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# On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Brief of the Federal Bar Association as Amicus Curiae, The Upjohn Company, et al. v. United States of America, et al.

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Docket No. 79-886 in the Supreme Court of the United States

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

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No. 79-886

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THE UPJOHN COMPANY, ET AL.,
Petitioners,
v.
UNITED STATES OF AMERICA, ET AL.,
Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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# BRIEF OF THE FEDERAL BAR ASSOCIATION AS AMICUS CURIAE

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# BRIEF OF THE FEDERAL BAR ASSOCIATION AS AMICUS CURIAE

The Federal Bar Association, with the consent of the parties, submits this Brief as amicus curiae in support of Petitioners.

## QUESTION PRESENTED

Whether communications between employees of a corporation and an attorney representing that corporation are entitled to the full protections of the attorney-client privilege only when the employees are those responsible for deciding and directing the corporation's response to the attorney's legal advice.

## INTEREST OF THE FEDERAL BAR ASSOCIATION

The Federal Bar Association is a professional association of approximately 14,000 lawyers and judges, the majority of whom are now or have been in service to the Federal Government. The Association is dedicated to advancing the science of jurisprudence and promoting the administration of justice and the highest quality representation before the Courts, departments, and agencies of the United States.

The parties to this case necessarily must focus upon the facts and the law in the context of their own interests and the particular circumstances of this case. But the question of the extent to which the attorney-client privilege protects communications between attorneys and their corporate clients implicates interests transcending the specific and narrow interests of Petitioners and Respondents in this litigation. The bedrock of the privilege is the nature of legal representation itself, and the constriction upon the privilege adopted below may influence the practice of law in a way contrary to the public's interest in the sound administration of justice and transaction of business by public institutions. The restrictive test for determining the extent of the attor-

ney-client privilege, embraced by the Court below, may impede effective and responsible legal representation of Federal agencies as well as corporations.

This Brief will focus upon these broad adverse consequences of the restrictive test for application of the attorney-client privilege that was adopted below.[1/]

## SUMMARY OF ARGUMENT

The narrow scope of the attorney-client privilege adopted by the Court below is a disservice to the public's interest in ensuring that public and private organizations receive responsible legal counsel for the conduct of their business.

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1/ We will not address the question presented to this Court with respect to whether the work product doctrine was properly applied in this case.

Limiting the protections of the attorney-client privilege to communications with a small number of people at the very top of an organization ignores the realities of how business is conducted by institutions today. It fails to recognize that day-to-day business decisions are made by lower level management and that the institution's business is conducted by operating personnel. These subordinate employees need to receive confidential legal counsel by attorneys fully knowledgeable in all facts pertinent to the subject matter of the legal advice. Denying the attorney-client privilege to attorneys' communications with such employees will impede this flow of information and legal advice critical to the lawful conduct of modern business.

Facts of pertinence to operation of public and private institutions

are possessed firsthand generally by subordinate personnel, not by those few members at the very top of the organization in its control group. The control group test presents a most unfair choice to attorneys and their organization clients -- either to investigate the facts fully from such subordinate personnel and thereby incur the risk that such facts will be susceptible to discovery from counsel, or to decline to investigate comprehensively and thereby render legal advice upon less than the complete factual picture. Moreover, even if the choice is made to interview subordinate personnel, these employees, knowing that their communications are not confidential, may naturally be reluctant to speak candidly. The net effect will be to make it more difficult to assure that an organization's

business is conducted in conformity with the law.

The narrow test adopted by the Court below conflicts with common-law principles sustaining application of the attorney-client privilege to communications with an attorney by an agent of the client. E.g., 8 J. Wigmore, Evidence § 2317, at 618 (J. McNaughton rev. 1961). The decision below clashes with the decisions of many State courts of this Nation that have followed this common-law rule. It clashes with the decisions of the Seventh and Eighth Circuits that have accorded greater protection to communications between subordinates of an organization and the organization's counsel. Harper & Row Publisher, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) (per curiam), aff'd by an equally divided Court, 400 U.S. 348 (1971); Diversified Industries,

Inc. v. Meredith, 572 F.2d 596, 606 (8th Cir. 1977) (en banc). The broader test of Diversified Industries should be adopted by this Court as the rule best accommodating all competing interests and thus most desirable "in the light of reason and experience." Rule 501, Federal Rules of Evidence.

