies to documents prepared by outside accountants under lawyers' aegis). *Accord,* In re Grand Jury Subpoena, 599 F.2d 504 (2d Cir. 1979) (accountants' workpapers possibly subsumed in attorney work product).

193. *See generally* Brunner, *supra* note 141, at 30-36, and cases noted: United States v. Faltico, 586 F.2d 1267 (8th Cir. 1978); Diversified Industries v. Meredith, 572 F.2d 596, 603 (8th Cir. 1978) (test is whether non-legal personnel could have performed the investigation); United States v. Lipshy, 79-2 U.S. Tax Cas. 88,274 (N.D. Tex. 1979) (general relationship of attorney to client examined); Herbert v. Lando, 73 F.R.D. 387, 398-400 (S.D.N.Y. 1976), *remanded on other grounds,* 568 F.2d 974 (2d Cir. 1977), *rev'd on other grounds,* 441 U.S.

without articulating one uniform rule. First, the Supreme Court approvingly noted that the communications involved were made to corporate counsel "acting as such,"[194] thus focusing on the general role of the lawyer. Second, the lawyer conducted "a factual investigation."[195] Third, the purposes of the investigation were "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.*"[196] Fourth, one result of the investigation was a policy statement with both legal and business implications. Perhaps the only conclusion which can be drawn from the Court's observations is that the lawyer may act in part as a businessman without sacrificing the privilege, and may give advice with an element of business content, so long as (1) he also acts in his capacity as a lawyer, and (2) the advice is of a legal as well as of a business character. *Upjohn* thus appears to grant protection to advice of mixed character, which is indeed the class of advice a corporate lawyer would be expected to give.

Beyond this conclusion, the extent to which communications an attorney makes as a businessman will be privileged remains uncertain. The lines are likely to be further blurred as corporations take up the invitation to bring lawyers increasingly into business decisionmaking.

IV. The Privilege—Ethical Considerations and Constitutional Rights

Upjohn hints at one topic of perhaps the greatest potential difficulty for lawyers. The *Upjohn* rule will begin to draw lawyers—largely without warning because of the tempting breadth of the holding—into a minefield of ethical dilemmas and problems of constitutional rights. The Court's virtual silence on these potential ethical problems stands as a further criticism of the holding. In an internal investigation of questionable payments, the corporation requires its lower-level employees to disgorge facts and practices

153 (1979) (intention to evoke legal, as opposed to business or professional advice); Zenith Corp. v. Radio Corp. of America, 121 F. Supp. at 794 (examine the particular communication); United States v. United Shoe Mach., 89 F. Supp. 357 (overall character of attorney's work for client examined).

194. 449 U.S. at 394.

195. *Id.*

196. *Id.* (quoting 78-1 U.S. Tax Cas. 83,597, 83,598, 83,599) (original emphasis).

which may expose them to individual criminal liability. What is the corporation's duty in that situation? May its lawyers ethically represent both the corporation and the non-control group employees? Does there exist a sensitive payments investigation in which the corporation and its non-control group employees do not have irreconcilable conflicts of interest? Would the continued fiction of one lawyer or law firm representing both management (the control group) and other employees cause the latter to forfeit important rights? The answers to these and related questions ought to have influenced the selection of the proper measure of "the client" for purposes of the attorney-client privilege, since they bear on the congruence of the identity of interests between the corporation and its employees. Moreover, these questions reveal the dimensions of the ethical problems with which *Upjohn* will confront courts and lawyers in the future.

A. *Conflict of Interest*

These topics are best illuminated by considering the lawyer's ethical obligations. The most prominent ethical consideration is the lawyer's duty to avoid conflicts of interest when representing multiple clients.[197] The American Bar Association's Code of Professional Responsibility, and Canons 5-15[198] and 5-18[199] in particular, commit the legal profession to an ethic which not only discourages, but nearly bans, representation of multiple clients with potentially conflicting interests. For example, EC 5-15 provides that a lawyer who is requested to represent multiple clients with potentially conflicting interests "must" weigh "carefully" the possibility that his judgment may be impaired or his loyalty divided if he accepts the position. "He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests."[200]

As to what choice the lawyer should make when he represents a corporation, the Code takes a consistent position: "A lawyer

197. ABA CANONS OF PROFESSIONAL ETHICS Nos. 5-14 through 5-20.
198. *Id.*, EC 5-15.
199. *Id.*, EC 5-18.
200. *Id.*, EC 5-15 (footnote omitted).

employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."[201]

The circumstances under which a corporate lawyer[202] might run afoul of these ethical canons arise both at the investigative stage of an internal inquiry and, later, at the litigation stage, when the government seeks to compel production of the results of the investigation.[203] The subject matter test tends to widen the gap between the interests and identities of the non-control group employees and the corporate client where such conflicts arise.

In the typical questionable payments investigation, the lawyer is charged with discovering whether the client-corporation has or may have violated the securities, tax, or other laws, and whether such violations subject it to civil or criminal liability. Since the "corporation" is an abstraction which operates only through agents and employees, the lawyer's task is to discover which management and lower-level employees have violated the law. In this limited

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201. *Id.*, EC 5-18. The canon further provides:

> In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

202. It is ethically permissible, under some circumstances, for a lawyer to represent several clients "whose interests are not actually or potentially differing." EC 5-19. However, the lawyer is obligated to explain any circumstances which might cause the client to question the lawyer's undivided loyalty, and in doubtful cases, the client's choice governs. It does not appear that in any of the questionable payments cases the "clients" were even advised of the problem, much less given a choice. Disciplinary Rule DR 5-105 generally forbids a lawyer from accepting or continuing employment which is "likely" to involve conflicting interests, except "if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 5-105(c). As the main discussion analyzes, there are several major, perhaps irreconcilable, conflicts of interest between the corporation and its employees-interviewees in a questionable payments investigation. In view of these, it does not seem possible for one lawyer or law firm to represent both within the bounds of the canons.

203. It is clear that in the typical questionable payments investigation, the "corporation" is perceived to be the client when the lawyer is initially retained, thereby establishing at the outset of the relationship the lawyer's coverage under EC 5-18. *See, e.g.*, the Board of Directors resolution in *Diversified Industries*, 572 F.2d 596, quoted at note 57 *supra*.

respect the lawyer's function resembles that of a governmental investigator.

Under the control group test, the lawyer represents only those persons who comprise top managment, and only in their agency capacity. Under the subject matter test, however, the lawyer would "represent" all employees whose duties may have included the maintenance or operation of a slush fund.[204]

The client-corporation's interest, as promoted by the lawyer's investigation, is to discover the facts and, quite possibly, to *reveal* those facts in order to avoid multiple corporate liability. The individual interests of non-control group employees may be diametrically opposed. They would wish to *conceal* any damaging facts since those facts might expose them to individual criminal or civil liability. Thus the corporation, wishing to preserve its rights and interests, calls upon its employees' institutional loyalty with the result that the employees may incriminate themselves.[205]

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204. Members of the control group may also have participated in the maintenance and operation of a slush fund and may also be interviewed by the lawyers. The treatment of these individuals, however, is likely to be different from that of the employees. As members of the control group (frequently members of the board of directors), these individuals have access to information not available to non-control group members. They will know the how and why of the investigation; they will likely be informed by the lawyer of all potential consequences of the probe. More importantly, they have the power to affect corporate action. While the ethical climate of dual representation of corporation and control group is far from pure, it is also qualitatively different (and improved) from that existing between corporation and non-control group employees.

