University of Dayton Law Review

Volume 7 | Number 1 Article 13

1981

Evidentiary Privilege: Help for Corporations? The Supreme Court Rejects the Control Group Test: Strengthens the Work-Product Doctrine

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EVIDENTIARY PRIVILEGE: HELP FOR CORPORATIONS? THE SUPREME COURT REJECTS THE CONTROL GROUP TEST: STRENGTHENS THE WORK-PRODUCT DOCTRINE—*Upjohn Co. v. United States*, 449 U.S. 383 (1981).

INTRODUCTION

The attorney-client privilege,[1] and its application to corporations, has long been a source of confusion in the federal courts.[2] The disorder stems from the competing interests arising between the liberal scope of discovery and the secrecy important to the attorney-client privilege.[3] The attorney-client privilege has been viewed as an exception to the general rule that the scope of discovery is to be liberally construed in order to provide all parties with information essential to proper litigation on all facts.[4] Even as an exception, however, the

1. The attorney-client privilege includes the broad ethical obligation of the attorney not to disclose the confidences of his client, as well as the evidentiary privilege that arises in litigation. Burke, *The Duty of Confidentiality and Disclosing Corporate Misconduct*, 36 BUS. LAW 239, 241 (1981); ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON NO. 4 (1976); *See generally* Van Dusen, *The Responsibility of Lawyers: Advising Management Under the ABA Code of Professional Responsibility*, 46 N.Y. ST. B.J. 565 (1974).

A much used definition of the attorney-client privilege is found in 8 J. WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. ed. 1961).

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

Id.

2. *See* Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972). Note, *United States v. Upjohn Co., The Sixth Circuit Adopts the Control Group Test*, 9 CAP. U.L. REV. 809 (1980); Note, *The Corporate Attorney-Client Privilege: The Subject Matter Test v. The Control Group Test: Will Reasonableness Prevail? United States v. Upjohn*, 5 DEL. J. CORP. L. 480 (1980); Note, *The Privileged Few: United States v. Upjohn—What Is the Scope of the Attorney-Client Privilege for a Corporation?* 25 S.D.L. REV. 415 (1980) [hereinafter cited as *The Privileged Few*]; Note, *Control Group Test Adopted as Standard for Assertion of Attorney-Client Privilege by Corporate Client—United States v. Upjohn Co.*, 58 WASH. U.L.Q. 1041 (1980) [hereinafter cited as *Control Group Test Adopted*].

3. The underlying rationale of both the attorney-client privilege and the broad scope of discovery is to promote the administration of justice. *See* United States v. Gordon-Nikkar, 518 F.2d 972 (5th Cir. 1975); Greyhound Lines, Inc. v. Miller, 402 F.2d 134 (8th Cir. 1968); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974); 8 J. WIGMORE, *supra* note 1, § 2192, at 70; Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759 (1971) [hereinafter cited as *Privileged Communications*].

4. *See* Mitsui & Co. (U.S.A.) Inc. v. Puerto Rico Water Resources Auth., 79

privilege has importance of its own in the dissemination of information.[5] Although confidential communications may be relevant, their disclosure may impair the social good derived from the proper performance of the functions of lawyers for their clients.[6] Only a fully-informed lawyer can render effective legal advice.[7] Unless clients are certain information they supply to their attorneys will not be discovered and used against them, it is unlikely lawyers will receive full information.[8]

F.R.D. 72 (D. Puerto Rico 1978). In deference to the goals of liberal discovery, some courts have attempted to limit the use of the attorney-client privilege. United States v. Goldfarb, 328 F.2d 280 (6th Cir. 1964); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963); United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950).

Wigmore has likewise attacked the attorney-client privilege.

> [T]he privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

8 J. WIGMORE, *supra* note 1, § 2291 at 554.

The nondisclosure of information sought through discovery hinders the fact-finding process. *The Privileged Few, supra* note 2, at 416; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 87, at 175 (2d ed. 1972).

5. *See* notes 3-4 *supra*. The purpose of the attorney-client privilege rests on the attorney being fully informed. Upjohn Co. v. United States, 449 U.S. 383 (1981); *See* Trammel v. United States, 445 U.S. 40 (1980); Fisher v. United States, 425 U.S. 391 (1976); United States v. Pfizer, Inc., 560 F.2d 326 (8th Cir. 1977).

6. Comercio E Industria Continental, S.A., v. Dresser Indus., Inc., 19 F.R.D. 513 (S.D.N.Y. 1956); MODEL CODE OF EVIDENCE rule 210 (1942).

7. *See* note 5 *supra*. *See* 8 J. WIGMORE, *supra* note 1, §§ 2290, at 543, 2291. In *Upjohn* Justice Rehnquist espoused the idea that, "[The privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." 449 U.S. at 389.

The Supreme Court also stated that the attorney-client privilege protects not only information given to the client (those able to act on legal advice), but also information given to the lawyer to enable him to give legal advice. *Id.* at 390. *See also* Pitney-Bowes, Inc. v. Mestre, 86 F.R.D. 444 (S.D. Fla. 1980) (privilege extends to communications from attorney to client as well as from client to attorney).

Other rationales for protecting the attorney-client privilege include:

1. The notion that increased disclosure between attorney and client increases assurance that the law is being complied with. *See The Privileged Few, supra* note 2, at 416; 449 U.S. at 392. The Court discussed this rationale's particular applicability to corporations who, unlike most individuals, must frequently consult attorneys about complex business transactions in order to ensure that those activities are within the bounds of the law.

2. The notion that, because the relationship between attorney and client is one of privacy, fears that communications might be revealed would hinder the administration of justice. 449 U.S. at 389.

8. C. MCCORMICK, *supra* note 4, § 87, at 175; 8 J. WIGMORE, *supra* note 1, §§ 2290, at 543, 2291, at 545; *The Privileged Few, supra* note 2, at 415-16.