## ARGUMENT

### I. THE NARROW, "CONTROL GROUP" TEST FOR APPLYING THE ATTORNEY-CLIENT PRIVILEGE TO COMMUNICATIONS BETWEEN ATTORNEYS AND THEIR CORPORATE CLIENTS WILL IMPEDE EFFECTIVE REPRESENTATION OF SUCH CLIENTS, CONTRARY TO THE PUBLIC INTEREST.

#### A. Effective And Responsible Legal Representation Of Any Client Begins With The Attorney Investigating And Discovering All Pertinent Facts That May Bear Upon The Matter Upon Which The Client Has Requested Legal Advice.

Selection, analysis, and understanding of the facts he or she professionally regards as pertinent is the law-

yer's invariable first step in serving the interests of his or her client. See, e.g., D. Binder & S. Price, Legal Interviewing and Counseling: A Client-Centered Approach 3 (1977); B. Shawcross, The Functions and Responsibilities of an Advocate 16 (1958); Justice Jackson, The Advocate: Guardian of Our Traditional Liberties, 36 A.B.A.J. 607, 610 (1950); see also L. Patterson & E. Cheatham, The Profession of Law 66 (1971). Such analysis of facts is an integral part of the legal evaluation process; and indeed it lies at the very heart of the attorney-client relationship:

> "A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal

> system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

ABA Code of Professional Responsibility, Ethical Consideration 4-1 (emphasis added); see also Hickman v. Taylor, 329 U.S. 495, 511 (1947); ABA Code of Professional Responsibility, Ethical Consideration 3-5. It is natural and inevitable for a lawyer, and an element in the exercise of his or her professional skill, to gather, assimilate, and analyze facts objectively before assuming the role of either counselor or advocate. In dispute resolution cases, for example, prospective litigants generally will not themselves know what, if

any, claims or defenses they may have and will come to a lawyer, present all facts, and let the lawyer decide which facts may be pertinent to legally sound claims or defenses. Only until initially confronting all the facts impartially can advocates competently tender partisan counsel regarding which claims or defenses are possible, which are likely to succeed, and which are likely to fail. This process can only be achieved through objective analysis of all the total factual circumstances made known to counsel and further disclosed by counsel's investigative efforts to learn the facts.

As this Court has long held, the very purpose of the attorney-client privilege is to facilitate this first stage of effective legal representation, learning the facts. E.g., Chirac v. Reinicker, 24 U.S. 474, 477, 11 Wheat.

280, 294 (1826); Blackburn v. Crawford's Lessee, 70 U.S. 186, 193, 3 Wall. 175, 192-193 (1865); Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U.S. 457, 458 (1876); Hunt v. Blackburn, 128 U.S. 464, 470 (1888); Alexander v. United States, 138 U.S. 353, 358 (1891); United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915); Fisher v. United States, 425 U.S. 391, 403 (1976). The privilege is society's recognition that, without the protection the privilege accords, a client may be reluctant to share with even his or her attorney all the facts possessing possible relevance to the client's legal problem. The restrictive test for protecting communications of the corporate client unnecessarily derogates this societal incentive to effective legal representation.

B. The Narrow, "Control Group" Test For Applying The Attorney-Client Privilege To Corporations Will Inhibit The Full Investigation And Discovery Of All Facts Bearing Upon The Matter Upon Which The Corporate Client Needs Legal Advice.

"The concept of the privilege to encourage consultation with an attorney to assure lawful conduct is as important to the corporation as it is to a natural person. Both need legal advice and representation and it is in the public interest that they have it." M. Ladd & R. Carlson, Cases and Materials on Evidence 335 (1972). What approach to the attorney-client privilege best implements this policy of encouraging lawful conduct? Clearly, a rule is necessary that accords more protection than the narrow, restrictive control group test adopted by the Court below.

A relatively unimpeded flow of

information and legal advice is critical to the lawful conduct of modern business. The complexity and wide-ranging scope of laws intended to regulate business affairs necessitate the rendering of uninhibited legal counsel to assure that the day-to-day operation of the business is in full compliance with the law. See Hercules Inc. v. Exxon Corp., 434 F.Supp. 136, 144 (D. Del. 1977), quoting United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358 (D. Mass. 1950); Note, The Attorney-Client Privilege and the Corporation in Shareholder Litigation, 50 S. Cal. L. Rev. 303, 306, 309 (1977). Increasing involvement of corporate counsel in the day-to-day business affairs of the corporation will further the public interest by making it easier to plan corporate affairs to avoid litigation. See SCM Corp. v. Xerox Corp., 70 F.R.D.

