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The Organizational Client: Attorney-Client Privilege and the No-Contact Rule

SHERMAN L. COHN*

A basic issue in the law governing lawyers is the identification of an attorney's client. Various duties, obligations, and rights arise from the attorney-client relationship. In the case of the individual who is a client, the answer is relatively easy. But in the case of the organizational client, the issue becomes more complex and the answers still are evolving. Indeed, the answer may differ depending on the legal context in which the question is asked and on the individual values being served.

In the context of organizational representation, the author believes that attorneys regularly advise organizations that no employee should speak with any person about the subject of organizational litigation. They should not speak with opposing counsel, or with opposing counsel's investigator on any subject, without counsel for the corporation being present. The very object of this kind of advice is to prevent information from reaching the other side. There is no rule on which this attitude is based. But neither is there a rule that requires corporate employees to talk.

The restricted contact with employees clearly is designed to protect the corporate client and to assist counsel in prevailing on behalf of his or her corporate client. One way of accomplishing this result is for the corporate authorities to announce that corporate counsel represents all employees of the corporation in the matter and to urge all employees to speak with corporate counsel in confidence. This too is relatively common.¹

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1. As has been stated by Professor Geoffrey C. Hazard, Jr., the reporter of the Kutak Commission: "The legal profession adheres to a 'basic narrative, sustained over two centuries,' that celebrates loyalty to one's client as the essence of legal representation, and the bar attempts to preserve that image of itself 'notwithstanding pervasive changes in American society and the profession itself'." Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244 (1991). Professor Hazard recounts Lord Brougham's famous quote in defense of Queen Caroline:

"[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client . . . is his first and only duty; and . . . he must not regard the alarm, the torments, the destruction which he may bring upon others. . . . [H]e must go on reckless of consequences [to all others and his country]." *Id.*

But all of this begs the questions: Is it right? Does it lead to justice? Is such an attitude imbedded in the law that controls the conduct of counsel? Should it be?

The other side of that coin, of course, concerns the ethical obligation of counsel for other persons, whether or not they are opposing parties in litigation or are involved in transactional negotiations. Can counsel for such other parties approach and interview corporate employees who are willing to talk? Or is that an ethical breach of a rule against contact of a person who is already represented by counsel?²

These issues are closely connected to the attorney-client privilege and the work-product doctrine in the corporate setting. When corporate counsel obtains a statement from a corporate employee, is that statement protected under the privilege or as attorney work product? Or, in a litigation setting, can such a statement be discovered by the opposing side?

The implications of these issues are presented starkly in the litigation surrounding a malpractice lawsuit against a hospital and physicians, in which a child was permanently disabled as a result of an incident during a surgical procedure.³ Shortly after the incident, hospital counsel had a nurse paralegal interview three nurses and a scrub technician, all operating room witnesses who were employees of the hospital.⁴ The paralegal prepared summaries of the interviews.⁵ Two years later, when these witnesses were deposed by plaintiff's counsel, none could recall anything about the incident.⁶ When plaintiff's counsel sought the interview summaries, hospital counsel objected on the ground of the attorney-client privilege.⁷ When the Arizona Supreme Court rejected the application of the privilege, the summaries were turned over and the observations of those witnesses were able to be utilized to arrive at as close to a just decision as possible.⁸ Once again, what if the court had held that the privilege applied?

The implications of these issues are also presented starkly in the litigation a generation ago between two large corporations: Xerox and IBM. As is well known, Xerox developed the first practical photocopier to reach the market. A few years later, IBM began marketing a photocopier in competition with Xerox. Xerox sued, accusing IBM of using Xerox's trade secrets that one or more of the IBM employees had obtained and that IBM was not entitled to use in the development of a photocopier.⁹ Just prior to the institution of the suit in 1970, and in anticipation of that litigation, IBM counsel interviewed and obtained written

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983) [hereinafter MODEL RULES].

3. *Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993).

4. *Id.* at 873.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 880.

9. *Xerox Corp. v. International Bus. Mach. Corp.*, 64 F.R.D. 367 (S.D.N.Y. 1974).

statements from thirty-seven IBM employees who may have had access to Xerox trade secrets to ascertain the flow of that information through IBM, and to ascertain whether any of the trade secrets had been used in connection with IBM's development of its photocopier.¹⁰ Counsel for Xerox thereafter deposed twenty-three of the thirty-seven and found that not one of them had any memory of the pertinent facts.¹¹ Xerox then sought discovery of all of the statements taken by IBM counsel.¹² The court held that, as for the twenty-three who had been interviewed and had no memory, Xerox had satisfied the inability to obtain the substantial equivalent by alternate means" prong of Federal Rule of Civil Procedure 26(b)(4), and thus had overcome the qualified work-product protection,¹³ but sent Xerox counsel back to depose the other fourteen before their statements could be obtained.¹⁴ Xerox then deposed ten of the remaining fourteen, with the same results.¹⁵ The judge said that was enough and ordered the production of all fourteen statements.¹⁶ The case was settled soon thereafter.¹⁷

In this example, as far as the official record shows, Xerox made no attempt to contact IBM employees informally, but took the much more expensive route of deposing each of them. Obviously in the presence of IBM counsel, not one of the twenty-three IBM employees had any memory of the situation. IBM counsel fought to keep Xerox counsel from seeing the statements that these employees had given to IBM counsel. The court decided the issue under the work-product doctrine,¹⁸ which, at best, is a qualified privilege. If the court had decided the issue under the Attorney-Client privilege and had decided that the privilege barred Xerox counsel from seeing the statements, the results would have been that the information apparently quite relevant (certainly important enough for IBM counsel to fight for years to keep it away from Xerox counsel) would have been kept quiet. This result, of course, would have worked to the advantage of IBM, but would it have led to a just result?