205. The Legal Ethics Committee of the District of Columbia Bar dealt with a situation closely in point in Opinion No. 14, 75-I-24 (January 26, 1976). The inquiry requested advice about several issues in a situation where an attorney once represented a client (now represented by another law firm) in connection with civil litigation by a government regulatory agency. The attorney's files relating to the former client were subpoenaed by a grand jury. In addition, the attorney had also represented jointly a corporate client which subsequently waived its attorney-client privilege. The Committee commented:

> None of our answers is affected by the fact that the representation of the client in question was a joint representation, along with a corporate client that subsequently waived its attorney-client privilege. That waiver frees the lawyer to produce documents that relate solely to the corporate client so far as any claims to confidentiality by it are concerned, but it does not free him to disclose documents that relate in any way to the former individual client. In this regard, we note that, when an attorney undertakes to reprsent a corporate officer in his individual capacity and also to represent the corporation, documents obtained or produced during such joint representation frequently, if not invariably, intertwine the interests of the joint clients. Such joint representation is fraught with potential conflict and a lawyer should represent a corporate official in his individual capacity and also represent the corporation only if the lawyer is convinced that differing interests, or potentially differing interests, are not

The fact that the non-control group interviewees are unlikely to perceive such a conflict when the interviews take place points to a second aspect of this conflict. Since the lawyer acts as a private investigator, and the typical interview is non-custodial, the lawyer is under no constitutional duty to advise the interviewees that they might be incriminated.[206]

But the potential for self-incrimination is real. Unlike the individual, the corporation has no Fifth Amendment privilege against self-incrimination;[207] therefore, the individual's narration of facts to the lawyer cannot be protected under a Fifth Amendment claim the corporation may assert. Thus the lawyer who interviews a non-control group employee effectively asks that employee to forfeit his own Fifth Amendment rights where the lawyer knows (but the employee may not) that the corporation could not protect his disclosures. The corporation may indeed have no institutional interest in asserting a Fifth Amendment right. The employee is thus placed in a pressured situation, left to determine on his own whether he has a self-incrimination problem, and if so, what rights he has. While the holding of *Miranda v. Arizona*[208] would not strictly apply, the typical questionable payments interview jeopardizes the interests *Miranda* sought to protect—informed choice and conflict-free legal representation. But for the "private" hat worn by the lawyer-investigator, it seems clear that the non-control group employees would otherwise be protected.

A third conflict arises when one considers the desirability and capacity to waive whatever attorney-client privilege may exist. The corporation may well desire to waive its privilege by disclosing sufficient data to the SEC to bring it within the Voluntary Disclosure

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presented. EC 5-15; EC 5-17; and EC 5-18.

Id.

In the questionable payments cases, it is likely that the interview notes taken by the lawyers generated the very intertwining of conflicting interests foreseen by the Opinion. This would clearly be true if an interviewee revealed that, at the direction of the Board Chairman, he set up and operated a slush fund.

206. The advice of rights required by Miranda v. Arizona, 384 U.S. 436 (1966), applies only in the context of a custodial interrogation conducted by a governmental police agency. *See* United States v. Beckwith, 425 U.S. 431 (1976).

207. Grant v. United States, 227 U.S. 74 (1913); Wilson v. United States, 221 U.S. 361 (1911). The privilege belongs only to the individual; thus, other institutional entities do not have a self-incrimination privilege. Bellis v. United States, 417 U.S. 85 (1974) (partnership); United States v. White, 322 U.S. 694 (1944) (union).

208. 384 U.S. 436 (1966).

Program, as did Upjohn and John Doe, Inc.[209] However, if the non-control group employees are part of "the client," they should have the right to decide whether their privilege should be waived, and under what circumstances.[210] In practice, that principle has not been followed, at least as demonstrated in *Upjohn*. Indeed, corporate management might consider it ludicrous that its own lower-level employees would claim authority to dictate to the corporation what could and what could not be revealed to a governmental agency. After all, management not the employees, is charged with formulating such high-level policies.[211] None of the cases in this area indicate that any of the investigated corporations entertained such a conception of employee authority,[212] and management would probably violate one or more corporate fiduciary principles if it permitted control of the privilege to slip away.[213] Thus the

209. In re Grand Jury Subpoena, 599 F.2d 504 (2d Cir. 1979). John Doe actually revealed some details of its investigation in a conference with SEC representatives.

210. This is so since the privilege belongs to the client alone and therefore can be waived only by him. Where the corporate client waives its privilege and the individual does not, the lawyer is probably trapped in an irreconcilable conflict of interests. *See* Legal Ethics Committee of the District of Columbia Bar, *supra* note 205.

211. The likely fact and subjective belief by the control group (principally the board of directors) that *it* makes corporate business and legal policy, rather than lower-level employees, is a good indication that the control group itself probably believes that only it represents, and is identified with, "the client."

212. The reverse factual situation is also possible: the employee-"client" may wish to waive the privilege while the corporation wishes to assert it, as, for example, when the employee requests immunity from prosecution, a reduced sentence for cooperation, or when he simply wishes the truth to come out. Under those circumstances, it strains credibility to imagine that the corporate entity would be at the forefront of the chorus urging that the employee is the client, or is closely indentified with the corporation. More likely, the corporation would urge that the employee does not speak for the corporation, has no authority to waive the privilege, and is not a member of the control group which does. The corporation's collective interest lies in asserting the privilege. The individual's interest lies in waiving it. Moreover, there may be several, or many, individual employees for whom waiver is the best legal course. Under the subject matter test, those individuals being the "clients," they would have the legal authority to waive the privilege on behalf of the corporation. Under the control group test, they would not. The latter would confine the waiver power to the body in which it would normally be thought to reside—the control group.

213. Directors and officers of a corporation have a solemn fiduciary relationship to the corporation and its shareholders, analogous to that of a trustee. Iowa S. Util. Co. v. United States, 348 F.2d 492 (Ct. Cl. 1965); Alvest, Inc. v. Superior Oil Corp., 398 P.2d 213 (Alaska, 1965). *See generally* 3 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 884-90 (1975). The directors have been held to be agents in whose care the shareholders place their trust. Pepper v. Litton, 308 U.S. 295, 306 (1939). Among the duties imposed as a result of this special relationship is the obligation to discharge their duties with conscientiousness and diligence. Schildberg Rock Products Co. v. Brooks, 258 Iowa 759, 140 N.W.2d 132 (Iowa

corporation acts contrary to the fundamental assumption of the subject matter test when it presumes that it has the exclusive right to waive the privilege. Moreover, fiduciary principles which impel corporate control groups to act in the best interests of the corporation will often conflict with the assertion that lower-level employees are "clients" and thereby may assert clients' rights as to waiver of the attorney-client privilege.

The conflicts of interest persist, and may well be exacerbated, through the litigation stage. At this stage, the government seeks to compel production of the lawyer's interview notes and questionnaire results, and the corporation resists, asserting the attorney-client privilege and work-product doctrine. Lower-level employees may then realize that the words they voluntarily gave at an earlier time, are now sought to be compelled in a proceeding where their employer cannot (and may not desire to) assert a Fifth Amendment defense. To the extent that defense is available to the individuals,[214] their rights have been eviscerated by the corporation. The result is that in at least one of these investigations,[215] the corporation felt compelled to retain separate counsel for the individual employees. Aside from the troublesome conflict of interest

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1966). Under these standards, the corporation's directors and officers would probably be in violation of their duty of loyalty if their best efforts were not exerted to stem such an unauthorized act.

214. Under present interpretations, the Fifth Amendment claim would probably be rejected, since the compulsion is directed toward a party with no Fifth Amendment privilege. *See* Fisher v. United States, 425 U.S. 391 (1976); Couch v. United States, 409 U.S. 322 (1973). Nevertheless, the privilege is not completely lost to custodians of institutional records. Curcio v. United States, 354 U.S. 110 (1957).