508, 513 (D.Conn. 1976). In situations potentially or actually involving litigation, an unimpeded flow of information enables the corporate attorney to interview employees in order to determine exactly what happened and to guage the various facets of the case. Weinschel, Corporate Employee Interviews and the Attorney Client Privilege, 12 B.C. Ind. & Com. L. Rev. 873 (1971).

Limiting the attorney-client privilege to communications with those at the very top of the corporate pyramid frustrates these objectives. The control group test ignores the fact that middle management executives, while not having the final word in major corporate issues, nevertheless play a major role in the decisionmaking process. Their advice may be sought by upper echelon executives, or they may in fact make decisions which are

only summarily approved by their superiors, or which need not be reviewed by their superiors at all. Weinschel, supra at 876. Manifestly these mid-level managers need to be able to communicate freely with corporate counsel as part of this decisionmaking process. In addition, because middle level executives and other subordinate corporate employees may often engage in acts for which corporate liability is sought, there is an obvious necessity for these individuals to communicate with corporate counsel. Indeed, if a corporate employee has the power to render the corporation liable for damages, should he not also have the power to make a confidential communication to, and receive confidential legal advice from, the company's counsel? See Note, Applicability of the Attorney-Client Privilege to Corporate Communications, 48 U. Cin.

L. Rev. 819, 822-823 (1979); McLaughlin, The Treatment of Attorney Client and Related Privileges in the Proposed Rules of Evidence for the United States District Courts, 26 The Record 30, 33 (1971). See also Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 608-609 (8th Cir. 1977) (en banc); Rule 801(d)(2)(D), Federal Rules of Evidence.

In corporations, those possessing firsthand knowledge of the facts upon which responsible legal advice must be based are not likely to be those representatives of the corporation found in the control group, but rather those mid-level managers and operating personnel in the company whose jobs are to conduct the day-to-day business of the company. See, e.g., Diversified Industries, supra at 608-609; In re Ampicillin Anti-

trust Litigation, 81 F.R.D. 377, 385-387 (D.D.C. 1978); Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1164-1165 (D.S.C. 1974). In antitrust and patent cases, for example, generally much of the critical sales and technical information necessary for responsible litigation or corporate counseling would be known only by the marketing and engineering "line" people -- not the members of the company's board of directors.

The evils of the narrow, control group test are that it presents unfair choices to attorneys and their corporate clients, and may prevent effective and responsible representation of corporations and frustrate attempts by corporations and their counsel to ensure that corporate action is taken in conformity with the law. When faced with the need to discover facts upon which to

render legal advice to the corporate client, counsel operating under the restrictions of the control group test must elect either to interview corporate representatives who are not in the control group, and thereby learn the facts but incur the risk that the attorney may be compelled to disclose these facts publicly because the interviews are not privileged; or to decline to interview these employees and render advice upon less than all the facts. Indeed, even in those occasions in which counsel and his corporate client choose to incur the risk of disclosure and proceed to interview employees who are not in the control group, such employees may be less than candid with counsel since they will not be speaking with any expectation that what they say will remain confidential.

Furthermore, the narrow, control

group test may mean that corporate employees not in the control group -- those mid-level managers and operating people closest to the daily business of the corporation -- may be deprived of legal advice with respect to the conduct of their day-to-day operations. Corporate counsel may be reluctant to provide such advice knowing that it is not confidential legal advice. If, for example, corporate counsel were to observe business practices as to which there conceivably might be a question of liability under the antitrust laws, counsel may be reluctant to point out ways in which the practices might be altered to resolve any doubt that they are prohibited under the antitrust laws, for fear that by doing so in a nonprivileged communication counsel will be flagging the problem and increasing the risk that legal action will be taken against his or her client.

Under the view of the privilege adopted by the Court below, even when legal advice is rendered directly to the control group, the restrictive notion of privilege may deny the benefits of that advice to those who are not in the control group. To be effective, communications from corporate counsel often require distribution within the company so that the advice may be effectuated. With the control group test, however, communications to others "down the chain of command" which relay or are based upon legal advice may constitute a publication waiving the attorney-client privilege. See, e.g., Natta v. Hogan, 392 F.2d 686, 693 (10th Cir. 1968). Under the circumstances, members of the control group, and their attorneys, may naturally be reluctant to communicate fully with lower level employees with respect to the subject

matter of the legal advice. The result will be diminished effectiveness in determining the corporation's response to legal advice.