The American Law Institute (ALI) in its still unfinished *Restatement of the Law Governing Lawyers*¹⁹ is now weighing in on these issues as applied to organizations, and particularly corporations. This paper details the development of the issues as they have unfolded historically and makes clear that where we are at the moment is not where we have always been. It then examines the position of the *Restatement*, as put forth in its latest draft. The paper then comes back to

10. *Id.* at 375.

11. *Id.*

12. *Id.*

13. *Id.* at 376.

14. *Id.* at 382.

15. *Xerox Corp. v. International Bus. Mach. Corp.*, 79 F.R.D. 7, 9 (S.D.N.Y. 1977).

16. *Id.*

17. Peter J. Schuyten, *Information Bank Abstracts*, N.Y. TIMES, Aug. 2, 1978, at D1.

18. *Xerox*, 79 F.R.D. at 8.

19. RESTATEMENT OF THE LAW GOVERNING LAWYERS (Proposed Final Draft No. 1, 1996).

*Samaritan Foundation v. Goodfarb*²⁰ and *Xerox v. IBM*²¹ to test whether the ALI approach is consonant with reaching a just result.

The issues must be approached by asking the significant question: Who is the attorney's client? The early development of our legal principles has focused on the individual. The modern corporation, and its broad application and uniform laws, did not exist two hundred years ago. And the partnership and the unincorporated association, though in existence, were not recognized as legal beings.

As the organizational structure became more of a factor in society, the law needed to adjust. This evolution can be seen, for example, in the law of jurisdiction as applied to a corporation. At first, a corporation was deemed to exist only in the state of incorporation and thus it could be sued only there.²² The law evolved to recognize that a corporation can exist outside of the state of incorporation, but it looked for some tangible sign of existence that implied a long duration or permanency before acknowledging that existence; e.g., an office, a factory, a warehouse, the entry of a contract, the "doing" of business.²³ Finally, in 1945, the law recognized that a corporation can be sued wherever it transacts any one act of business or its agent commits any one tort or action that causes some injury.²⁴

The same struggle can be seen in the law governing lawyers. That law, too, in its earliest formation, focused upon the individual, both as the client and as the attorney. It is only in recent times that, for example, the law firm is recognized as a subject of the law governing lawyers. The American Bar Association (ABA) *Canons of Professional Ethics*²⁵ focused solely upon the individual practitioner, making no direct reference to law firm practice. The *Model Code of Professional Responsibility*,²⁶ adopted in 1969, noted that the attorney may have "associates."²⁷ The *Model Rules of Professional Conduct*,²⁸ adopted in 1983, for the first time deals directly with the law firm and certain relationships within the firm.²⁹

The same evolution that we noted with the law firm also has occurred with the

20. *Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993).

21. *Xerox Corp. v. International Bus. Mach. Corp.*, 79 F.R.D. 7 (S.D.N.Y. 1977).

22. See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 524 (1839) (holding that a corporation may sue an individual in another state but the corporation only exists within the state in which it was chartered).

23. See *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264 (1917) (holding that a railroad corporation, which did not own property within a state, could not be held to be doing business within that state merely because its cars were moved through the state by a second carrier).

24. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.").

25. CANONS OF PROFESSIONAL ETHICS, adopted by the American Bar Association in 1908.

26. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1970) [hereinafter MODEL CODE].

27. Cf. MODEL CODE DR 4-101(d), 7-107(J), EC 4-2, 4-5 (recognizing "partners" as well as "associates").

28. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

29. See MODEL RULES Rule 5.1, 5.2 (focusing respectively on the responsibilities of a supervising lawyer and on the duties of a subordinate attorney).

corporation. No ABA *Canon of Ethic* deals with the lawyer's relationship with the corporation as such. The *Model Code* raises the matter, but solely as an aspirational ethical consideration.³⁰ The *Model Rules*, on the other hand, focus directly upon this relationship as a part of black-letter law.³¹

More specifically, this paper focuses upon two aspects of this more general problem:³² (1) the attorney-client privilege and (2) the rule, now found in *Model Rule* 4.2, that a lawyer is not to communicate directly with another person whom the lawyer "knows to be represented by another lawyer in the matter" except with the knowledge and consent of the other lawyer.³³ The question common to the two is: Who is the client in the organizational setting? Unfortunately, the answer to this question is not uniform from state to state.³⁴ And recently the United States Supreme Court weighed in with its views applicable to federal question matters in federal court, so that even within the federal court system itself the answer may very well differ,³⁵ depending on whether the substantive issue, in the context of which the question arises, is to be determined by federal or state law.³⁶

There is now an attempt to arrive at a unified answer to this question. For the past decade, the ALI has been drafting a *Restatement of the Law Governing Lawyers* (the *Restatement*). The ALI is attempting to put forth a coherent doctrine, based upon experience and reason, that will bring consistency to this area of the law.

To evaluate the ALI's efforts and to understand the impact of its proposals, it is critical to review the history of the attorney-client privilege as applied to

30. MODEL CODE EC 5-18.

31. MODEL RULES Rule 1.13.

32. Another issue concerning the identity of the client in the corporate setting arises where a corporation has subsidiary, parent, or sibling corporations. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (defining the client for purposes of *Model Rule* 4.2); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-390 (1995) (discussing the definition of a client among affiliated corporations for purposes of identifying conflicts of interest).

33. MODEL RULES Rule 4.2.

34. See UNIF. R. EVID. 502(a)(2) (defining the organizational client for purposes of the attorney-client privilege as persons who either have the authority to act on advice rendered to the client organization or who make or receive confidential communications in the course of their employment); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (defining the client for purposes of *Model Rule* 4.2 as "employees with managerial responsibility, those whose act or omission may be imputed to the organization and those whose statements may constitute admissions by the organization with respect to the matter in question"). Compare *Consolidated Coal v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982) (holding that the control-group test strikes a reasonable balance on the question of attorney-client privilege) with *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1995) (holding for the subject-matter test while reasoning that it more completely addresses the problem of a corporate privilege).

35. See *Upjohn v. United States*, 449 U.S. 383 (1981) (rejecting a narrow control-group test and refusing to use a subject-matter test, instead using a case-by-case approach).