Another recognized exception to the broad scope of discovery is the work-product doctrine.[9] Absent an adverse party's substantial need for materials in preparation of his case, the doctrine protects against disclosure of any memoranda, notes, or working papers created by an attorney in anticipation of litigation. In addition, an attorney need not reveal his mental impressions, conclusions, opinions, or legal theories concerning the litigation.[10] The work-product doctrine is based primarily on the right of a lawyer to enjoy privacy while preparing a case for litigation.[11] While still an important function in the fair administration of justice, the work-product doctrine, like the attorney-client privilege, runs head on against the goals of liberal discovery.[12]

FACTS AND DECISION

The Supreme Court in *Upjohn Co. v. United States*,[13] addressing the battle between the goals of liberal discovery and the exceptions

9. The work-product doctrine, which was first articulated in Hickman v. Taylor, 329 U.S. 495 (1947), is now codified in FED. R. CIV. P. 26(b)(3). The rule provides in pertinent part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering the discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

While the work-product doctrine is similarly supported by the rationales of privacy and administration of justice, it is distinct from and broader than the attorney-client privilege. United States v. Nobles, 422 U.S. 225 (1975); Duplan Corp. v. Deering Milliken, Inc., 61 F.R.D. 127 (D.S.C. 1973); *Privileged Communications, supra* note 3, at 30. The attorney-client privilege is a privilege owned by the client, which may be invoked by the attorney or the client. The work-product doctrine is a privilege of the attorney and may be invoked only by the attorney.

Information that may not be privileged from discovery under the attorney-client privilege may still be exempt under the work-product doctrine. 449 U.S. at 401. The work-product doctrine principally protects mental processes of the attorney, providing a privileged area within which to analyze and prepare a client's case. United States v. Nobles, 422 U.S. 225 (1975).

10. FED. R. CIV. P. 26(b)(3).

11. Hickman v. Taylor, 329 U.S. 495 (1947); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963); United States v. 38 Cases, More or Less, 35 F.R.D. 357 (W.D. Pa. 1964).

12. *See* notes 3-5 *supra*.

13. 449 U.S. 383 (1981), *rev'g in part*, United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979).

thereto,[14] held that under certain circumstances communications between corporate attorneys and corporate employees made pursuant to an internal corporate investigation are protected from disclosure to the Internal Revenue Service.[15] The Court also made clear that the work-product doctrine is applicable to Internal Revenue Service summonses.[16]

In *Upjohn*, the petitioner[17] was informed by its independent accountants that one of the company's foreign subsidiaries had made payments directly or indirectly to foreign government officials, presumably to enhance business opportunities abroad.[18] Upjohn began

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14. *See* notes 1-7 *supra*.

15. 449 U.S. at 383.

16. Under I.R.C. § 7602, the Internal Revenue Service (I.R.S.) may summon a person to produce for I.R.S. examination any books, papers, records, or other data which may be relevant or material to an I.R.S. inquiry into the correctness of a tax return. If the person summoned under § 7602 neglects or refuses to obey the summons, the United States District Court for the district in which the person resides or is found, has jurisdiction to compel compliance with the summons and order an attachment for contempt if the summons is not obeyed. I.R.C. § 7604.

The principal issues in *Upjohn* revolved around the company's refusal to comply with an I.R.S. summons which demanded production of

> [a]ll files relative to the investigation conducted under supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period. The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.

449 U.S. at 387-88.

The company felt that the information demanded in the second part was guarded from disclosure by both the attorney-client privilege and the work-product doctrine. The Sixth Circuit Court of Appeals gave the work-product issue cursory treatment by footnoting that the work-product doctrine did not apply to an I.R.S. summons under § 7602. 600 F.2d 1228 n.13. The Supreme Court, however, dissatisfied with the lower court's loose, conclusory language, took up the issue in detail. The Court investigated the legislative history of the I.R.S. provisions, read the plain meaning of the statutes, and cited case law to support its conclusion that the work-product doctrine indeed is applicable to a tax summons. 449 U.S. at 398-99.

17. The Upjohn Company is a worldwide producer and distributor of pharmaceuticals. Mr. P.T. Parfet Jr. is the company's Chairman of the Board. Mr. Gerard Thomas is Upjohn's Vice President, Secretary, and General Counsel.

18. The payments of approximately $4,400,000 were first discovered while Upjohn's independent accountants were auditing the books of the foreign subsidiary. The company voluntarily provided the I.R.S. with limited information which ultimately prompted the I.R.S. to conduct an audit of Upjohn's 1972-73 consolidated federal income tax return. Upjohn also disclosed details of the questionable payments to the Securities and Exchange Commission on Form 8-K in hopes of receiving lenient treatment by the SEC. 600 F.2d at 1225. For a thorough discussion of the SEC Voluntary

an internal investigation of the payments by preparing and distributing a letter containing a questionnaire to all foreign and general area managers, seeking detailed information concerning the payments.[19] The managers were informed that the purpose of the questionnaire was to gain full information regarding the nature and magnitude of any payments.[20] Managers were also aware that the investigation was highly confidential and was not to be discussed with anyone other than those Upjohn employees who might be helpful in providing information.[21]

After discovering information regarding Upjohn's questionable payments, the Internal Revenue Service demanded production of the questionnaires and counsel's notes on the interviews to determine the effect of any such payments on Upjohn's tax liability.[22] Upjohn refused to comply with the I.R.S. demand, asserting protection by the attorney-client privilege and the work-product doctrine.[23]

The United States District Court for the Western District of Michigan enforced the summons for documents. The decision was affirmed in part, reversed in part, and remanded by the Sixth Circuit Court of Appeals.[24] The court of appeals adopted the "control group" test as the standard for determining the scope of the attorney-client privilege in the corporate context. While it recognized that the attorney-client privilege is applicable to corporations,[25] the sixth circuit

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Disclosure Program, see Note, *Discovery of Internal Corporate Investigations*, 32 STAN. L. REV. 1163, 1166-68 (1980).

19. 449 U.S. at 386-87. The decision to investigate the payments was a result of consultation among Upjohn's Chairman, its General Counsel, and outside counsel. The letter and questionnaires were prepared by Upjohn's in-house counsel. Upjohn's General Counsel interviewed recipients of the questionnaires and other Upjohn employees. *Id.*

20. *Id.*

21. *Id.*

22. *Id. See* note 16 *supra*.