In this regard, reducing the scope of the protection accorded corporations by the privilege will deter use by corporations of counsel to seek out and correct corporate wrongdoing. Any loss of this self-policing by corporations, with the alternatives being either absence of detection or detection by governmental agencies at a cost to the public fisc, is certainly not in the public interest. See Diversified Industries, supra at 610; Note, The Attorney-Client Privilege, the Self-Evaluative Report Privilege and Diversified Industries, Inc.

v. Meredith, 40 Ohio St. L.J. 699, 713 (1979).[2/]

The narrow, control group test conflicts with generally accepted, common-law principles concerning the proper application of the attorney-client privilege. In general, the privilege has been recognized to safeguard the confidentiality of communications made by agents of a client, for the client's benefit, to the client's

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2/ The use of lawyers to conduct analyses and reviews similar to that conducted by the attorneys for Petitioners in this case is common both to the Government and to private industry alike. See, e.g., In re Grand Jury Subpoena, 599 F.2d 504 (2d Cir. 1979) (retention by corporation of outside law firm to conduct investigation and render advice regarding possible illegal payments to foreign officials by employees of the corporation); In re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979) (same); "Westinghouse Seeks End to Cloud Caused By Suits Over Uranium Supply Contracts", Wall Street Journal, June 7, 1978, at 17, col. 1 (same); "Civil Service Hires Lawyer To Study Alleged Abuses", N.Y. Times. Nov. 5, 1977, at 8, col. 6 (retention of attorney "to conduct a 'comprehensive and independent inquiry'" into alleged abuses within the Civil Service Commission); (continued on next page)

counsel. E.g., 8 J. Wigmore, Evidence § 2317, at 618 (J. McNaughton rev. 1961);[3/]

(continued from page 22)
Diversified Industries, supra (retention by corporation of outside counsel to conduct an investigation and report to the board of directors concerning allegations of the commission of bribery by employees of the corporation); Herlihy & Levine, Corporate Crisis: The Overseas Payment Problem, 8 Law & Pol. Int'l. Bus. 547, 586-587 (1976) (retention by corporations of outside counsel to conduct independent investigations of possible management fraud); SEC Current Report, Form 8-K, Cities Service Co., Comm'n File No. 1-1093, at 1, 3, 5-6 (Sept. 1975) (retention by corporation of outside counsel to investigate possible illegal payments to foreign political entities and other illegal accumulations or use of corporate funds); CBS, Inc., "Report of Counsel, Investigation of Prize Money Descriptions With Respect to the 'Heavyweight Championship of Tennis' Matches" (July 1, 1977) (retention by corporation of outside counsel to conduct an investigation and report to management concerning allegations that tennis matches that were advertised and promoted as involving prize money to be awarded on a "winner-take-all" basis in fact involved prize money to be awarded proportionately to the losers as well as to the winners) (Report on file at Federal Communications Commission, Washington, D.C.).

3/ "The client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by any form of agency employed or set in motion by the client is within the privilege.
(continued on next page)

Annot., Evidence: Attorney-Client Privilege as Applicable to Communications Between Attorney and Client's Agent, Employee, Spouse, or Relative, 139 A.L.R. 1250, 1251 (1942). So, too, employees of the corporation not in the control group should be entitled to speak confidentially to counsel for their principal, the corporate client. English authority has held communications between all company employees and company counsel to be protected by the attorney-client privilege when the communications relate to the subject matter as to which the company is seeking legal advice. E.g., Wilson v. Northhampton & Banbury Junction Ry., 14 Equity

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(continued from page 24)

"This of course includes communications through an interpreter, and also communications through a messenger or any other agent of transmission, as well as communications originating with the client's agent and made to the attorney." (Emphasis in original; footnotes omitted.)

Cases 477, 484 (1872). In this country, the great majority of the State courts that have considered the question have adhered to this "English Rule" and have not confined the attorney-client privilege to the select few members of an organization's control group. See, e.g., Jay v. Sears, Roebuck & Co., 340 So.2d 456, 457 (Ala. Civ. App. 1976); D.I. Chadbourne Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964); Bingham v. Walk, 128 Ind. 164, 27 N.E. 483 (1891); Graham v. Allis-Chalmers Manufacturing Co., 41 Del. Ch. 78, 188 A.2d 125 (1963); Fire Ass'n of Philadelphia v. Flemming, 78 Ga. 733, 3 S.E. 420 (1887); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942); Riddle Spring Realty Co. v. State, 107 N.H. 271, 220 A.2d 751 (1966); State v. Kociolek, 23 N.J. 400, 129 A.2d 417 (1957); Ford Motor Co. v.