36. See Julie Elizabeth Rice, *The Attorney-Client Privilege in the Corporate Context: The Intersection of Federal and Illinois Law*, 1984 U. ILL. L. REV. 175 (noting the divergence of Illinois and federal law and the uncertainty that this divergence creates for lawyers in federal court).

organizations, generally the corporation. The ALI proposals are firmly rooted in this history, but make some significant departures. Therefore, the first section of this paper will explore how the privilege, as applied to corporations, developed in the United States. This leads to the significant Supreme Court decision of *Upjohn v. United States*,³⁷ an important benchmark in the development of the law. While *Upjohn* has not been adopted by all of the states, which has seeded confusion in the federal courts, it is the basis of the approach adopted by the ALI. Thus, *Upjohn* furnishes the jump off point for an examination of the *Restatement*, which is the second major section of the paper. Focus is then turned to the rule that a lawyer is not to contact directly an adverse client who is represented by counsel,³⁸ the so-called anti-contact or no-contact rule. The significant question again concerns who is to be included in the concept of client for the purpose of this rule when the client is an organization. It is the thesis of this paper that the attorney-client privilege and the anti-contact rule should be viewed and evaluated together, rather than in isolation. Moreover, this amalgam must be evaluated critically in terms of the reality of organizational psychology.

This paper concludes that even the compromise arrived at by the ALI — a broader attorney-client privilege with a narrower no-contact rule — perverts justice. As we saw in *Samaritan Foundation v. Goodfarb*,³⁹ when questioned by counsel opposing the organization for which they work, employees often “forget” what they told organizational counsel a short time before.⁴⁰ Thus, permission to contact and talk with employees does not always lead to disclosure of relevant information. And, if the attorney-client privilege is used to hide completely what the employee knows, justice in any objective sense cannot prevail. While it is good for organizational counsel to be able to question employees and fully investigate, this paper concludes that any good is outweighed by the injustice that occurs when facts are hidden from view. Admittedly there is value in the confidentiality required when a client directly seeks legal advice, which justifies the attorney-client privilege; however, this paper concludes that the expansion of the attorney-client privilege, while perhaps justified in the investigatory setting of *Upjohn*, is unjustified when applied by the *Restatement* to broader settings.

I. A HISTORY OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

A. INTRODUCTION

The courts have never had any doubt that corporations should enjoy the

37. 449 U.S. 383 (1981).

38. MODEL RULES Rule 4.2.

39. *Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993).

40. *Id.* at 873.

benefits of an attorney-client privilege.⁴¹ Indeed, the United States Supreme Court recognized the corporate attorney-client privilege as early as 1915.⁴² However, the point has been argued in academia and in at least one court decision.⁴³ A quick look at the competing arguments is instructive as we explore why it has been so difficult to arrive at a satisfactory definition of "client" in this setting.⁴⁴

There are two competing visions for the relationship between a corporation and its lawyers.⁴⁵ The first views corporations as wholly distinct from natural persons in their rights and attributes and is reluctant to bestow the rights of natural persons upon corporations.⁴⁶ Under this vision, as argued by Chief Judge Campbell in *Radiant Burners v. American Gas Association*⁴⁷ and some academics,⁴⁸ organizations are the creation of state government and therefore should not receive fundamental personal rights such as the privilege against self-

41. See *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 319-320 n.7 (7th Cir. 1963) [hereinafter *Radiant Burners II*] (citing cases recognizing the corporate attorney-client privilege going back to 1885 in the United States and 1833 in England).

42. See *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915) (assuming that corporations could claim the benefit of the privilege even though no issue of its applicability had been raised). Compare *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771, 772 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir. 1963) [hereinafter *Radiant Burners I*] (holding by Chief Judge Campbell that the privilege, for the first time, does not apply to corporations) with *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 484 (E.D. Pa. 1962) (holding by Judge Kirkpatrick that the privilege applies to corporations because most courts had joined the Supreme Court in assuming its application). The Supreme Court twenty years later reiterated, "[T]his Court has assumed that the privilege applies when the client is a corporation, and the Government does not contest the general proposition." *Upjohn*, 449 U.S. at 390 (citing *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318 (1915)).

43. E.g., DAVID LUBAN & DEBORAH L. RHODE, *LEGAL ETHICS* 276-77 (2d ed., 1995); DAVID LUBAN, *LAWYERS & JUSTICE* 217-34 (1988); James A. Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy*, 40 U. DET. L.J. 299, 323-25, 376 (1963); see also, e.g., Note, *The Applicability of the Attorney Client Privilege to a Corporation—The Current Evolution of an "Accepted" Rule of Law*, 17 U. MIAMI L. REV. 382 (1963) (discussing the potential impact of *Radiant Burners I* and the necessity of an organizational privilege); Note, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 276-77 (1981) (arguing that high cost and uncertain benefits of the privilege make it socially wasteful). The one decision known to this author holding that the privilege does not apply is that of Chief Judge Campbell in *Radiant Burners I*, 207 F. Supp. at 771.

44. David Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 956 (1956) (pointing out the many difficult questions that result from giving a personal privilege to an organization).

45. The author is indebted to Dean John Sexton for the development of this thesis. See John Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443 (1982) (discussing the idea of two competing visions for the corporate attorney-client privilege at the time of the *Upjohn* decision).

46. See *Radiant Burners I*, 207 F. Supp. at 771 (arguing that the corporation should not have any privileges), *rev'd*, *Radiant Burners II*, 320 F.2d at 314.