23. 449 U.S. at 388. *See* notes 9 & 16 *supra*. Upjohn did provide the I.R.S. with a list of employees who had communicated with the General Counsel and outside counsel. The I.R.S. subsequently interviewed 25 persons named on the list. 449 U.S. at 396.

24. 600 F.2d at 1227-28.

25. *Id.* at 1226. Courts and authors have repeatedly assumed that the attorney-client privilege applies to corporations. United States v. Louisville and Nashville R.R., 236 U.S. 318 (1915); Georgia-Pac. Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956); Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792 (D. Del. 1954); United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass 1950); MODEL CODE OF EVIDENCE rule 209(a) (1942); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 503(b)[04], at 41 (1981); Comment, *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation*, 39 FORDHAM L. REV. 281 (1970); Comment, *The Applicability of the Attorney-Client*

found that the communications made between in-house counsel and the company's subordinate corporate agents and employees were not protected by the privilege for the simple reason that the communications were not the "client's."[26]

The United States Supreme Court rejected the control group test as the standard of applicability of the attorney-client privilege to corporations, remanding the case for further proceedings on Upjohn's work-product claim.[27]

ANALYSIS

Despite conflict in the federal courts and considerable prompting from commentators,[28] the Supreme Court set no clear standard for future cases applying the attorney-client privilege to corporations. Instead, the Court rejected the control group test; drafted narrow standards applicable solely to the *Upjohn* facts; and stressed the work-product doctrine as additional and alternative support for its decision.[29]

Privilege to a Corporation—The Current Evolution of an "Accepted" Rule of Law, 17 U. MIAMI L. REV. 382 (1963).

The first case to squarely address the issue was Radiant Burners v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963). The court reversed the district court's ruling that the privilege did not apply to a corporate client. *Id.* at 324. The court also footnoted a lengthy list of cases to support its holding that the attorney-client privilege is appurtenant to the corporation. *Id.* at 319-20 n.7. For expansive commentary on the district court's decision in *Radiant Burners*, see Note, *Corporations—Attorney-Client Privilege—Nonavailability of the Privilege to Corporations*, 4 B.C. INDUS. & COM. L. REV. 416 (1963); Note, *Evidence: Federal Rules of Civil Procedure: Attorney-Client Privilege as Applied to Corporations*, 48 CORNELL L.Q. 551 (1963); Note, *Privileged Communications—Attorney and Client—A Corporation May Not Invoke the Attorney-Client Privilege*, 76 HARV. L. REV. 655 (1963); Note, *Attorney-Client Privileges: Application To A Corporate Client*, 46 MARQ. L. REV. 551 (1963); Note, *Attorney-Client Privilege Held Not Available to Corporations*, 37 N.Y.U.L. Rev. 955 (1962).

Although the applicability of the privilege to corporations is well settled, confusion still exists on the crucial question who qualifies as the corporate client. *See* Note, *The Attorney-Client Privilege—Identifying the Corporate Client*, 48 FORDHAM L. REV. 1281 (1980); Kobak, *supra* note 2; *Privileged Communications, supra* note 3.

26. 600 F.2d at 1225. The court reasoned that since corporations are inanimate, artificial entities, employees involved with compartmentalized responsibilities do not represent the entire corporation. The opinion by Judge Merritt stated, "[i]t is only the senior management, guiding and integrating the several operations, which can be said to possess an identity analogous to the corporation as a whole." *Id.* at 1226.

27. 449 U.S. at 402.

28. For articles generally critical of the control group test and in favor of developing a standard for future cases, see Note, *Application of the Attorney-Client Privilege to Corporations: New Directions and a Proposed Solution*, 20 B.C.L. REV. 953 (1979); *See also* note 2 *supra*.

29. 449 U.S. at 386.

A. Rejection of the Control Group Test

The Supreme Court viewed its problem as one of deciding if and how to apply the attorney-client privilege to the facts before it in order to be consistent with the purpose of the privilege.[30] Justice Rehnquist, writing for the majority, viewed the purpose of the attorney-client privilege as the encouragement of full and frank communication between attorneys and their clients, thereby promoting broader public interests in the observance of law and administration of justice.[31] The majority justified each of its objections to the control group test on the basis that the test did not foster the purpose and policies of the attorney-client privilege, as the Court saw them.

The Court first refused to apply the control group test originally articulated in *City of Philadelphia v. Westinghouse Elec. Corp.*[32] The control group test limits the number of employees who may claim the attorney-client privilege on behalf of the corporation. The *City of Philadelphia* court extended the privilege to an employee only

> if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an 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.[33]

The control group test is intended to limit exceptions to the broad scope of discovery.[34] Fears that needed information would be made privileged by funneling it through corporate attorneys led to increased support of the control group test. Courts advocating the test believed a broad "zone of silence" would be created if the attorney-client

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30. *Id.* at 389.

31. *Id. See* note 7 *supra.*

32. 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

33. 210 F. Supp. at 485. Other cases adopting the control group test include: Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D. Pa. 1970); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963).

A much cited commentary regarding the control group test is Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970) [hereinafter cited as *Attorney-Client Privilege for Corporate Clients*].