O.W. Burke Co., 59 Misc.2d 543, 299 N.Y.S. 2d 946 (Sup.Ct. 1969); In re Hyde, 149 Ohio 407, 79 N.E.2d 224 (1948); Gass v. Baggerly, 332 S.W.2d 426 (Tex. Ct.Civ. App. 1960); Horlick's Malted Milk Co. v. A. Spiegel Co., 155 Wis. 201, 144 N.W. 272 (1913); contra Shere v. Marshall Field & Co., 26 Ill.App.3d 728, 327 N.E. 2d 92 (1974).[4/] This rule recognizing the

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4/ Six states, by statute, have modified this common-law rule in their jurisdictions by adopting Rule 502(a)(2) of the Uniform Rules of Evidence (1974), which defined "representative of the client" in "control group" terms, i.e., as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." 3A Ark. Stat. Ann. § 28-1001, Rule 502(a)(2); Me. Rev. Stat. Ann., Maine Rules of Evidence, Rule 502; Nev. Rev. Stat. § 49.075; N.D. Rules of Evidence, Rule 502; Okla. Stat. Ann. tit. 12, § 2502; S.D. Rules of Evidence § 19-13-2. This definition of "representative of the client" appeared in the Preliminary Draft of the Proposed Federal Rules of Evidence, 46 F.R.D. 161 (1969), but was eliminated by the Advisory Committee from the 1972 Final Draft of the Proposed Rules that was approved by this Court in 1972. No definition of "representative of the client" was contained in the Rules approved by this Court. See Advisory Committee's Note to Proposed Federal Rule of Evidence 503; see also 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 503[03] (1979).

need for corporate clients to speak confidentially, through agents, to corporate counsel was incorporated in model codes of evidence promulgated in 1942 and 1953. American Law Institute, Model Code of Evidence, Rule 209 (1942); National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence, Rule 26(3) (1953). And, of course, the Seventh and Eighth Circuits have applied broader, subject matter tests for the application of the privilege to corporations, rather than the narrow, control group test adopted by the Sixth Circuit below. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) (per curiam), aff'd by an equally divided Court, 400 U.S. 348 (1971); Diversified Industries, supra.[5/]

5/ For several decisions of District Courts applying the "subject matter" test, see Petitioners' Petition for a Writ of Certiorari at 8, note 1.

The Court below afforded scant discussion of its rationale for rejecting the broader, subject matter test consonant with these common-law principles. It assumed that, if the subject matter test were adopted, corporate members of the control group -- those at the very top of the corporation -- inevitably would seize upon that test in order "to shield themselves from information about possibly illegal transactions." United States v. Upjohn Co., 600 F.2d 1223, 1227 (6th Cir. 1979). The Court hypothesized that the control group would purposely insulate itself from the "full details" of the transaction which is the subject of the legal advice; and that corporate counsel thus would be "the exclusive repository of unpleasant facts," which would remain "undiscoverable." Id.

The Court's reasoning is an in-

adequate justification for so restricting the attorney-client privilege as applied to organizations. Even if the control group chose to act in the manner suggested by the Court below -- an unduly harsh assumption concerning the bona fides of high level corporate and agency officials -- the Court's concern that all facts would reside, undiscoverable, only with counsel, does not follow. The attorney-client privilege, properly applied, would not prevent inquiry directly of the corporate employees whom corporate counsel had interviewed; nor would it prevent discovery directly from the corporation of pertinent documentary evidence (other than written communications with counsel). E.g., 4 Moore's Federal Prac-

tice ¶ 26.60[2], at 26-233 to -234 (2d ed. 1979).[6/] Nor would it allow such documentary evidence to be shielded from disclosure by funnelling the evidence to corporate counsel. E.g., Grant v. United States, 227 U.S. 74, 79 (1913); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 324 (7th Cir.), cert. denied, 375 U.S. 929 (1963). The privilege would only prevent the unseemly scenario of corporate counsel becoming unwilling witnesses and sources of evidence against their clients. See Hickman v. Taylor, 329 U.S. 495, 516-518 (1947) (Jackson, J., concurring).

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6/ The Court below concluded that, in this case, the burden of this discovery from sources other than corporate counsel would be "severe." While this may be true in the particular circumstances of this case, this condition is hardly an adequate justification for enunciating a rule of general application which discounts the ability of a discovering party to obtain information from sources other than corporate counsel without doing violence to the attorney-client privilege.