47. *Id.*

48. See LUBAN & RHODE, *supra* note 43, at 276-77 (arguing that the theoretical justifications for the privilege are insubstantial); LUBAN, *supra* note 43, at 217-34 (discussing the absence of theoretical justification for the organizational privilege); Gardner, *supra* note 43, at 323-25, 376 (stating that the organizational privilege was a mistake in legal history).

incrimination or the attorney-client privilege,⁴⁹ at least not without specific statutory action.⁵⁰ Further, it is urged, as corporations are major societal actors capable of wreaking much havoc when they go “bad,” their activities need to be monitored and illegalities exposed and punished to encourage behavior beneficial to society.⁵¹ Proponents of this view also argue that corporations need no encouragement to speak with their lawyers because the special legal duties imposed on organizations require them to speak with attorneys on a regular basis regardless of the existence of a privilege.⁵² With the exception of Chief Judge Campbell’s decision in *Radiant Burners*,⁵³ however, a total rejection of a corporate attorney-client privilege has not found favor in the courts, as the corporate attorney-client privilege is now accepted by the United States Supreme Court and by all states.⁵⁴

The second vision is a “voluntary compliance” model of corporate behavior.⁵⁵ It has gained currency in response to both the complex set of laws and regulations that now govern corporations and the limited enforcement resources available for enforcing these laws and regulations.⁵⁶ This model views corporations as institutions dedicated to complying with the law, where self-monitoring is critical to such compliance.⁵⁷ To encourage this self-monitoring activity, corporations should be given a broad attorney-client privilege to protect and encourage self-evaluation and consultation with counsel, which will lead to better voluntary law enforcement.⁵⁸ The United States Supreme Court utilized just this rationale in 1981 in deciding *Upjohn v. United States*⁵⁹ when it ruled that the attorney-client privilege is broad enough to cover information collected by counsel from all employees of the corporation questioned during an internal investigation of possible violations of law.⁶⁰

49. See CHARLES L. WOLFRAM, *MODERN LEGAL ETHICS* § 6.5.3, at 283-84 (1986) (“[A]rguments [for the corporate privilege] based on human dignity are irrelevant. The corporation as an entity has no legal or moral claims to dignity. The humans who act as agents of the corporation are entitled to such dignity, but individually they are not the client . . .”).

50. See *Radiant Burners I*, 207 F. Supp. at 773 (“[A] corporation [that] is a mere creature of the state and not a natural entity should not, without legislation, be afforded a privilege historically created only for natural persons.”).

51. E.g., Sexton, *supra* note 45, at 463-470; Note, *The Supreme Court, 1980 Term, supra* note 43, at 276-277.

52. Note, *The Supreme Court, 1980 Term, supra* note 43, at 276-78.

53. *Radiant Burners I*, 207 F. Supp. at 771.

54. See, e.g., *Upjohn v. United States*, 449 U.S. 383 (1981) (holding for the existence of a privilege). In addition, the Uniform Rules of Evidence adopted in some form in every state allow for a corporate attorney-client privilege. UNIF. R. EVID. 502. Finally, even *Radiant Burners I* was reversed by the Seventh Circuit. *Radiant Burners II*, 320 F.2d at 314.

55. Sexton, *supra* note 45, at 468-470.

56. *Id.*; *Upjohn*, 449 U.S. at 392-93.

57. Sexton, *supra* note 45, at 468-470; *Upjohn*, 449 U.S. at 392-93.

58. Sexton, *supra* note 45, at 468-470; *Upjohn*, 449 U.S. at 392-93.

59. *Upjohn*, 449 U.S. at 383.

60. *Id.* at 393. Professor Sexton points out that the IRS argued that the Supreme Court should have adopted a narrow attorney-client privilege, because the IRS needed access to more information in order to better enforce

With the force of the Supreme Court behind it, the “voluntary compliance” model is now widely, but not universally, accepted. The battle persists as to the circumstances under which the privilege applies to communications between counsel and employees and agents of large modern corporations.⁶¹ The two different visions reflect the positions being taken. Clearly, if one starts from the “voluntary compliance” model, there is an incentive to build in as wide an attorney-client privilege as possible, to encourage counsel and the employees and agents to have candid conversations.⁶² But if one starts from the premise that corporations will not comply voluntarily and must be closely monitored, then the privilege’s application becomes begrudging, and the tendency is one of limiting the privilege upon some rational boundary.⁶³

One such rational boundary for the narrower model is a focus on the attorney in two capacities: one, in the attorney’s advisory role, giving advice to the client as to what the law permits and prohibits;⁶⁴ the other, in the attorney’s litigation and transaction-enabling roles, looking to the client to direct counsel on the objectives of the representation and to make decisions on major matters such as whether to make or accept a settlement offer. With these two capacities as the sole focus, a rational line can be drawn limiting the privilege to conversations between counsel and corporate personnel in the upper corporate echelons. But if the focus is broader, to include a role in internal investigations to ensure that corporate employees are adhering to the requirements of law, then the narrower model has severe limitations.

When a matter reaches litigation, the party opposing the corporation has an interest in discovering as much as possible, looking for damaging evidence. If there is no corporate attorney-client privilege, then, of course, the opposing party may discover all that was said to the corporation’s lawyer. This basic rejection of the corporate attorney-client privilege has drawn virtually no support and is, for all practical purposes, one of pure academic discussion.⁶⁵

If one posits a corporate attorney-client privilege, then it becomes of great

the law against Upjohn and other corporations. Thus, the IRS had the first vision of the corporation developed above, namely that enforcement of these major societal actors cannot be hindered by granting privileges to organizations that have numerous incentives to consult with their attorneys. The Supreme Court, however, had the second vision, based on corporate voluntary compliance, and rejected the narrower version of the privilege. Sexton, *supra* note 45, at 470-71.

61. See *Admiral Ins. v. United States Dist. Ct.*, 881 F.2d 486 (9th Cir. 1988); *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994). Interestingly, Chief Judge Campbell noted that the fact that a corporation is monolithic undermines the idea that it can have a privilege at all. He reasoned that a privilege implies a bond of secrecy between the lawyer and the client and that the bond of secrecy cannot exist in the modern corporation where there are many individuals involved. *Radiant Burners I*, 207 F. Supp. at 774.

62. See *Upjohn*, 449 U.S. at 392 (arguing the importance of encouraging employee honesty); Sexton, *supra* note 45, at 470.