34. *See* note 3 *supra.* United States v. Upjohn Co., 600 F.2d 1223, 1227 (6th Cir. 1979); Comment, *The Privileged Few: The Attorney-Client Privilege As Applied to Corporations*, 20 U.C.L.A. L. REV. 288, 300 (1972).

privilege were extended beyond control group members.[35] Reiterating misgivings about restricting the scope of discovery, the sixth circuit in *Upjohn* held that only communications made by top management to the corporation's attorney, which otherwise met the requirements of the attorney-client privilege, would be protected from disclosure.[36]

Unlike an individual client, who alone provides information to his lawyer and then acts upon advice returned, the corporate client includes middle and lower level employees who necessarily possess information needed by the corporation's lawyers but at the same time are not responsible for acting on the attorney's advice.[37] The *Upjohn* Court aptly pointed out that advocates of the control group test, by limiting protected communications to those made between lawyers and persons in control, embrace only half of the purpose of the attorney-client privilege. The advocates' approach fails to distinguish clients' dual roles as providers of information and actors on returned advice.[38] The majority criticized this approach in light of the purpose of the attorney-client privilege. "Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[39] The modern corporation is structured in a way that places middle and lower level employees in a position to obtain relevant information needed by corporate counsel.[40] Even though the lower-echelon employees are not normally responsible for acting upon advice given by corporate attorneys, it is vital that information they possess be communicated to counsel.[41]

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35. 600 F.2d at 1227. Simon, *The Attorney-Client Privilege As Applied to Corporations*, 65 YALE L. J. 953, 955 (1956). Simon's article first voiced the "zone of silence" phrase. Simon asserted that corporations with their large number of agents, masses of documents, and frequent dealings with lawyers have a greater ability to insulate and hide many of their activities by discussing them with legal advisers. Thus, a "zone of silence" is created over corporate activities.

36. 600 F.2d at 1226.

37. 449 U.S. at 391.

38. *Id. See Control Group Test Adopted, supra* note 2, at 1051.

39. 449 U.S. at 390.

40. In commentary written before the *Upjohn* decision, authors recognized that modern corporations and their structures are complex mazes, with high level management relying daily on information supplied by employees not members of a control group. *See, e.g.*, Note, *Corporations—Attorney-Client Privilege—The Attorney-Client Privilege Is Applicable to a Corporate Employee's Communication if the Employee Makes it at the Direction of His Superior to Secure Legal Advice for the Corporation, if the Subject Matter Is Within the Scope of the Employee's Corporate Duties, and if its Contents Are Not Disseminated Beyond Persons Who Need to Know Them*, 47 GEO. WASH. L. REV. 413, 424 (1979).

41. The Supreme Court pointed out that in some instances lower level employees

Adoption of the control group test would give an attorney dealing with a complex legal problem a "Hobson's choice."[42] If a corporate attorney chose not to seek information from non-control group members in order to preserve application of the attorney-client privilege, he or she would run the high risk of not being fully informed of relevant facts. If the attorney decided to interview lower level employees in order to obtain information, fears that such information, now discoverable through loss of the attorney-client privilege, would be subsequently used against the supplying employee could restrict full and frank communication. Thus, the very purpose of the attorney-client privilege would be thwarted. The consequences of this misguided approach can be seen in the example of a truck driver for a large corporation. If he is involved in an accident for which the company may be liable, he could well be the only one able to tell the corporate attorney what happened. Since the driver is not a member of the control group, corporate counsel could be compelled to disclose to the opposing party what the driver said regarding the accident.[43] Such a result would surely undermine the very nature of the attorney-client privilege.

The Supreme Court also based its rejection of the control group test on the test's adverse effect on the corporate lawyer's role as part of the managing team of the corporation. The corporate lawyer not only formulates advice when the client is faced with a specific legal problem, but also supplies and seeks day-to-day information to ensure corporate compliance with the law. The attorney's task is a formidable one in light of the complex regulatory laws facing modern corporations today.[44] If corporate attorneys are stymied in their efforts to become fully informed, their valuable efforts and contributions as part of corporate management threaten to become limited.[45]

While on its face the control group test would appear to lead to predictable results, in practice it is difficult to apply.[46] The test limits protection of the attorney-client privilege to those who play a substan-

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may be responsible for acting upon legal advice rendered. 449 U.S. at 392. This observation strengthens rejection of the control group test because both purposes of the attorney-client privilege are satisfied by lower level employees. *See* Duplan Corp., v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D.S.C. 1974).

42. 449 U.S. at 391-92 (quoting Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 608-09 (8th Cir. 1977)).

43. Stern, *Attorney-Client Privilege: Supreme Court Repudiates the Control Group Test*, 67 A.B.A.J. 1142, 1143 (1981).

44. 449 U.S. at 392.

45. *Id. See also* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D.S.C. 1974); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977).

46. 449 U.S. at 393.

tial role in deciding a corporation's response to legal advice.[47] It is not always clear who fits within this category, making the control group test an uncertain privilege. The purpose of full and frank communication cannot be served if the attorney and client cannot predict with some degree of certainty what discussions will be protected.[48] This problem with the control group test was pointed out by the majority which stressed that any standard applied must serve the purpose of the attorney-client privilege.[49]

The Supreme Court also refused to adopt the broader "subject matter" test in its *Upjohn* decision.[50] The subject matter test was set forth by the seventh circuit in *Harper & Row Publishers, Inc. v. Decker*,[51] and modified by the eighth circuit in *Diversified Indus., Inc.*

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47. *Id. See* note 33 *supra*.

48. *Compare, e.g.*, Hogan v. Zletz, 43 F.R.D. 308, 315-16 (N.D. Olka. 1967), *aff'd in part sub nom.* Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968) (control group includes managers and assistant managers of patent division and research and development department) *with* Congoleum Indus., Inc. v. GAF Corp., 49 F.R.D. 82, 83-85 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3d Cir. 1973) (control group includes only division and corporate vice presidents, and not two directors of research and vice president of production and research). 449 U.S. at 393.

49. 449 U.S. at 393.

50. *Id.* at 386. Although the Court focused its attention on refuting the control group test, it is important to understand the subject matter test because the guidelines set forth in the *Upjohn* holding resemble the standards in the subject matter test.

51. 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided Court*, 400 U.S. 348 (1971). Justice Douglas took no part in the affirming decision.

The plaintiffs, consisting of state and local governments, public schools, and public libraries, filed antitrust actions against various publishers and wholesalers of children's library books for alleged conspiracies to inflate prices. The United States District Court for the Northern District of Illinois, finding that the attorney-client privilege did not prevent discovery, permitted the plaintiffs to inspect and copy certain memoranda, all but one of which were prepared by company attorneys during interviews of employees shortly after they had testified before a federal grand jury. The United States Court of Appeals, Seventh Circuit, issued a writ of mandamus compelling the lower court to vacate its order. The subject matter test was initiated in the court's conclusion.