215. *See* United States v. Peat, Marwick, Mitchell & Company, No. 77-118 (N.D.N.Y. Dec. 9, 1977). As reported in Judge Foley's decision, the Internal Revenue Service was investigating a pattern of questionable payments by United Bank Corporation of New York (UBC). It sent UBC the eleven "slush fund" questions, to which UBC responded by engaging the accounting firm, Peat, Marwick, Mitchell & Company, and the law firm, Cleary, Gottlieb, Steen & Hamilton, to conduct an internal investigation. Thirteen of the officers of UBC and its subsidiaries who were interviewed were individually summoned by the Internal Revenue Service. Most declined to respond to questioning on the basis of their Fifth Amendment privilege. When the government sought enforcement of the summons issued to Peat, Marwick for its copies of the interview notes, UBC intervened but did not assert the Fifth Amendment privilege on behalf of the thirteen individual officers. Those individuals appeared with four separate law firms to represent them in their efforts to intervene in the suit, claiming among other things that the taxpayer could not properly represent their Fifth Amendment interests. The court stated that any Fifth Amendment interests could be asserted at a later date, if the investigation ripened into a criminal charge and trial, and so denied intervention.

problems created here for the lawyer, it is no solution for the corporation, having through *its* lawyers created a waiver of individual Fifth Amendment rights, to provide its now incriminated employees with free counsel. Although the corporation might also assert the attorney-client privilege and work-product doctrine at the enforcement stage, the same conflicts or potential conflicts described above still loom.

Additional conflicts tend to widen the schism between the identities and interests of the corporation and the non-control group employees. The corporation's control group, at least the board of directors, have a high fiduciary duty toward the corporation and its shareholders. That duty has been described as closely analagous to that of a trustee; it includes the duty to act in good faith for the corporation's best interests, and to give conscientious care and one's best judgment to all corporate tasks. No such fiduciary duties restrict the lower-level employees. If a corporate officer or director is faithful to his oath, he will assiduously discover and prosecute those responsible for his corporation's potential securities law and tax law violations. He will assert the corporation's interest in all inquisitorial proceedings. He will discharge the individuals responsible for the malefactions. Non-control group individuals will often have the very opposite incentives, particularly where they participated in the corporation's misdeeds.

In view of all of these actual and potential conflicts of interest, it is difficult to justify the contention that non-control group employees are so indentified with the interests of the corporation that they ought to be considered "the clients." To the contrary, their interests are deeply at odds with those of their employer. The subject matter test is therefore largely incompatible with the definition and concept of "client" that the attorney-client privilege is supposed to foster.[216]

B. *Other Canons and Rights*

Canon 7[217] mandates that a lawyer represent a client zealously within the bounds of the law. This general mandate includes the duty to resolve in favor of his client all doubts as to the bounds of

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216. *See* note 213 *supra.*

217. ABA CANONS OF PROFESSIONAL ETHICS No. 7 (EC-7): "A Lawyer Should Represent A Client Zealously Within the Bounds of the Law."

the law,[218] the duty to assert permissible constructions of the law which would be favorable to the client,[219] the duty to assure that a client's decision-making results from full information and careful consideration of alternative courses,[220] and the duty to advance the client's cause before an administrative agency and to identify to that agency the identity of his client (unless identity is privileged).[221] The lawyer who has been retained and paid by a corporation to conduct an internal investigation would have difficulty fulfilling the letter and spirit of this canon. His "clients' " conflicting interests arise not only between corporation and lower-level employees, but among these employees themselves, such as where one implicates another in a questionable payments scheme. The lawyer who obeys EC 5-18 (the corporation, not any employee, is the client) and who therefore gives full loyalty to the corporation will have, to that degree, a lessened ethical incentive to obey the commands of Canon 7 as to the employees he has interviewed. Indeed it is doubtful whether these individuals will be perceived as part of the "client" before the subject matter test theory makes it convenient to do so.[222]

At the litigation stage, interviewee-employees will want to assert the attorney-client privilege, work-product doctrine, Fifth Amendment privilege, and similar defenses to compelled production of their prior revelations. As discussed above, the corporation has no Fifth Amendment privilege[223] and may desire to waive other protections.

If defenses to the investigations exist, the corporation may not always wish to assert them. If the corporation seeks lenient treatment under the SEC's Voluntary Disclosure Program, it may wish to bare its secrets, to the potential detriment of the individual non-control group employees. Only the corporation's interest is

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218. *Id.*, EC 7-3.

219. *Id.*, EC 7-4.

220. *Id.*, EC 7-8.

221. *Id.*, EC 7-15.

222. Besides these conflicts, a host of others confront the lawyer who chooses to participate in corporate management as a director or officer. *See* Hershman, *Special Problems of Inside Counsel for Financial Institutions*, 33 BUS. LAW. 1435 (1977); Note, *Should Lawyers Serve as Directors of Corporations for Which They Act as Counsel?*, 1978 UTAH L. REV. 711 (1978); *The Murky Divide: Professionalism and Professional Responsibility*, 31 BUS. LAW. 457 (1975).

223. *See* note 207 *supra*.

served under these circumstances. The corporation may wish to avoid a criminal trial or civil proceedings by pleading to a charge or settling a case, again forfeiting the interests of lower-level employees. Negotiations, bartering, and the like always find their way into administrative investigations. A corporation potentially chargeable with securities law violations or tax evasion would not likely have an incentive to consider the additional burden of individuals' interests as its own.

The effect of the subject matter test is therefore also to set one "client" against another, and one ethical canon against others. It is difficult to justify a concept of the term "client," such as that embodied in the subject matter test, which creates or exacerbates a host of such ethical dilemmas.

These actual and potential conflicts of interest may also impair the Sixth Amendment right to the effective assistance of counsel (assuming that right is available at the stage of a Criminal Investigation Division investigation),[224] or simply the non-constitu-

224. Whether it does so apply is not clear. The Supreme Court has indicated that advice of the "Miranda" rights, including the right to counsel, is not constitutionally required when a Criminal Investigation Division inquiry is begun, unless the taxpayer is then the subject of a custodial interrogation. Beckwith v. United States, 425 U.S. 341 (1976). Therefore, no Fifth Amendment rights are at stake, and the IRS agent is not required to advise a taxpayer of that right or his right to counsel. The decision does not state whether the latter right applies, as a matter of constitutional law. However, in practice, and by Internal Revenue Manual requirements, the "Miranda" warnings are in fact given. Even if not required, where a right (constitutional or not) is conferred by IRS practice or procedure for the protection and benefit of the taxpayer, courts have usually held their violation as bars to government summonses. That principle, however, has been eroded, perhaps completely, by United States v. Caceres, 440 U.S. 741 (1979). Some courts hold that the right to counsel applies at any "critical" stage of a "prosecutorial chain of events" where a defense must be either asserted or lost, and where that result would derogate from a fair trial later on. United States ex rel. Reed v. Anderson, 461 F.2d 739, 742-44 (1st Cir. 1972); United States v. Hurt, 543 F.2d 162 (D.C. Cir. 1976); Pirtle v. State, 263 Ind. 16, 323 N.E.2d 634 (Ind. 1975); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (S.C. 1974). Certainly rights may be waived or preserved during the investigation stage of an IRS proceeding. On the other hand, the Supreme Court has hinged the adherence of the right to an adversary judicial proceeding. Kirby v. Illinois, 406 U.S. 682 (1972) (four Justices concurring, a fifth in result only). Such seemingly "investigatory" matters as electronic surveillance are not a "critical stage," even when the government knows at the time of the surveillance that the defendant has retained a lawyer. United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973), *cert. denied*, 405 U.S. 989 (1973). Moreover, in a questionable payments case, the investigation proceeds privately.