63. Sexton, *supra* note 45, at 470.

64. “About half the practice of a decent lawyer consists of telling the client he is a damn fool.” 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938).

65. See *supra* text accompanying notes 42-49 for such a discussion.

significance as to how far that privilege extends. If for the purpose of the privilege the concept of “client” is construed narrowly, then conversations between counsel and other constituents of the corporate entity will be discoverable. The battle is fought as well concerning the application of the privilege to a former officer, director, or other employee of the corporate entity. Thus, it can be seen that the issue is of great practical importance in modern litigation.

B. THE DEVELOPMENT OF TWO COMPETING TESTS:
CONTROL GROUP VERSUS SUBJECT MATTER

The classic judicial definition of the attorney-client privilege was laid down by Judge Wyzanski in *United States v. United Shoe Machinery Corp.*⁶⁶ Judge Wyzanski permitted a corporation to claim the attorney-client privilege, stating, without supplying any analysis, that the privilege applies to “information furnished [to the attorney] by an officer or employee” of the corporation.⁶⁷ In so doing, Judge Wyzanski ignored dicta in *Hickman v. Taylor*,⁶⁸ that statements of lower-level employees are not within the privilege.⁶⁹

The starting point of analysis is Judge Kirkpatrick’s decision in *City of Philadelphia v. Westinghouse Electric Corp.*⁷⁰ Judge Kirkpatrick adopted and applied what has come to be known as the “control-group test”:

[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.⁷¹

Judge Kirkpatrick developed this test because of his dissatisfaction with the

66. 89 F. Supp. 357, 359 (D. Mass. 1950) (“It follows that in so far as these letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged as contain, or have opinions based on, information furnished by an officer or employee of the defendant in confidence and without the presence of third persons.”).

67. *Id.*

68. 329 U.S. 495 (1947).

69. *Id.* at 508. While discussing the availability of the statements of employees taken by the employer’s lawyer as against a claim of attorney-client privilege, Justice Murphy stated, “For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. . . .” *Id.* See also *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962) (“I cannot help feeling that he [Judge Wyzanski in *United Shoe Machinery*] is in conflict with *Hickman v. Taylor*.”). It is worth noting that the tugs in *Hickman* were not owned by a corporation. The clients of the interviewing lawyer were being represented as individuals. And although the witnesses were employees, the situation is not directly analogous to a corporate client. *Hickman*, 329 U.S. at 495.

70. 210 F. Supp. at 483.

71. *Id.* at 485.

alternatives.⁷² He dismissed any test that relied on the rank of the corporate employee as too nebulous, writing, "in corporate terminology the same title does not always mean the same thing."⁷³ After he dismissed, without comment, an approach that would turn on "whether the acts of the employee which he disclosed to the lawyer in his communication were acts for which the corporation would be responsible,"⁷⁴ he offered his own test.⁷⁵ Under his test, a communication between a corporate official and counsel would be privileged if the official sought legal advice on behalf of the corporation or directed the counsel in some legal action, reasoning that, because a corporation could only speak through an employee, any communication of a corporate official made as part of his duties was the communication of the corporate client.⁷⁶ If that communication was made while seeking legal advice on behalf of the corporation or if the communication sought to direct counsel, then that communication should be privileged.⁷⁷

The control-group test clearly satisfies the basic rationale for the privilege of encouraging communication between the client, here the corporation, and its lawyers. Its focus, however, is on decision makers and those who personify the corporation, ensuring that the highest levels of management and the board of directors are included. However, it does not cover those agents or employees who have no decision-making authority or authority to direct or control counsel, but nonetheless are closely involved with the matter for which the corporate attorneys have been retained or whose actions have given rise to or could give rise to corporate liability.⁷⁸

The control-group test also has the potential problem of being unclear. For any given situation those "in a position to control . . . any action" may shift greatly within a corporation. On some matters, only the highest officers of the corporation may make decisions, and they must deal with counsel in making those decisions. In others, it may be a department head or a branch manager who has the power to decide and to deal with local counsel in arriving at those decisions. This can lead to uncertainty and requires counsel and corporate officers to act upon their prognostication as to whom a court will later hold to have been included in the control group for the particular transaction or controversy and, thus, whose statements to counsel are privileged.⁷⁹

Finally, the control-group test is the most narrow application of the attorney-

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* ("In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation to have the authority to act. . . .").

79. See *Upjohn v. United States*, 449 U.S. 383, 393 (1981) (stating that lower courts interpret the control-group standard inconsistently).

client privilege. Conversations between the corporate attorney and employees who fall outside of the control group are not covered by the privilege at all. This may inhibit corporate counsel from making an intensive internal investigation into possible violations of law by corporate employees who fall outside the control group, for anything that such an employee tells the attorney is protected, at most, by the qualified work-product privilege and not by the more absolute privilege applicable to conversations between client and attorney.⁸⁰

*Westinghouse*⁸¹ put into play the issue of how far the corporate attorney-client privilege extends. While its ruling was adopted by many federal courts,⁸² several refused to follow Judge Kirkpatrick's lead. The key case to break with the *Westinghouse* control-group test was *Harper & Row Publishers, Inc. v. Decker*.⁸³ *Harper & Row* found the control-group test wanting because it excluded from the privilege counsel's conversations with lower echelon employees, treating them as mere witnesses.⁸⁴ The Seventh Circuit felt that the confidences of such employees deserved protection because even the lowest level employee acts on behalf of the corporation and may possess information vital to the legal matter under investigation.⁸⁵ The *Harper & Row* test became known as the subject-matter test:

We conclude that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.⁸⁶

This broad test has three major components: 1) the employee must make the communication at the direction of his or her superior; 2) the communication must be on a "subject matter" about which the corporation is seeking legal advice from, or giving instruction to, counsel; and 3) the subject matter must concern the employee's work duties. Thus, all interviews done in the course of an internal audit or investigation would be covered because any employee interviewed by or on behalf of corporate counsel at the direction of the employee's superiors on a

80. See *Hickman v. Taylor*, 329 U.S. 445, 508 (1947) (pointing out that the privilege did not extend to the witnesses in the case).

81. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962).

82. See, e.g., *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968) (holding for a control-group test in a patent case); *United States v. Amarada Hess Corp.*, 619 F.2d 980, 986-87 (3d Cir. 1980) (holding for a control-group test in a case involving the enforcement of summonses); *In re Grand Jury Investigation*, 599 F.2d 1224, 1237 (3d Cir. 1979) (holding for control-group test after considering all alternatives); *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock*, 68 F.R.D. 397 (E.D. Va. 1975) (holding for a control-group test because it was the easiest to apply).

83. 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd by equally divided court*, 400 U.S. 348 (1971).

84. *Id.* at 491.

85. *Id.*

86. *Id.* at 492.

legal matter connected with his or her employment would fall within the privilege. The Seventh Circuit in *Harper & Row* opened up this issue, and in the next eleven years a significant minority of the federal courts that considered the issue adopted some form of the subject-matter test.⁸⁷

This test expands the privilege beyond the control-group test in two ways. First, it covers more individuals than the control-group test because it applies not just to upper management but to all employees in the right circumstances. Second, it applies not just to management's obtaining advice from counsel or giving instructions to counsel, but to all investigatory work done by counsel. It very clearly allows the possibility that information uncovered through an internal investigation by counsel is privileged. If carried to its logical conclusion, the organizational privilege is not just a narrow functional doctrine to encourage discussions between management and the company's lawyers over the law's requirements, but it should permit the lawyer, under cover of the privilege, to enter into discussions with any employee, whether for the purpose of obtaining information from that employee or to furnish that employee advice on legal matters pertaining to his or her position.

The other major impact of this test is the result of the unusual timing of *Harper & Row*⁸⁸ and its disposition by the Supreme Court. *Harper & Row* created a circuit conflict during a time in which an advisory committee was drafting the Federal Rules of Evidence.⁸⁹ *Harper & Row* was affirmed by an equally divided Supreme Court.⁹⁰ Shortly thereafter, the Rules Advisory Committee's proposed Federal Rules of Evidence were approved by the Supreme Court.⁹¹ These proposed rules adopted an unusually vague rule in the area of the corporate attorney-client privilege, and provided virtually no assistance in its commentary.⁹² It seems reasonably clear that the generality of the proposed rule can be

87. Sexton, *supra* note 45, at 451 n.39; *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 372 (E.D. Wis. 1979); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 456-57 (N.D. Ill. 1974), *aff'd mem.*, 534 F.2d 330 (7th Cir. 1976); *Hasso v. Retail Credit Co.*, 58 F.R.D. 425, 428 (E.D. Pa. 1973); *Panduit Corp. v. Burndy Corp.*, 1972 U.S.P.Q. (BNA) 46, 47 (N.D. Ill. 1971).

88. *Harper Row*, 423 F.2d at 487.

89. *See Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968) (holding for a control group test).

90. *Harper Row*, 400 U.S. at 348.

91. 120 CONG. REC. H12, 253-54 (daily ed. Dec. 18, 1974).

92. Supreme Court Advisory Committee Note (subd. (a)(1), 56 F.R.D. 183, 237 (1972)). The Supreme Court's proposed Federal Rules of Evidence for the United States Courts and Magistrates included a detailed, thirteen rule, Article V that covered all privileges. Nonetheless, proposed Rule 503(a), covering the attorney-client privilege, did not define "representative of the client," preferring to leave it "to resolution by decision on a case-by-case basis." Rules of Evidence for United States Courts and Magistrates, Advisory Comment Note, 56 F.R.D. 183, 237 (1972). In the end, Congress did not accept any of Article V as proposed and reduced its contents to the current Rule 501. 120 CONG. REC. H12, 253-54 (daily ed. Dec. 18, 1974). Rule 501 reads "the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and

attributed to the unsettled nature of the law in the Supreme Court at the time.⁹³

After these conflicting tests were in place, and without a clear Supreme Court decision or guidance from the Federal Rules of Evidence, other courts attempted further variations. The most notable attempt, by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*,⁹⁴ added to the subject-matter test the requirement that "the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents."⁹⁵ Thus in the Eighth Circuit, the full test has five requirements:

[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 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.⁹⁶

The resulting state of the law was, needless to say, confusing. While it was agreed that there was an attorney-client privilege for corporations, the scope of that privilege was unclear. Circuits and district courts were in direct conflict on the matter, the Supreme Court was divided, and the Federal Rules of Evidence merely deferred to this muddled common law. In this context *Upjohn*⁹⁷ was heard and decided.

C. *UPJOHN V. UNITED STATES*: THE SUBJECT-MATTER TEST

The facts of *Upjohn* are familiar. *Upjohn*'s general counsel was informed that overseas subsidiaries might have made illegal payments to foreign government officials in aid of securing business.⁹⁸ The general counsel, along with outside counsel, prepared a detailed questionnaire that was sent to all overseas managers

experience." FED. R. EVID. 501. See KENNETH REEDER & STEPHEN A. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 128, 133 (Michie Co. 1975) (reprinting the congressional reports on Rule 501).

93. As is developed herein, a further complicating factor is that portion of Federal Rule of Evidence 501 that requires federal courts to apply the state law on privilege wherever state law supplies the rule of decision; for example, (but not limited to) diversity cases. FED. R. EVID. 501.

94. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), *aff'd en banc*, 572 F.2d 606 (8th Cir. 1978).

95. *Id.* See also *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377 (D.D.C. 1978) (holding that the privilege protects communications so long as they were intended to be confidential).

96. *Diversified Indus.*, 572 F.2d at 609.

97. *Upjohn v. United States*, 449 U.S. 383 (1981) (decided three years after *Diversified Industries*, 572 F.2d 596, and ten years after *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd by equally divided court*, 400 U.S. 348 (1971)).