> [A]n 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 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 communication is the performance by the employee of the duties of his employment.

423 F.2d at 491-92.

For an expanded discussion of *Harper & Row*, see Note, *Attorney-Client Privilege for Corporate Clients, supra* note 33; Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360 (1970); *Privileged Communications, supra* note 3; *The Privileged Few, supra* note 2.

The Supreme Court had an opportunity to clarify the law when it granted certiorari to hear the *Harper & Row* case. Instead, however, the Court foreshadowed its reluctance to set down a specific test for future cases by affirming the *Harper & Row* deci-

v. Meredith.[52] The subject matter test provides a privilege of nondisclosure for communications between an employee and corporate counsel when that employee possesses employment related information

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sion without opinion. Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COM. L. REV. 873, 877 (1971); Note, *Civil Procedure—Attorney-Client Privilege—Privilege Protects Communications Made by Corporate Employee To Secure Legal Advice and a Matter Committed to a Professional Legal Advisor Is Prima Facie Committed To Secure Legal Advice*, 13 VAND. L. REV. 667, 672 (1978) [hereinafter cited as *Civil Procedure*].

52. 572 F.2d 596 (8th Cir. 1977). The corporate defendant, Diversified Industries Inc., sought to protect from discovery the contents of a certain memorandum and report prepared for its benefit by outside counsel. The defendant was sued in the district court for unlawful conspiracy. The plaintiff, Weatherhead Company, allegedly was paid large sums of money out of Diversified's "slush fund" to procure the purchase from Diversified by Weatherhead of large amounts of inferior copper. 572 F.2d at 600. The memorandum was a full and detailed report of Diversified's internal investigations into the payments. It identified persons who had been interviewed and set out the substance of what they had said. It discussed persons who did not give information, mentioning instructions given to employees demanding their cooperation with the law firm. 572 F.2d at 601. On hearing en banc, Judge Heaney announced that, subject to certain restrictions, the *Harper & Row* subject matter test was the proper standard by which to measure the scope of a corporation's attorney-client privilege. The modified subject matter test adds stipulations which narrow the application of the test.

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

572 F.2d at 609.

For detailed commentary on the *Diversified* decision see Note, *Attorney-Client Privilege—Diversified Industries, Inc., v. Meredith: New Rules for Applying the Privilege When the Client Is a Corporation*, 57 N.C. L. REV. 306 (1979) (test balances the narrowness of the control group test with the expansiveness of the *Harper & Row* decision); Note, *The Corporate Attorney-Client Privilege—A Compromise Solution*, 11 CONN. L. REV. 94 (1978) (modified test provides a middle ground between the criticisms of the control group test and the *Harper & Row* decision); Note, *Corporate Attorney-Client Privilege—Diversified Industries, Inc. v. Meredith: The Modified Harper & Row Test*, 4 J. CORP. L. 226 (1978) (new test curbs *Harper & Row's* potential for abuse and still allows for a greater degree of privilege than does the control group test).

Although the *Harper & Row* and *Diversified* decisions have been discussed as having similar sum and substance, the *Diversified* test stands for the position of better protecting the purpose underlying the attorney-client privilege. The largest potential for abuse in the *Harper & Row* test is the corporation's ability to funnel most corporate communications through attorneys in order to prevent discovery. 572 F.2d at 609. Under the *Diversified* test, the receipt of ordinary business reports by the company's attorneys would not be sufficient to invoke the privilege. The added stipulations requiring that the communications be made for the purpose of securing legal advice and not be disseminated beyond those persons who, because of the corporate structure, need to know their contents, would not be met. *Supra* note 50.

acquired in the ordinary course of business and when the employee confidentially disseminates the information to corporate counsel in order to assist the attorney in giving legal advice to the corporation.[53] The subject matter test offers a wider and more practical reach for the attorney-client privilege and is not based on the rank or status of a particular employee. The Court refused, however, to base its decision on a choice between the control group and subject matter tests. Significantly, the Court did not quiet the conflict among the circuit courts debating the choice before the *Upjohn* decision.[54]

B. Adoption of a Narrow Standard

The *Upjohn* decision supplies corporations conducting internal investigations of possible wrongdoing with some guidelines on how to conduct such procedures in order to ensure protection by the attorney-client privilege.[55] The *Upjohn* Court was willing to define a "test" to serve corporate attorneys advising their clients in at least this narrow area of the law. Although the Court did not articulate a standard to govern all cases, by holding that the communications at issue were privileged, it aligned itself with the modified subject matter test of the eighth circuit in *Diversified*.[56]

The majority noted that the communications at issue were made by Upjohn employees to corporate counsel to aid in formulating legal advice.[57] The communications were made at the direction of corporate superiors.[58] The communications concerned subject matter within the scope of the employees' duties and were considered "highly confidential" when made.[59] By stressing these factors, the Court had essentially applied the elements of the modified subject matter test to the *Upjohn* facts.

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53. 600 F.2d at 1226.

54. The District Courts of the Second, Fourth, Ninth, and District of Columbia Circuits, and the Courts of Appeal for the Seventh and Eighth Circuits adopted the subject matter test. The Court of Appeals for the Third Circuit firmly adopted the control group test, as did the Sixth Circuit. *See Control Group Test Adopted, supra* note 2, at 1048.

55. Recently, there has been a sharp rise in the number of companies retaining special counsel to investigate internal corporate wrongdoing. Brodsky, *The "Zone of Darkness": Special Counsel Investigations and the Attorney-Client Privilege*, 8 SEC. REG. L. J. 123 (1980). *See also* SEC v. Citizens & S. Realty Investors, 450 SEC. REG. & L. REP. A-15 (BNA 1978); SEC v. IU Int'l Corp., 450 SEC. REG. & L. REP. A-15 (BNA 1978).

56. *See* note 52 *supra*. Feld, *Supreme Court in Upjohn Protects Attorney-Client Privilege; Upholds the Work-Product Doctrine*, 54 J. TAX. 210, 212 (1981).