Nevertheless, it remains true that, had the investigation been conducted by the IRS instead of employer's lawyers, the employee-witnesses would have been advised of their right to counsel, and the swift retention of counsel at the start of a criminal investigation is

tional expectation and the ethical requirement that a lawyer will render his most effective, unimpeded assistance. The employee's best defense to a slush fund charge might be "superior orders," his superiors being the guilty parties. But his lawyer, who represents the corporation, might then urge that the employee's act were *ultra vires*. Such a conflict in defenses in fact has arisen.[225] An employee accused of wrongdoing might also seek immunity in exchange for testimony against the corporation, thereby placing his interests in direct conflict with those of the corporation.[226]

The conclusion to be drawn from these potential defenses is simple: counsel's assistance would not be "effective" under the Constitution or Canon 7 if his loyalty is divided by potentially conflicting defenses.[227] To represent both corporation and non-control group employees in an internal payments investigation (or at trial) irretrievably deprives *both* "clients" of the effective assistance of counsel, whether viewed as a constitutional or purely ethical matter. Moreover, as a matter of policy the law should not encourage representation where lawyers are in danger of violating ethical canons, or where clients are deprived of the effective assistance of counsel.[228]

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the rule rather than the exception. Even if a questionable payments investigation does not threaten the right to counsel as a matter of constitutional law, legal assistance and reliance on legal advice is, undeniably, of considerable import as a matter of fairness. Lawyers have an ethical obligation, analogous to the constitutional right to counsel, to provide the most effective and zealous representation when called upon to do so. *See generally* EC 7-1 and Canon 7.

225. United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976), *cert. denied*, 429 U.S. 998 (1977).

226. United States v. RMI Co., 467 F. Supp. 915 (M.D. Pa. 1979) (Sherman Act violations).

227. *See* Glasser v. United States, 315 U.S. 60 (1942); United States v. Gongis, 374 F.2d 758, 761 (7th Cir. 1967). The law in this area has developed, not surprisingly, exclusively in the criminal field. While there is doubt as to the existence of a constitutionally based Sixth Amendment right in civil cases, there is no doubt that clients desire, expect and pay for "effective" assistance of counsel. In this sense criminal law cases are instructive. In *Glasser*, 315 U.S. 60, the Supreme Court held that a criminal defendant is denied his Sixth Amendment right where his attorney represents a co-defendant as well. While refusing to fashion a per se rule, in Holloway v. Arkansas, 435 U.S. 475 (1978), the Court acknowledged that the Sixth Amendment is one of those constitutional rights so basic to a fair trial that its denial can almost never be harmless error. *See generally* 55 A.B.A.J. 262 (Mar. 1969); Annot., 31 A.L.R.3d 715 (1970). *See also* Yablonski v. United Mine Workers, 448 F.2d 1175 (4th Cir. 1971) (union counsel directed to withdraw because of conflicting interests with representation of officer); Canon v. United States Acoustics Corp., 398 F. Supp. 209 (N.D. Ill. 1975) (shareholder derivative suit).

228. The A.B.A. Commission on Evaluation of Professional Standards has proposed a

V. WORK-PRODUCT DOCTRINE

The work-product doctrine must be carefully distinguished

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new rule in its Model Rules of Professional Conduct in the proposed Code of Professional Responsibility. The Rule (drafted before *Upjohn*) does not offer a solution to the dilemmas posed by *Upjohn*. The proposed Rule provides:

> (a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents.
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> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in or intends action, or a refusal to act in a matter related to the representation, that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in material injury to the organization, the lawyer shall proceed as is reasonably appropriate to the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant consideration. The measures taken shall be designed to minimize disruption and the risk of a disclosure of information relating to the representation of the organization. Such measures may include:
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> (1) asking reconsideration of the matter;
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> (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
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> (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
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> (c) When a matter has been referred to the organization's highest authority in accordance with paragraph (b), and that authority insists upon action, or a refusal to act, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include disclosure of information relating to the representation of the organization only if the lawyer reasonably believes that:
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> (1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with interests of the organization; and
>
> (2) disclosure of the information is necessary in the best interest of the organization.
>
> (d) In dealing with an organization's officials and employees, a lawyer shall explain the identity of the client when necessary to avoid embarrassment or unfairness to them.
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> (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1-7. If the organization's consent to the dual representation is

from the attorney-client privilege.[229] This statement bears emphasis because *Upjohn* has blurred this usually clear distinction. A privilege, once proved and not waived, absolutely bars compelled disclosure at whatever stage of representation it is asserted. The work-product doctrine, however, is qualified. It can be pierced by a showing of substantial need.[230] The attorney-client privilege is some four hundred years old.[231] The work-product doctrine, though said to be of ancient origin,[232] has found practical expression and widespread application only in the last thirty-four years.[233] Courts have reviewed or evaluated the doctrine almost always in the context of pending litigation. It has also been codified in Rule 26 of the Federal Rules of Civil Procedure, a rule applicable after the start of litigation. By contrast, the attorney-client privilege cases frequently deal with communications alleged to be privileged at almost every stage of the client's representation.[234] Moreover, the work-product doctrine protects primarily the *attorney*, not the client. It nurtures and protects the attorney's freedom of thought, investigation and expression. It is the attorney's to create, to assert or to waive.

In *Upjohn,* the Supreme Court held that (1) the work-product doctrine applies as a defense to an IRS administrative summons, and that (2) with respect to lawyers' notes of interviews, one who seeks to penetrate it must make a showing greater than substantial need or inability to obtain the data by other means. In holding that the doctrine applied to IRS investigations, the Court reasoned that "[n]othing in the language of the IRS summons provisions or

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required by Rule 1-7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented.

Upjohn in fact *complicates* the function of the rule by: 1) expanding rather than narrowing the definition of "client," possibly beyond the corporation to include shareholders, etc., and 2) creating a quasi-attorney-client relationship between corporate counsel and non-control group personnel which is in obvious conflict with the attorney's predominant duty to the corporation and which may lead to the unseemly result of the non-control group person's being sacrificed to the greater corporate good if, for example, the corporation seeks shelter under the SEC's Voluntary Disclosure Program.

229. The doctrine was announced in Hickman v. Taylor, 329 U.S. 495 (1947). *See generally* Maurer, *Privileged Communications and the Corporate Counsel,* 28 ALA. LAW. 352 (1967).

230. *See* E.I. DuPont v. Phillips Petroleum, 24 F.R.D. 416 (D. Del. 1959).

231. 8 WIGMORE, *supra* note 13.

232. 8 WIGMORE, *supra* note 13, § 2294.

233. 35 A.L.R.3d 412 (1970).

234. 8 WIGMORE, *supra* note 13.

their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine."[235] Citing its prior decision, *Donaldson v. United States*,[236] the Court observed that the doctrine was encompassed in Rule 26 of the Federal Rules of Civil Procedure, which Rules were made applicable to summons enforcement proceedings by Rule 81(a)(3). This reasoning departs strikingly from the pro-enforcement tone the Court adopted in *United States v. Euge*,[237] where it held that handwriting exemplars could be compelled by summons. In *Euge*, the Court went to great historical lengths to emphasize how liberally the summons power should be construed. Time after time, the Court stated, that power had been read to reach anything which qualified as "books, papers, records and other data." The Court summarized its own history in this field as follows:

> As early as 1911, this Court established the benchmarks for interpreting the authority of the Internal Revenue Service to enforce tax obligations in holding that, "the administration of the statute may well be taken to embrace all appropriate measures for its enforcement, [unless] there is . . . substantial reason for assigning to the phrase[s] . . . a narrower interpretation." *United States v. Chamberlin*, 219 U.S. 250, 269. This precise mode of construction has consistently been applied by this Court in construing the breadth of the summons authority Congress intended to confer in § 7602. . . . There is thus a formidable line of precedent construing congressional intent to uphold the claimed enforcement authority of the Service if such authority is necessary for the effective enforcement of the revenue laws and is not undercut by contrary legislative purposes.[238]

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235. 449 U.S. at 398. The Court also assumed another conclusion of profound significance. In citing Rule 501 of the Federal Rules of Evidence, the Court appeared to sanction the application of these rules at a stage earlier than the trial of a lawsuit. Nowhere in the entire field of summons enforcement litigation (and possibly in administrative law) is there such an indication that rules explicitly formulated for the conduct of trials will have application at the agency's investigative stage. This dictum may create difficulties for the IRS, if not for other investigative agencies, for years to come as lawyers attempt to use the evidence rules as bars to agency investigative techniques. Yet the Court gave no hint that it considered the propriety of exporting the Federal Rules of Evidence to such foreign territory. As to the Federal Rules of Civil Procedure, and in particular the work-product doctrine, the Court noted that the Government "wisely" conceded their application.