98. *Upjohn*, 449 U.S. at 386.

as a part of a letter signed by Upjohn's chairman of the board.⁹⁹ The letter advised the managers that the Chairman had asked the general counsel to conduct an investigation concerning any such payments, that as a part of that investigation the managers were to answer the questionnaires, that the questionnaires were to be returned to the general counsel, and that the investigation was to be treated as "highly confidential."¹⁰⁰ Based on the results of the investigation, Upjohn voluntarily reported to the Internal Revenue Service ("IRS") that illegal payments had been made.¹⁰¹ In response, the IRS began its own investigation by requesting numerous documents, including the questionnaires.¹⁰² Upjohn refused to turn over the questionnaires on the ground of attorney-client privilege.¹⁰³

Factually, *Upjohn* fit perfectly into the "voluntary compliance" rationale and the subject-matter test.¹⁰⁴ First, this was a matter Upjohn voluntarily explored to find out if its employees were in compliance with the prohibition on payments to foreign officials. Upjohn also voluntarily revealed to the IRS the violations that it had found. Second, it was a clear match with the *Harper & Row*¹⁰⁵ test: 1) the questionnaires were filled out by corporate employees at the request of their superior, 2) the questionnaires inquired into a matter on which Upjohn was seeking legal advice, 3) the payments being investigated were made in connection with pursuit of Upjohn's business, and 4) the employees from whom the information was obtained were involved in that aspect of the corporate business.¹⁰⁶

The opposing side, of course, would see the matter quite differently. From its focus, the investigation was done from a fear of being caught and a desire to be proactive in forestalling government investigation and prosecution.¹⁰⁷ Under this view, with or without the privilege, Upjohn would have performed this very investigation; all the privilege would accomplish would be to allow Upjohn to hide the full extent of its wrongdoing.

Justice Rehnquist, writing for the majority, specifically rejected the control-group test and took the "voluntary compliance" view.¹⁰⁸ However, the majority did not expressly adopt the subject-matter test, with or without any of its

99. *Id.*

100. *Id.* at 387.

101. *Id.*

102. *Id.*

103. *Id.* at 383.

104. See Sexton, *supra* note 45, at 469 ("The voluntary compliance model of corporate behavior flows naturally from the facts of the *Upjohn* case.").

105. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970).

106. *Id.* at 491.

107. Sexton, *supra* note 45, at 497 n.107. See generally Note, *The Supreme Court, 1980 Term, supra* note 43, at 276-77; Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970). An internal compliance program is recognized under the federal Sentencing Guidelines as a factor to reduce a sentence that would otherwise be imposed. *Infra* note 315.

108. *Upjohn v. United States*, 449 U.S. 383, 384 (1981).

modifications. Instead, the Court took what has been called by Professor Sexton a “functional” approach.¹⁰⁹ The functional approach embraces no test and matches the vision of voluntary compliance as the purpose of the privilege. Professor Sexton describes the Court’s functional approach as follows: “[The Court] asked whether application of the privilege in circumstances of the kind at issue would enhance the flow of information to corporate counsel regarding issues about which corporations seek legal advice.”¹¹⁰ Justice Rehnquist’s rationale for having a corporate privilege was a clear vision of voluntary compliance:

Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.¹¹¹

The Court accepted the premises that corporations need the privilege in order for their employees to be encouraged to communicate fully with corporate lawyers, that corporations are active and voluntary followers of the law, and that such compliance goes beyond the threat of being caught.¹¹² The Court’s opinion clearly supports the idea that corporations need privacy to the extent afforded by the attorney-client privilege to comply with laws, and that internal investigations should be protected as a corporate effort to monitor compliance.¹¹³

Without actually saying so, Justice Rehnquist did in fact use the subject-matter test. The facts that Justice Rehnquist cited in support of the privilege match the key elements of *Harper & Row*. Upjohn’s counsel were acting as counsel, at the direction of corporate superiors, gathering information on important legal matters within the employment duties of those interviewed from people who knew that was the purpose of the interview, and who were instructed by their corporate superior to cooperate fully in the investigation on a confidential basis.¹¹⁴ This is the subject-matter test.¹¹⁵

Yet, the Court did not articulate a test. There is no doubt that their restraint was deliberate. The Court stated explicitly that it did not “undertake to draft a set of rules [that] should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501.”¹¹⁶

109. Sexton, *supra* note 45, at 462. See *Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993) (“We think an approach that focuses solely upon the status of the communicator fails to adequately meet the objectives sought to be served by the attorney-client privilege. We take a functional approach.”).

110. Sexton, *supra* note 45, at 462.

111. *Upjohn*, 449 U.S. at 389.

112. Sexton, *supra* note 45, at 463.

113. See *Upjohn*, 449 U.S. at 394-95 (holding that Upjohn was making an effort to comply with the laws and obtain legal advice).

114. *Id.* at 395.

115. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491 (7th Cir. 1970).

116. *Upjohn*, 449 U.S. at 396 (quoting the Senate Report: “[T]he recognition of a privilege based on a

D. BEYOND *UPJOHN*

While *Upjohn*¹¹⁷ made it more or less clear what the Supreme Court thought of the attorney-client privilege in the corporate setting, its refusal to articulate a test and its reliance on Federal Rule of Evidence 501 left lower federal courts on their own to develop a meaningful test within the doctrine laid down by *Upjohn*. As Chief Justice Burger, concurring in part, feared, the result is “continuing uncertainty and confusion . . . [with] inherent dissonance”¹¹⁸

Sixteen years after *Upjohn*, two answers seem to have been formulated. The first is a literal interpretation of *Upjohn* and Federal Rule of Evidence 501: the privilege should be determined “by the principles of the common law in light of reason and experience” on a case-by-case basis, without any standard.¹¹⁹ The second is that the Court’s reasoning in *Upjohn* clearly favored the subject-matter test and was a tacit endorsement of either the *Harper & Row*¹²⁰ or the *Diversified Industries*¹²¹ formulation of that test.