57. 449 U.S. at 394.

58. *Id.*

59. *Id.* at 395.

In addition to the elements of the modified subject matter test, the Court added two factors of its own that it considered important to the preservation of the attorney-client privilege in the *Upjohn* decision. First, the Court emphasized that the information needed by counsel, which would supply the basis for legal advice, was not available from upper-echelon management.[60] Second, it noted that the employees were aware they were being questioned in order that the corporation could obtain legal advice.[61] Adoption of these factors indicates the Court's awareness of the complex functioning of a modern corporation.

Although the Court identified elements for determining the applicability of the attorney-client privilege to corporations, the *Upjohn* decision nevertheless represents a narrow holding.[62] Except in the limited context of investigating internal wrongdoing, no new standards were set nor old tests clarified. In fact, the Supreme Court has furthered confusion in federal courts by simply adding elements to a preexisting test.[63] While rejecting the control group test as too narrow, the Court used the facts before it to tighten up the modified subject matter test in order to calm the fears of a large "zone of silence."[64] Consequently, the degree of predictability essential to the purpose of the attorney-client privilege is still lacking. Corporate counsel are aware of the factors applicable to the *Upjohn* facts as stated by the Supreme Court, but are unaware of the impact or importance of these factors in subsequent investigations.

The Court's failure to provide more guidance spurred a concurring opinion by Chief Justice Burger.[65] In deference to the purpose of the attorney-client privilege and the duty of the Court to provide guidance, the Chief Justice would have articulated a standard to govern similar cases. Chief Justice Burger's general rule would have read,

> [A] communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of

60. *Id.* at 394.

61. *Id.* The questionnaire clearly indicated the legal implications of the interviews. A statement attached to the questionnaire indicated that "all payments must be proper and legal." The statement began, "Upjohn will comply with all laws and regulations," and continued by saying that commissions or payments would "not be used as a subterfuge for bribes or illegal payments." *Id.* at 395.

62. *See* note 29 and accompanying text *supra.*

63. *But see* Feld, *supra* note 56, at 213 (Court's refusal to adopt a particular test may be an implicit invitation to the lower federal courts to broaden the scope of the privilege).

64. *See* Simon, *supra* note 35, at 955.

65. *See* note 70 *infra.*

> employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.[66]

While the Chief Justice's standard would solidify the guidelines drafted by the majority, it would still leave important questions unanswered regarding the weight to be accorded the various factors relied upon by the *Upjohn* majority.

The fact that the communications were made for the purpose of obtaining legal advice and were considered "highly confidential" are both important in serving the purposes of the attorney-client privilege. These requirements ensure full and frank communication between client and counsel. Thus limited, the privilege protects only communications intended to be confidential,[67] and in the corporate context negates the temptation of corporate management to funnel all information through its attorneys in order to avoid disclosure.[68] The fact that the communications in *Upjohn* concerned matters within the scope of the employees' duties is important in light of the competing interests between the attorney-client privilege and broad discovery. This criterion denies the use of the privilege to an employee who was merely a witness to an event.[69] It is, therefore, another means of blocking corporate misuse of the attorney-client privilege, properly limiting use of the privilege to situations in which its goals are served. Based on the privilege's traditional status as an exception to broad discovery, these factors mentioned by the Court are necessary elements for the application of the attorney-client privilege to corporate investigations and should continue to be so in future cases.

The *Upjohn* Court's requirement that communications be made at the direction of corporate superiors seems valid on its face as a device to protect broad discovery. In practice, however, the requirement overlooks the fact that modern, complex corporations operate in large part by the decision making of middle and lower level employees. This requirement competes with the Court's awareness of the managerial functioning of a large corporation. Furthermore, the Court did not

66. 449 U.S. at 403.

67. IBM Corp. v. Sperry Rand Corp., 44 F.R.D. 10 (D. Del. 1968). *See The Privileged Few, supra* note 2, at 426.

68. *The Privileged Few, supra* note 2, at 426; *Civil Procedure, supra* note 51, at 679.

69. *Id.*

mention what level of corporate management could direct communications between an employee and corporate counsel. Thus, on this particular requirement, corporate counsel and federal courts are faced with the same bewilderment that the control group test presented to them. Unfortunately, Chief Justice Burger's discussion of the requirements in his concurrence also fails to clarify the reasons or need for corporate management's authorization of communications between employee and lawyer.[70]

The new factors added by the Court in *Upjohn* are also unclear for corporate counsel relying on the decision. The Court's emphasizing that upper-echelon management did not possess the information needed to supply a basis for receiving legal advice again indicates its awareness of the functions of the modern corporation. The Court's examination of this issue is, however, "unduly formalistic."[71] The opinion does not make clear whether this factor is a prerequisite to the application of the privilege or merely an observation made by the Court based on the case at bar. The Court also noted that the Upjohn employees were aware they were being questioned in order that the corporation could obtain legal advice.[72] While this fact received extensive commentary from Justice Rehnquist,[73] its relationship to enhancing the goals of the attorney-client privilege is murky. It is arguable that full and frank communication is hampered when corporate employees are made aware that their responses to management's questions carry potential legal consequences.[74] Determining the degree of importance placed upon this factor will be a major difficulty in application of the privilege. If employee knowledge is indispensable to the privilege's application nearly all communications between corporate counsel and employees will be less than candid. While it is more

70. 449 U.S. at 403. Rejecting the control group test applied by the court of appeals, Justice Rehnquist commented, "We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so." *Id.* at 386. Justice Rehnquist's refusal to lay down a test to decide the question with mathematical precision conflicts with his desire to articulate a certain privilege to enable the attorney and client to predict with some degree of certainty whether particular discussions will be protected. *Id.* at 393.

In his concurring opinion, which noted the majority's discrepancy, Chief Justice Burger advocated development of a standard that would govern similar cases and afford guidance to corporations, counsel advising them, and the federal courts. *Id.* at 402.

71. Feld, *supra* note 56, at 212. In establishing several other factors in the decision, the Court was sensitive to the fact that the modern corporation is not run in all respects from the boardroom.