The traditional operation of an administrative agency investigative process sanctions an inequality of rights between the contenders. This is in direct contrast to the democracy of formal civil litigation, where both parties, even the Government, are equal before the court.

236. 400 U.S. 517 (1971).

237. 444 U.S. 707 (1980).

238. *Id.* at 714-16. *See also* United States v. Davey, 543 F.2d 996 (2d Cir. 1976) (computer tapes).

In *Euge*, the Court found a summons to be enforceable if its purpose was not specifically forbidden by statute or policy; in *Upjohn*, a general policy which applied to litigation-stage discovery—not specific to the summons power—was sufficient to prevent enforcement. These conflicting positions may be reconciled by construing Rule 26(b)(3) as a "specific" prohibition or the embodiment of a substantial countervailing policy. However, the Court only alluded to this argument.[239] The Court failed to cite *Euge's* forceful and unequivocal language, nor did it explain how Rule 26(b)(3) qualifies as a "specific" prohibition on the *summons* power.[240] While Rule 81(a)(3) does make the civil rules *generally* applicable to the judicial enforcement of a summons, cases in this field—including cases decided by the Supreme Court and cases involving other aspects of Rule 26—endorse with near unanimity the opposite conclusion. Those cases stand for the proposition that despite Rule 81(1)(3), nothing in the civil rules regarding such matters as complaints,[241] Rule 4 summonses,[242] discovery,[243] or even trials,[244] will stand in the way of summary proceedings for the enforcement of IRS summonses. Indeed the case cited by the *Upjohn*

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239. The 'strong public policy' underlying the work-product doctrine was reaffirmed recently in United States v. Nobles, 422 U.S. 225, 236-40 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26 (b)(3).

> As we stated last Term, the obligation imposed by a tax summons remains 'subject to the traditional privileges and limitations,' United States v. Euge, 444 U.S. 707 (1980). Nothing in the language of the IRS summons provisions or their legislative history suggests an intention on the part of Congress to preclude application of the work-product doctrine.

449 U.S. at 398 [footnote omitted].

This statement of the Court's must be contrasted with the language of *Euge* and *LaSalle National Bank*. Those two cases, and *LaSalle* in particular, interpret the summons power to reach anything not specifically forbidden. In *Upjohn*, the Court does an about-face: if not *permitted*, the summons is forbidden.

Moreover, courts have never sanctioned application of other Civil Rules to thwart the summons authority. Donaldson v. United States, 400 U.S. 517 (1971) (Rule 24 intervention); Kennedy v. Rubin, 254 F. Supp. 190, 194-95 (N.D. Ill. 1966) (Jury trial, Rule 37); United States v. Gajewski, 419 F.2d 1088, 1092 (8th Cir. 1969) (Rule 4 Summons and Complaint); United States v. Morgan Guaranty Trust Co., 572 F.2d 36, 42 n.9 (2d Cir. 1978), *cert. denied*, 439 U.S. 822, *rehearing denied*, 439 U.S. 997 (1979) (Rule 26 discovery).

240. Sections 7605 (b), (c) and 7603, for example, contain specific restrictions on the summons authority.

241. *See* 419 F.2d 1088. *See also* note 239 *supra*.

242. *Id.*

243. *See also* United States v. Garden St. Nat'l Bank, 607 F.2d 61, 73-74 (3d Cir. 1979).

244. *See generally id.*

Court—*Donaldson v. United States*[245]—is taken out of context. In *Donaldson,* the Supreme Court denied the taxpayer's attempt to invoke Rule 24 to intervene in a summons enforcement case against his employer. In so doing, the Court said:

> The Civil Rules, of course, do have an application to a summons proceeding. Rule 81(a)(3) expressly so provides. But the Civil Rules are not inflexible in this application. Rule 81(a)(3) goes on specifically to recognize that a district court, by local rule or by order, may limit the application of the rules in a summons proceeding. . . . This feature was recognized as purposeful by the Advisory Committee when the pertinent language was added to Rule 81(a)(3) in 1946 . . . . The post-*Powell* cases, too, are clearly and consistently to the effect that the footnote in *Powell* was not intended to impair a summary enforcement proceeding so long as the rights of the party summoned are protected . . . .[246]

Thus the Court's conclusion that the work-product doctrine applies to an IRS summons is not supported by the Federal Rules of Civil Procedure nor by the Court's previous summon enforcement cases.

With respect to the specific summoned data—interview notes and memoranda—the *Upjohn* Court held that Rule 26's work-product protection applied, but outwardly refused to decide what standard of need was required to overcome it. The Court also reasoned that the attorney-client privilege applied to verbatim interview notes.[247] However, as to the lawyer's notes, the Court arguably read *Hickman v. Taylor* to mean that *no* showing of necessity could justify their production.[248] Since the interview notes by necessity revealed "the attorney's mental processes,"[249] disclosure was permitted, but not "simply on a showing of substantial need and inability to obtain the equivalent without undue hardship."[250] Some "far stronger showing of necessity and unavailability by other means"[251] was required.

By holding that almost no showing of necessity could overcome the work-product protection for a lawyer's recordation of witnesses' oral statments, the Court may have effectively created a

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245. 400 U.S. 517 (1971).
246. *Id.* at 528-29.
247. 449 U.S. at 400.
248. Such was not the holding of the case. *See* note 252 *infra.*
249. 449 U.S. at 400.
250. *Id.* at 401.
251. *Id.* at 402.

true privilege from a previously qualified one. From now on, a lawyer may successfully claim work-product protection for non-verbatim notes of a witnesses' statements, if he proves that he took them in continuing confidence. This holding appears to expand *Hickman* beyond its original confines, and beyond the borders of some appellate decisions that interpret it.[252] However, by expanding the scope of the work-product doctrine, the Court has ironically undercut the rationale for the broad attorney-client privilege rule it announced earlier in the case—candor. The Court's near absolute protection for *recorded* witness statements creates an incentive for the lawyer to write down what was previously unwritten.[253]

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252. In *Hickman,* three categories of data were sought: statements written and signed by witnesses, the attorney's unrecorded impressions of witness interviews, and the attorney's recorded memoranda of some of those interviews. As to the last two categories, the Court decided that where "only a naked, general demand" was made, and where the only purpose for obtaining the statements was "to help [the lawyer] prepare himself to examine witnesses and to make sure that he has overlooked nothing," 329 U.S. at 512, 513, and where "the essence of what petitioner seeks either has been revealed to him already through the interrogatories or is readily available to him direct from the witnesses for the asking," 329 U.S. at 509, the Court did not believe that any showing of necessity could be made "under the circumstances of this case" and "[u]nder ordinary conditions." 329 U.S. at 512. This limitation did not preclude piercing the shield if more was shown. *See* 329 U.S. at 509, 511.