We submit that the approach of the Eighth Circuit in Diversified Industries provides sufficient protection for the interests served by the attorney-client privilege while simultaneously recognizing the need for appropriate discovery in litigation. The Diversified Court held that communications between all corporate employees and corporate counsel may be privileged 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." Diversified Industries, supra at 609. See also 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 503(b)[04] (1979). The Diversified test provides a protection that is more in tune with the legal needs of corporations and of the role of the corporate attorney today. We urge that it be adopted by this Court.

## II. THE NARROW, "CONTROL GROUP" TEST FOR APPLYING THE ATTORNEY-CLIENT PRIVILEGE SHOULD BE REJECTED BECAUSE IT WOULD ADVERSELY AFFECT THE REPRESENTATION OF FEDERAL AGENCIES.

The structure and operation of Federal agencies make them as subject as corporations to the pernicious consequences of the restrictive "control group" test for defining the limits of the attorney-client privilege. This is an additional reason why this test should not be approved by this Court.

Agencies, like corporations, are not characterized by one, small group of upper-level managers conducting the agencies' day-to-day business. Decision-making authority is decentralized and diffused, so that the day-to-day decisions are made by middle and lower level management. See, e.g., Wallace, A New Test for Management by Objectives, 2 The Bureaucrat 362, 366 (1974); W. Gellhorn & C. Byse, Administrative Law 103 & n.9, 109 (5th ed. 1970); H. Hensel & J. Millett, Departmental Management in Federal Administration 33-35, 42 (1949); see also P. Drucker, Management: Tasks, Responsibilities, Practices 136 (1974). There simply is no readily identifiable "control group" of upper management with the expertise and time to direct all individual facets of the day-to-day affairs of the agency. Nor would it be a desirable system for managing the agencies if there were.

See Drucker, supra at 555 ("[a] structure that forces decisions to go to the highest possible level of organization rather than be settled at the lowest possible level is clearly an impediment").

This realistic view of how agencies are managed dictates that there be assurance that agency counsel may freely and effectively advise middle management and other subordinate employees without the inhibitions that will attend if the control group test is at play. Agency lawyers, like their corporate counterparts, should not have to confront the Hobson's choice of foregoing complete oral or written communications with middle level managers or operating personnel, for fear that the substance of these communications will not be privileged, and thereby basing their legal advice upon incomplete data, or engaging in

such communications and thereby incurring the risk of subsequent disclosure. Middle level managers and other subordinate agency personnel must not feel inhibited by fear that communications are not privileged; they must be free to be candid with their counsel, to share all facts with their attorneys, so that agency counsel may render responsible legal advice, based upon all pertinent data, to these employees, as well as to those at the top of the agency management. And we should expect no less if our agency decisions are to have rational bases. See 5 U.S.C. § 706(2).

The control group test will also adversely impact upon agencies in litigative contexts. All the facts which need to be known by attorneys representing agencies are not known, firsthand, by the small control group of managers at the

very head of the agency. They may be known by middle level managers and operating people. This is a fact of life common to agencies as well as corporations; and the restriction of the attorney-client privilege solely to communications from the control group would hamper effective litigation counseling and representation in court. Agencies and corporations alike would experience the same inhibitions chilling frank disclosure to attorneys; there would be the prospect of attorneys, by conscious decision or by the force of this reluctance of agency employees to speak frankly, furnishing legal representation with less than complete knowledge and understanding of the controversy.

Should this Court affirm the decision below, the spectre of lower courts applying the control group test to Federal

agencies is not a fanciful one. Courts have recognized the similarities between agencies and corporations, and have accordingly applied the same rules or tests for each when applying the attorney-client privilege. See, e.g., Hearn v. Rhay, 68 F.R.D. 574, 579 (E.D. Wash. 1975); see also Coastal States Gas Corp. v. United States Department of Energy, No. 79-2181, slip op. at 15 (D.C. Cir. Feb. 15, 1980); Mead Data Central, Inc. v. United States Department of the Air Force, 566 F.2d 242, 254 n.25 (D.C. Cir. 1977). Unless this Court expressly instructs otherwise, the similarities in the structure and operation of corporations and Federal agencies are so great that lower courts may find no logical distinction precluding application of the control group test to agencies. The adverse consequences of the control group

test thus would be compounded, for the negative impact upon Federal agencies, charged with service in the public interest, would be injurious to the Nation. To the extent the control group test would influence negatively the rendering of effective and responsible counsel to Federal agencies, the American public would be the loser.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed insofar as it adopts the "control group" test for the application of the attorney-client privilege, and the cause remanded with instructions that the Court apply the standard adopted in Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 606 (8th Cir. 1977) (en banc).

Respectfully submitted,

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