72. 449 U.S. at 394.

73. *See* note 61 *supra*.

74. *See* note 8 *supra*.

evident to the employee that an internal corporate investigation may involve legal ramifications, the Court did not indicate whether the privilege would protect communications between attorney and employee when the consequences of a response are undetermined.

C. Work-Product Doctrine Found Applicable to I.R.S. Summonses

Once the Supreme Court rejected the control group test and found that the communications by the Upjohn employees to corporate counsel were covered by the attorney-client privilege, a decision had to be reached regarding Upjohn's contention that its notes and memoranda of the interviews were protected by the work-product doctrine.[75] The Court found that any material subject to the summons which was not protected by the attorney-client privilege fell under the cloak of the work-product doctrine and therefore gained protection from disclosure.[76]

As with the attorney-client privilege, the claim of work-product privilege is not affected by the client being a corporation.[77] The work-product doctrine first announced in *Hickman v. Taylor*[78] cannot properly be described as a privilege. It is simply a requirement that cause be shown if disclosure is to be made of materials created in the course of a lawyer's preparation of a case.[79] In practical effect, however, the work-product doctrine serves as an alternative means of protection from compelled disclosure. When adopting the doctrine, the *Hickman* Court recognized a qualified protection from disclosure of an attorney's written statements, private memoranda, and personal recollections prepared in anticipation of litigation.[80] The *Hickman* Court's rationale is summed up in Justice Murphy's opinion.

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75. 449 U.S. at 397. *See* note 9 *supra*.

76. 449 U.S. at 401. The work-product issue arose principally through Upjohn's assertion that its notes and memoranda of interviews contained more than mere answers to questions. Upjohn sought this alternative means of avoiding disclosure because the attorney-client privilege protects only against disclosure of communications. Additionally, seven of the 86 employees interviewed by Upjohn's counsel had terminated their employment with Upjohn at the time of the interview. While neither the district court, court of appeals, nor Supreme Court addressed the issue whether communications between corporate counsel and ex-employees are privileged, if they are not, the work-product doctrine may provide a means of preventing discovery. *Id.* at 394 n.3.

77. Duffy v. United States, 473 F.2d 840 (8th Cir. 1973); Radiant Burners Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963).

78. 329 U.S. 495 (1947). *See* note 9 *supra*.

79. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). *See* note 9 *supra*.

80. 329 U.S. at 510; Miller, *The Corporate Attorney-Client Privilege and the Work Product Doctrine: Protection from Compelled Disclosure in Criminal Investigation of a Corporation*, 12 U.S.F.L. REV. 569, 592 (1978).

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work-product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing, and the interest of the client and the cause of justice would be poorly served.[81]

Implementation of the work-product doctrine invokes a battle between discovery and non-disclosure similar to that which occurs in applying the attorney-client privilege.[82] The quest for a certain degree of privacy for lawyers often competes with the desire for broad discovery, even though the common end of both is to serve the cause of justice.

The Government in *Upjohn*, attacking the company's assertion of work-product protection, chose not to rely on the sixth circuit's decision that the doctrine did not apply to I.R.S. summonses. Faced with an array of adverse legislative history, past court decisions, and the Federal Rules of Civil Procedure, the Government was aware that its argument would be scant on any of these bases.[83] Instead, the Govern-

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81. 329 U.S. at 510-11.

82. *See* notes 1-7 *supra*.

83. "The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses." 449 U.S. at 397. "Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine." *Id.* at 398. *See also* note 16 *supra*.

FED. R. CIV. P. 81(a)(3) provides, *inter alia*,

> These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided

ment based its argument for requiring production on the magistrate's decision that it had made a sufficient showing of necessity to overcome the doctrine's protection.[84] The *Hickman* decision left open the opportunity for discovery of written materials obtained or prepared by adversary's counsel. Without the possibility of overcoming the doctrine on a showing of necessity, the *Hickman* Court felt that the liberal ideals of deposition and discovery would be stripped of much of their meaning.[85] Relevant and nonprivileged facts that remain hidden in an opposing attorney's file that are essential to the preparation of a case may be discoverable.[86] Requiring production may also be proper where witnesses are no longer available or may be reached only with difficulty.[87] Likewise, Federal Rule of Civil Procedure 26(b)(3) mandates that upon a showing that the party seeking discovery has substantial need of the materials in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means, discovery of documents and tangible things prepared in anticipation of litigation may be had.[88] The Government attempted to use the "substantial need" and "without undue hardship" standard by maintaining that the Upjohn interviewees were scattered across the globe and that Upjohn had forbidden its employees to answer questions it considered irrelevant.[89]

Most important, the *Hickman* decision based the work-product exception on written materials. What the Government failed to discern was that the statements written by Upjohn's counsel on the questionnaires were oral statements in the form of memoranda and therefore

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by statute or by rules of the district court or by order of the court in the proceedings.

But see United States v. McKay, 372 F.2d 174 (5th Cir. 1967) (the relevancy of the work-product doctrine to a proceeding for the enforcement of a summons issued by the Commissioner of the I.R.S. may well be doubted).

84. 449 U.S. at 399.

85. 329 U.S. at 511-12.

86. *Id.* at 511.

87. *Id.*

88. *See* note 9 *supra*. A 1970 amendment to rule 34 eliminated some confusion caused by having two distinct requirements of justification. Prior to the amendment, rule 34 required a showing of "good cause" in order for a moving party to demand discovery and production of documents and things for inspection, copying, or photographing. On the other hand, rule 26 required a showing of "substantial need" and "without undue hardship" in order to obtain trial preparation materials. The "good cause" requirement was eliminated because of the erratic and uncertain protection it provided to the parties from whom production was sought, and replaced by the more specific provisions of rule 26 relating to materials prepared for trial. *See* Explanatory Notes of Advisory Committee on 1970 Amendments to Rules, 48 F.R.D. 487 (1970).