253. Opinion work product, consisting of a lawyer's reasoning and legal opinion, and analyses or assessments of a client's position, is still entitled to an absolute protection. *See* Fed. R. Civ. P. 26(c)(3); *Sun Company,* 599 F.2d at 1231. Interview notes were not, prior to *Upjohn,* absolutely forbidden from disclosure, but the protection to be accorded was greater than that for questionnaire results. The former may reveal the attorney's mental processes, i.e., his opinion work product. 599 F.2d at 1231. Their reliability is the product of many factors, including the conditions of the interview, editorial discretion and the time at which the notes are reduced to memoranda form. *Id.* Moreover, their discovery creates a danger of converting the attorney from advocate to witness. The matter had been left open by Federal Rules of Evidence, Rule 1101, which provides in part:

> (b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act.
>
> (c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.
>
> (d) Rules Inapplicable. The rules (other than with respect to privilege) do not apply in the following situations:
>
> * * *
>
> (2) Grand Jury. Proceedings before grand juries.

Fed. R. Evid. 1101.

The court in *John Doe, Inc.,* conceded that the work-product doctrine was not strictly a privilege, 599 F.2d at 509, but noted that it had been applied to grand jury proceedings, citing In re Terkeltoub, 256 F. Supp. 683 (S.D.N.Y. 1966); Matter of Rosenbaum, 401 F.

These inconsistencies call into question the desirability of applying the work-product doctrine prior to litigation or at the administrative level. The doctrine was announced in a case where the lawyer's work-product was generated in direct anticipation of litigation following a boat accident. Such a setting is a civil suit where the issues are sharply defined, the litigants are equal before the court and the Federal Rules of Civil Procedure apply equally to both sides.

In contrast, the nature of an administrative investigation, and particularly an IRS investigation, is far different.[254] The investigation is often wide-ranging and the issues not well-defined until the investigation is well under way.[255] Issues of "discoverability" do not arise often, and the "admissibility" of evidence is simply not pertinent.[256] The investigation is said to be inquisitorial, not accusatorial, in part because the IRS audits tax returns which may be several years old and because the taxpayer is usually in control or possession of all the facts.[257] The Supreme Court has often endorsed this characterization of IRS and other administrative investigations.[258]

Supp. 807, 808 (S.D.N.Y. 1975); and *Sun Company*, which also declared the availability of the work-product doctrine as a defense to a grand jury subpoena. Nothing in the legislative history of the Federal Rules of Evidence appears to suggest that Rule 1101 was intended to encompass the work-product doctrine.

254. The fact that the issue is addressed in the context of a summons enforcement suit does not convert an administrative inquiry into an accusatorial judicial proceeding. The government's suit to enforce the summons is designed to be a temporary detour from the administrative track, a summary proceeding with a judicial and legislative preference on the calendar. *See* Donaldson v. United States, 400 U.S. 517 (1971); United States v. Davey, 426 F.2d 842, 845 (2d Cir. 1979); 26 U.S.C. § 7609(h). Once the summoned data is obtained, the administrative investigation goes forward.

255. United States v. Brown, 349 F. Supp. 420, 430-31 (N.D. Ill. 1972), *aff'd*, 478 F.2d 1038 (7th Cir. 1973).

256. In Re Albert Lindley Lee Memorial Hospital, 209 F.2d 122 (2d Cir. 1953):

> Such investigatory inquiry by a Government agent is not a judicial proceeding. . . . Even administrative agencies like the Federal Trade Commission, the Labor Board and the Interstate Commerce Commission have never been restricted by the rigid rules of evidence applicable in courts of law. . . . [T]here is even less reason to restrict the revenue agent's inquiry by technical rules of evidence.

Id. at 123. (Footnote and citations omitted). The Supreme Court has stated on at least one occasion that the rules of evidence do not restrict agency inquiries. Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 705-06 (1948). *But see* note 235 *supra*.

257. United States v. Brown, 349 F. Supp. 420 (N.D. Ill. 1972), *aff'd*, 478 F.2d 1038 (7th Cir. 1973).

258. United States v. Morton Salt Co., 338 U.S. 632, 638-41, 647-51 (1950); Federal

Moreover, public policy does not structure an equality of interests or rights in administrative inquiries as it does in most lawsuits. Congress grants the agency extremely wide-ranging powers of inquiry, limited only by constitutional and other liberally-construed boundaries. For example, section 7601 of the Internal Revenue Code directs the Secretary of the Treasury or his delegate "to the extent he deems it practicable" to cause Treasury Department officers or employees "to proceed . . . and inquire after and concerning all persons [ ] who may be liable to pay any internal revenue tax . . . ."[259] The Supreme Court has characterized the collection of the revenue as the "life-blood of government,"[260] and has often given voice to Congressional policy that the revenue laws, both civil and criminal, be vigorously enforced.[261] This principle holds true for other agencies, even to the extent that some constitutional rights are of questionable application at the administrative level.[262] The effect of this policy at the administrative level is to create a disparity between the powers granted to the IRS and the protections retained by taxpayers. The latter are routinely expected to display their records and knowledge upon request or upon the command of a summons.[263] At the same time, it is recognized that the outcome of the administrative process may vary

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Trade Comm'n v. Cement Institute, 333 U.S. 683, 705-06 (1948); Interstate Commerce Comm'n v. Baird, 194 U.S. 25, 39-41 (1904).

259. 26 U.S.C. § 7601.

260. Bull v. United States, 295 U.S. 247, 259 (1935).

261. Section 7601 imposes on the IRS the "duty to canvass and to inquire." Donaldson v. United States, 400 U.S. at 523.

262. Withrow v. Larkin, 421 U.S. 35 (1975); Hannah v. Larche, 363 U.S. 420, *rehearing denied*, 364 U.S. 855 (1960); In re Groban, 352 U.S. 330 (1957); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 204 (1946) (corporations subject to "visitorial power" of state over Fourth Amendment claims). For example, there is no requirement of probable cause precedent to an agency's right to investigate matters within its jurisdiction. It need only show that the investigation is legitimate and the subpoenaed documents relevant. 327 U.S. at 209; Securities & Exchange Comm'n v. Brigadoon Scotch Dist. Co., 480 F.2d 1047, 1052-54 (2d Cir. 1973). In the case of an IRS summons, there are two easily met additional requirements to show that the summoned data are not in the IRS' possession and that the administrative steps for issuance and service have been followed. United States v. Powell, 379 U.S. 48, 56-58 (1964). Indeed, the Supreme Court has held that it is up to the affected agency, rather than the agent, to establish its own jurisdiction to investigate through its procedures. Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 508-10 (1943).

263. This expectation derives from the general duty to obey promptly the commands of a summons. United States v. Bremicker, 365 F. Supp. 701, 703 (D. Minn. 1973); In re D.I. Operating Co., 240 F. Supp. 672, 677 (D. Nev. 1965) (quoting Blair v. United States, 250 U.S. 273 (1919)).

widely.[264] An audit by the Examination Division of the IRS may cover one or a dozen tax issues, and result in a refund, a deficiency, or one or more penalties.[265] An investigation by the Criminal Investigation Division may have these outcomes or may result in a recommendation for criminal prosecution of the taxpayer. The powers and protections available to each side are intentionally unequal.[266]

In particular, administrative agencies' powers to subpoena documents, take testimony under oath, and require the submission of reports, are likewise extensive.[267]

Administrative agencies also have an oversight role, which further distinguishes them from civil litigation. When the latter engage in a dispute over a transaction (e.g., a contract), the two parties have been participants and have some, or even equal, knowledge of the facts. Thus, the party seeking to pierce the work-product shield will often have some specific knowledge of the form or content of the documents it seeks or the events of the transaction involved. This equality of knowledge rarely exists in an IRS or other administrative investigation. There the subject often has exclusive knowledge and control. It is difficult, therefore, for the IRS to state the specific grounds on which it claims it needs a document it may have never seen.[268] These policy considerations ought to point to the nonrecognition of the work-product doctrine earlier than at the trial level, or at least to a lessening of the showing of

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264. 3 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW, §§ 1901-1904 (1977) [hereinafter cited as MEZINES].

265. *See* note 35 *supra.*

266. The agency proceeds informally, by investigation rather than adjudication. This flexibility of procedure is said to be desirable because of the inquisitorial, fact-finding nature of the agency. *See* Hannah v. Larche, 421 U.S. 420; Brotherhood of Ry. & S.C. v. Association for Benefit of Non-Contract Employees, 380 U.S. 650 (1965); Inland Empire Dist. Council LSWU v. Millis, 325 U.S. 697, *rehearing denied,* 326 U.S. 803 (1945); National Labor Relations Bd. v. Botony Worsted Mills, 133 F.2d 876 (3d Cir. 1943), *cert. denied,* 319 U.S. 751 (1943). *See* note 258 *supra.*

267. Interstate Commerce Comm'n v. Smith, 245 U.S. 33 (1917); Harriman v. Interstate Commerce Comm'n, 211 U.S. 407 (1908); Top Value Meats v. Federal Trade Comm'n, 586 F.2d 1275 (8th Cir. 1978). *See* United States v. Powell, 379 U.S. 48 (1964). Statutory authority and wide ranging scope of agency powers are contained, for example, in 29 U.S.C. § 161(1) (1976) (NLRB); 15 U.S.C. § 49 (1976) (FTC); 49 U.S.C. § 305(d) (1976) (ICC); 15 U.S.C. § 79r(c) (1976) (SEC). *See generally* United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), on the contrast between the allocation of rights at the administrative and litigation stages of a criminal case.

268. *See Brown,* 349 F. Supp. 420.

need required to overcome it.[269]

Cases which recognize the work-product doctrine reflect some of the same policy concerns as those in the attorney-client privilege area.[270] They note that lawyers will be unable or unwilling to render the required, that is, the most effective, counsel if their thoughts, facts, and investigative efforts are open to view,[271] or that they will simply not write down that which needs to be written, resulting in the same or similar damage to the system.[272]

Unlike the suggested effects of the subject matter and control group tests, evaluation of this proposition does in fact suffer from an absence of empirical data. There appears to be no empirical study which has attempted to quantify the extent to which lawyers will diminish their efforts because of the hypothetical unavailability of the work-product defense. The available evidence from the cases indicates that lawyers in fact wrote down and communicated the results of the internal investigations. But this result is of little significance since the scope of the work-product defense, if considered at all, was not made clear. The cases simply do not show whether the lawyers believed they had a work-product protection, or whether they even perceived the potential challenge to it as a danger.

However, it is possible to make projections about the dangers *Hickman* and other courts perceived. The doctrines' supporters argue that legal efforts would suffer if work product were easily discoverable, that is, "what is now put down in writing would remain unwritten."[273] But there is no work-product difference between the knowledge in an attorney's memory and the same knowledge reduced to writing.[274] Each is equally subject to discovery to the extent work-product itself is discoverable. The argument must therefore be that lawyers will stop *creating* work-product altogether.[275]

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269. *See id.*; United States v. McKay, 372 F.2d 174 (5th Cir. 1967).

270. *See* In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 945-46 (E.D. Pa. 1976).

271. *See* Duplan Corp. v. Deering Milliken, 397 F. Supp. 1146, 1190 (D.S.C. 1974).

272. *See* 329 U.S. at 511.

273. *Id.*

274. Later memories may fade, but the case does not distinguish between oral and written work-product. To the extent that oral work-product is argued to be less reliable because it is given well after the events, the justification for the application of the work-product doctrine is lessened, because the "sacrosanct" nature of the knowledge has been eroded.

275. If it were somehow possible for a law firm to conduct an *Upjohn*-type internal investigation without the use of written materials altogether, and to render its report orally

This outcome is probable only if the dangers of abandoning work-product protection outweigh those forces impelling the investigation in the first place.[276]

However, once the SEC or IRS becomes involved in a corporate investigation, a partial resolution may take place in the way of consent orders, suits, or relief under the Voluntary Disclosure Program. Upjohn Company and other corporations evidently believed the danger of SEC inquiry or shareholder suits to be so great that they did not wait for the onset of the agency's inquiry. The potential liabilities, whether explicit or not, of shareholder derivative suits, SEC Rule 10-b(5)[277] or other litigation, fines, penalties,[278] delistings, and the like, are the corporation's preeminent considerations. The countervailing danger—that disclosure of attorney work-product may lead ulimately to criminal tax penalties—may appear far more remote at the time.[279] Thus, to the extent thinking in the boardroom is focused and aired at all, it is more likely than not that the dangers of non-disclosure are seen as harsher and less remote than the reverse. Considerations which would likely impel corporations to generate disclosable data in the normal course of business, or even to commence internal investigations, would be present with respect to the work-product doctrine. Corporations need and demand written attorney work-product simply because of independent, overriding business and legal considerations.

A. *Standard for Substantial Need*

Since *Upjohn* has held that an IRS summons is subject to the work-product defense, there remains a question of what standard of need must be shown in order to override it.

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to the Board of Directors, protection would still not be available. The lawyer's thoughts, facts, opinions and the like would still be work-product, and indeed could be subject to summons or subpoena from the lawyer or from the Board.

276. Of course, there is the added likelihood that few lawyers would wish to put themselves out of business by advising the client they did not wish to undertake the investigation.

277. Securities Act of 1933, Sec. 17(a)(2), 15 U.S.C. § 77q(a) (1976); Securities Exchange Act of 1934, Sec. 10(b), 15 U.S.C. § 78j (1976); Rule 10b-5, 17 C.F.R. § 240.10b-5 (1981).

278. The penalties include criminal prosecution of corporation and individuals, 15 U.S.C. §§ 77u(d), 77ff(a) (1976). *See also* 18 U.S.C. § 371 (1976); 15 U.S.C. § 78(a) (1976).

279. [1979] I.R.S. Ann. Rep. 22 (1979). The report notes that about one in three Criminal Investigation Division investigations resulted in a recommendation for prosecution.

The Supreme Court suggested that a stronger showing of necessity and unavailability would be required than the traditional standard or than that made by the Government in *Upjohn*. The Government had shown that the subject witnesses were widely scattered around the world. It had also proved the company's active hindrance of the interview process by its instructions to employees not to speak on any topic which the *company* considered irrelevant to the IRS's investigation.[280] In light of these facts, the Court's conclusion that sufficient need had not been established strains credulity. The Court could have, but did not, take judicial notice of additional facts. (1) The passage of time would have made stale whatever interviews the IRS could now obtain, whereas the events involved were far fresher to the witnesses at the time of the interviews. (2) Any employee-witness is likely to perceive the IRS as hostile; employees loyal to their corporation probably did so. (3) In tax matters, the primary source of facts is the taxpayer; in the questionable payments area, the practices are by nature even more secret.

Perhaps the Court would now require that the witness be dead,[281] or that he refuse to answer questions on grounds of self-incrimination.[282] It may be that the Government would be required to show that the continuance of the investigation depended on access to those interviews, or that it had made attempts to summon the witnesses but they had refused to respond.[283] Each of these requirements would impose greater burdens than the courts have generally imposed since *Hickman*.

B. *What Should the Standard Be to Overcome the Work-Product Defense?*

Public policy considerations favoring swift and vigorous enforcement of administrative process, and the inherent features of

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280. That judgment is generally consigned to the IRS. United States v. Acker, 325 F. Supp. 857 (S.D.N.Y. 1975).

281. *See Sun Company*, 599 F.2d 1224.

282. Whether the obstruction is grounded on the Fifth Amendment privilege or the claim of irrelevance, the result is the same.