89. 449 U.S. at 399.

did not fall within the often quoted exception to the *Hickman* protection.[90] The *Hickman* Court's concern for strictly protecting attorneys' mental processes is carried over into rule 26 of the Federal Rules of Civil Procedure.[91] Despite the exceptions in rule 26, no showing of relevance, substantial need, or undue hardship will justify compelled disclosure of an attorney's mental impressions, conclusions, opinions, or legal theories.[92] "Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production."[93]

The main source of uncertainty in reconciling the *Hickman* decision with rule 26 stems from the rule's failure to clarify whether oral statements fall into the first part of rule 26(b)(3), which would make them subject to the "substantial need" and "without undue hardship" standard. Some courts have steadfastly kept oral statements out of the first half of rule 26(b)(3) and concluded that no showing of necessity can overcome work-product protection based on oral statements. In *Duffy v. United States*,[94] an attorney for the Northern Gas Company was ordered by the district court to answer Grand Jury questions which would have required revelation of information received from informants and was also ordered to bring all notes, memoranda, or other records of all such contacts. The Eighth Circuit Court of Appeals reversed the attorney's conviction for civil contempt, basing its decision on the absolute, rather than conditional protection of the work-product doctrine.[95] In *In re Grand Jury Investigation*,[96] an attorney representing a bank refused to produce documents subpoened during a Grand Jury investigation into criminally false statements in bank customers' loan applications. The investigation centered on the possibility that certain bank officers had knowingly concealed that in-

90. Upjohn's General Counsel described his notes of the interviews as containing what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere.
449 U.S. 400 n.8.

91. *See* note 9 *supra*.

92. Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

93. 329 U.S. at 512-13.

94. 473 F.2d 840 (8th Cir. 1973).

95. *Id.*

96. 412 F. Supp. 943 (E.D. Pa. 1976).

formation from responsible authorities.[97] The court held the attorney's notes of conversations were absolutely protected from disclosure.[98] The Supreme Court in *Upjohn* noted that courts declining to adopt this absolute rule have nonetheless recognized that such material is entitled to special protection.[99]

The Supreme Court in *Upjohn* did not decide the issue, but instead rejected the magistrate's conclusion simply because he incorrectly assumed oral statements could be denied work-product protection based on the standards of rule 26(b)(3).[100] A closer analysis of Justice Rehnquist's language, however, unveils the conclusion that oral statements, at least in the form of notes and memoranda in response to internal investigations, represent the mental processes of the attorney and, therefore, are not discoverable under any circumstances. "The notes and memoranda sought by the Government here, however, are work-product based on oral statements . . . they reveal the attorneys' mental processes in evaluating the communications."[101]

By concluding that the magistrate applied the wrong standard in Upjohn's work-product claim, the Court strengthened the doctrine at the expense of liberal discovery. The opinion leaves no doubt that the work-product doctrine is applicable to an I.R.S. summons enforcement proceeding. The work-product decision also dampens the I.R.S.'s hopes for a more convenient and open means of investigating possible corporate wrongdoing, placing the privilege at least on equal footing with liberal discovery.[102]

CONCLUSION

The Supreme Court's efforts in *Upjohn* to strike a balance between liberal discovery and the privileges that serve as exceptions thereto have resulted in three conclusions. First, and most important, the control group test has clearly been refuted as the basis for applying the attorney-client privilege to corporate communications. Second, cor-

97. *Id.* at 945.

98. *Id.* at 949.

99. 449 U.S. at 401; *See, e.g.*, In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979); *cf.* In re Grand Jury Subpoena, 599 F.2d 504, 512 (2nd Cir. 1979) (notes and memoranda based on oral interviews may be discovered only upon a high degree of necessity).

100. 449 U.S. at 401. Rule 26 hints that oral statements are not subject to discovery under the first part of 26(b)(3), but the language is less than clear. "[A] party may obtain discovery of documents and *tangible* things . . ." (emphasis added).

101. 449 U.S. at 401.

102. *See* Feld, *supra* note 56, at 213 n.13. Several attempts have been made to formulate reasons to justify discovery of counsel's work product. For the most part, the reasons have failed to accomplish discovery.

porate counsel conducting internal investigations are supplied with guidelines as to what factors will be considered when communications between counsel and corporate employees are protected from disclosure. Third, the Court made plain that the work-product doctrine does apply to I.R.S. summonses, and reaffirmed that more than traditional *Hickman* necessity must be shown in order to justify disclosure of oral statements.

Beyond the clear conclusions written, much else was left unanswered in the *Upjohn* opinion. Although the Court laid to rest the control group test, its inability to expand the guidelines of application beyond one narrow area of the law will hamper federal courts and corporate counsel in their efforts to properly fulfill the purposes of the privilege. By failing to stress the applicability or importance of the several factors noted in *Upjohn* to subsequent cases wrestling with the same issues, the Supreme Court has left the door open for lower courts to formulate their own tests under different facts. As a result, the Court has missed an opportunity to eliminate the confusion existing in the federal courts. By establishing a privilege which is uncertain it has perhaps created more confusion. Increased litigation will certainly be a result of an uncertain privilege. The effect of the *Upjohn* decision on a corporation's incentive to investigate possible internal wrongdoing remains unclear. A certain privilege can act to increase or stymie the incentive to investigate. Corporate management's confidence that communications made pursuant to an investigation will be kept within the corporate walls can either spur the initiation of an investigation or provide management with the abusive tools to cover-up wrongdoing.

By rejecting the control group test and strengthening the work-product doctrine, the *Upjohn* decision arguably favors privilege rather than discovery as the means to ensure the administration of justice. At least with respect to I.R.S. summons enforcement proceedings, the Court has reversed the roles of privilege and disclosure and tapped the latter as the exception. Corporations relying on the *Upjohn* decision are put on notice that federal courts will at least in part apply the standards of the modified subject matter test in the application of the privilege between attorney and client. Beyond that, corporations must rest their decisions on the presumption that, via the *Upjohn* opinion, the role of privileges in the corporate context is placed at least on equal footing with disclosure and that justice is achieved when both are given equal weight. Consequently, the door has been opened for the potential use of privilege as a sword rather than a shield.

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