283. *See Hickman v. Taylor*: "Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may be properly had. . . . And production might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U.S. at 511.

an administrative inquiry,[284] should be fundamental considerations in determining when the work-product defense should and should not be available. The Seventh Circuit in *United States v. Brown*[285] has recently considered the issue. There the Court of Appeals affirmed the district court's enforcement of an IRS summons for an accountant's notes and workpapers.[286] The district court had stated that the IRS's showing of need to overcome the valid assertion of work-product protection should be less than the showing required of an ordinary litigant.[287] The district court focused on four factors: (1) the general policy that access to information promotes justice in administrative proceedings just as it does in litigation; (2) the importance of IRS investigations to the integrity and equity of the tax system; (3) the intent of Congress to give the IRS a wide-ranging field of inquiry and powerful tools to accomplish the task; and (4) the inability of the IRS to know, initially, the nature, importance and relevance of documents it seeks, or even to know *what* data to seek—and the corollary that the facts are largely or even exclusively within the taxpayer's knowledge or control. The court formulated this rule: where a party resists disclosure on work-product grounds, the IRS satisfies an initial burden to show need by making a good faith declaration that the documents are believed to be necessary to the determination of the taxpayer's correct tax liabilities and that it believes the information cannot be obtained from any other source.[288] The burden then shifts again to the party asserting the right to withhold evidence to disprove these assertions.

This procedure appears to be a reasonable compromise. It effectively shifts the burden of proving a negative—lack of need and/or the presence of an alternative source—but the shift is to the party in control of the facts. In a corporate sensitive payments investigation, it will almost always be possible for the IRS's investigating agent to declare in good faith that he has no alternative sources[289] and that he needs the data; the slush fund is by defini-

284. 3 MEZINES, *supra* note 264, §§ 1901-03.

285. 478 F.2d 1038 (7th Cir. 1973), *aff'g* 349 F. Supp. 420 (N.D. Ill. 1972). *See also Sun Company*, 599 F.2d 1224.

286. 478 F.2d at 1040-41.

287. *See id.* at 1041.

288. 349 F. Supp. at 431.

289. Such a declaration, if not proof, is effectively a requirement of the showing of need in any event. *See Sun Company*, 599 F.2d 1224.

tion clandestine both in operation and in accounting.[290] The investigating agent would nevertheless be under a duty to make an actual good faith effort to find and interview the employees themselves, perhaps to the extent of issuing summonses to them.

On the other hand, the corporation itself is the party which knows the pertinence to or effect on tax returns and liabilities of the summoned data. It would obviously know the contents of interview notes, questionnaires and appended accounting data. It would therefore be in a better position to evaluate the summoned data's effect on the IRS's investigation and to prove lack of necessity. It would not be unfair to place such a burden on the corporation. *Brown* places the burden of proving the work-product defense back on the traditional party—the party in control of the facts.

While *Brown's* adoption of a reduced showing of need in the context of an IRS summons comports with the underlying principle that need must be shown to defeat the work-product defense, the argument may compel the rejection of the defense altogether when applied specifically to an agency investigation of a corporation's questionable payments practices. The cases which explicate the principle of "substantial need" can be distilled to two simple tests. (1) Does the party seeking discovery have an alternative to raiding opposing counsel's files? (2) Has the alternative been tried?[291] Some courts hold that sufficient need is shown simply because one party has exclusive control over the facts, or exclusive or superior opportunity to ascertain the facts.[292] Under this liberal view of need, the court need be convinced only that the beneficial objectives of pre-trial discovery will be achieved,[293] or that the information sought is directly in issue and the need for it compelling.[294] Such factors as lapse of time, likely hostility of witnesses,

290. Few employees know about it; fewer would likely be willing to talk. Employees would be naturally reluctant to disclose their malefactions, not only because the disclosure could subject them to personal criminal liability, but also because their corporate employer would also be exposed to liability. Moreover, as noted elsewhere, the IRS investigates several years after the events, further complicating a delicate investigation.

291. Indeed, several courts have framed the standard of need in terms not of the witness' availability or the seeker's efforts, but in terms of the uniqueness of the documents sought. Merrin Jewelry Co. v. St. Paul Fire & Marine Ins. Co., 49 F.R.D. 54, 57 (S.D.N.Y. 1970). The documents generated by the corporations in their questionable payments investigations can easily be seen to be unique. *See* note 30 *supra.*

292. People of State of California v. United States, 27 F.R.D. 261 (N.D. Cal. 1961).

293. Crowe v. Chesapeake & Ohio Ry. Co., 29 F.R.D. 148, 151 (E.D. Mich. 1961).

294. Bird v. Penn Central Co., 61 F.R.D. 43.

and control of alternatives by the other party, would go to the determination of whether there was a compelling need for the information.[295]

In an IRS administrative investigation or any other agency inquiry into a corporation's questionable payments practices, all of these elements would be present. The only practically available source for the facts would be the target corporation itself. Moreover, since the payments would be concealed by design in fictitious accounts or hidden by other means, no alternative domestic source (e.g., land records, unambiguous bank records, etc.) would exist. Not only would the information the agency sought be vital to its case, but also it would be the very reason for the investigation itself.

CONCLUSION

The *Upjohn* decision has undoubtedly caused major corporations and their counsel to breathe a collective sigh of relief. Despite the Supreme Court's disclaimers to the contrary, it has in fact fashioned very broad rules, and while the Court's reasoning is subject to question, at least the law is clear. As one commentator has put it: "The opinion solves the problem for me of whether I can talk to low-level personnel. The answer is yes."[296]

But like so many broad rules, *Upjohn* may carry the seeds of its own modification. The decision itself is a blueprint, an expert's guide, for the fabrication of privilege, and lawyers are likely to employ that blueprint in unintended ways. There will now be a strong incentive and temptation to shield anything remotely sensitive by funneling it through an attorney's interview or investigation. A danger that the opponents of the subject matter test have foreseen—management's possible "hear no evil, see no evil" attitude—may take on the spectre of harsh reality. That prospect of an ever-broadening "zone of silence" finds support in the Court's acknowledgment that so many aspects of modern corporate behavior require legal guidance. This statement would, of course, be especially true for matters known to be "sensitive" in the first place.

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295. Southern Ry. Co. v. Lanham, 403 F.2d 119, 127-31 (5th Cir. 1968), *rehearing denied*, 408 F.2d 34 (5th Cir. 1969). The Fifth Circuit would not even require the moving party to proceed by way of depositions first.

296. Huffman, *Upjohn Tells How to Ensure Privilege for all Employees*, Legal Times of Washington, Jan. 19, 1981, at 1, col. 1.

The Court's brave new world of privilege will thus spawn difficulties for the district courts and courts of appeals for years to come. Both in private civil and in criminal litigation, it is likely that courts will see the very careful crafting of cocoon-tight privilege claims by the deliberate redirection of data through lawyers. Such an incentive and temptation—due solely to the inherent features of the subject matter test effectively adopted by the Court—appear to be of questionable compatibility with the traditional conception of the attorney-client privilege.

The Court's refusal to bifurcate the concept of "client" in the corporate area also may breed problems for lawyers. Potential conflicts of interest and problems of multiple representation always loom in the course of the representation of corporations. Now that the Supreme Court has declared *all* employees to be protectable, the potential for conflicts of interest will multiply.

In the end, the pattern of future cases may well show a retreat from the *Upjohn* rules, or at least their limitation, when difficulties of discovery and potential conflicts of interest start to prevent effective truth-finding. The courts are not likely to tolerate for long a set of rules which has the potential, in the hands of imaginative lawyers, to undercut the courts' effective functioning. Such a process, however, as the Supreme Court said in *Upjohn*, must be worked out on a case-by-case basis. The *Upjohn* rules will thus be with the courts for years to come.