The Ninth Circuit favored a literal interpretation of *Upjohn* when it decided *Admiral Insurance Co. v. U.S. District Court*.¹²² Under *Upjohn*, the Ninth Circuit said, “each case must be evaluated to determine whether application of the privilege would further its underlying purpose” to encourage attorney-client communications.¹²³ The Ninth Circuit found that *Upjohn* “stands for the proposition that [where] the advantages of preserving the privilege outweigh the inescapable disadvantages of the resultant secrecy” the privilege applies.¹²⁴ The Ninth Circuit specifically interpreted the *Upjohn* holding to apply the privilege “to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee’s corporate

confidential relationship . . . should be determined on a case-by-case basis” S. REP. NO. 93-1277, at 13 (1974)). Thus, section 501 provides that, except where “[s]tate law provides the rule of decision,” privilege “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.” Chief Justice Burger, concurring in part in the *Upjohn* opinion, disagreed with the majority’s refusal to articulate a standard. He would have rejected the control-group test and adopted the subject-matter test articulated in *Harper & Row* and *Diversified Industries*. *Upjohn*, 449 U.S. at 402-04 (citing *Harper & Row*, 423 F.2d at 491).

117. *Upjohn*, 449 U.S. at 383.

118. *Upjohn*, 449 U.S. at 404.

119. *Id.* at 397. See, e.g., *Admiral Ins. Co. v. United States District Ct.*, 881 F.2d 1486 (9th Cir. 1988) (applying *Upjohn* by analogy), *LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981) (applying same); *United States v. Mobil*, 149 F.R.D. 533 (N.D. Tex. 1993) (choosing to avoid application of a rigid test and instead to evaluate whether the application of the privilege would further its purpose); *Eglin Federal Credit Union v. McKelvey*, 91 F.R.D. 414 (N.D. Ga. 1981) (stressing the Supreme Court’s adoption of a case-by-case approach); *Boyer v. Bd. of County Comm’rs*, 162 F.R.D. 687 (D. Kan. 1995) (acknowledging the absence of a test in *Upjohn*, and reasoning based on *Upjohn* principles).

120. *Harper & Row*, 423 F.2d at 487.

121. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

122. 881 F.2d 1486 (9th Cir. 1988).

123. *Id.* at 1492.

124. *Id.*

duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation.”¹²⁵ This “non-test” test seems to be a presumption of privilege for the corporation for any communication concerning an employee’s work asked for by the corporation. At least four district court cases use standards similar to *Admiral*.¹²⁶

The other view of *Upjohn*¹²⁷ is neatly summarized by the District Court of the District of Columbia in *Independent Petrochemical Corp. v. Aetna Casualty and Surety Co.*¹²⁸ The District Court simply stated that both *Upjohn*¹²⁹ and *Diversified Industries*¹³⁰ are controlling and proceeded to use the *Diversified Industries* subject-matter test.¹³¹ The District Court, stressing that not all communications made to legal counsel are assumed to be privileged, stated, “[i]t is far too expansive an interpretation to say that any communication made by any employee to corporation’s legal counsel is prima facie done so for legal advice and therefore is privileged absent some other showing.”¹³² This formulation seems to contradict *Admiral’s* emphasis that *Upjohn* constitutes an endorsement of the advantages of the privilege, with little, if any, regard for its costs. Perhaps not surprisingly, the District Court found no privilege.¹³³

Turning to state law, it must be noted that *Upjohn* clearly is not a constitutional decision. Thus, each state is free to adopt its own rule. The Supreme Court’s guidance in *Upjohn*, while totally embraced in some states, was accepted with modifications in others, and rejected in still others.¹³⁴

The matter is complicated by the fact that in many states this issue is governed by statute. As promulgated in 1974, Rule 502(a) of the Uniform Rules of

125. *Id.*

126. *E.g., In re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981); *United States v. Mobil*, 149 F.R.D. 533 (N.D. Tex. 1993); *Eglin Fed. Credit Union v. McKelvey*, 91 F.R.D. 414 (N.D. Ga. 1981); *Boyer v. Bd. of County Comm’rs*, 162 F.R.D. 687 (D. Kan. 1995).

127. *Upjohn v. United States*, 449 U.S. 383 (1981).

128. 672 F. Supp. 1 (D.D.C., 1986); *see also In re Intl. Systems and Controls Corp. Sec. Litig.*, 91 F.R.D. 552 (S.D. Tex. (1981) (finding a test similar to *Diversified Industries* applicable. The corporate privilege “extends to those communications to or from the attorney by any employee if the communication concerned matters within the scope of the employee’s corporate duties, the employee was aware he was being questioned in order that the corporation may obtain legal advice, and the communication was considered highly confidential when made and has been kept confidential by the company”).

129. *Upjohn*, 449 U.S. at 383.

130. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

131. *Independent Petrochemical*, 672 F. Supp. at 3.

132. *Id.* at 5.

133. *Id.*

134. *Consolidated Coal v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982) (rejecting *Upjohn* and adopting a control-group test); *Fruehauf Trailer Corp. v. Hagelthorn*, 528 N.W.2d 778 (Mich. Ct. App. 1995) (declaring *Upjohn* controlling by finding the privilege not warranted by the facts of the case); *Command Trans. v. Y.S. Line (USA) Corp.*, 116 F.R.D. 94 (D. Mass. 1987) (adopting *Upjohn*); *Southern Bell T. & T. Co. v. Deason*, 632 So.2d 1377 (Fla. 1994) (holding *Upjohn* to be persuasive authority); *Samaritan Foundation v. Goodfarb*, 862 P.2d 870 (Ariz. 1993) (approving *Upjohn* but adopting neither a control group or subject matter test).

Evidence provided for the control-group test.¹³⁵ And this version was adopted by several states.¹³⁶ Five years after *Upjohn*,¹³⁷ the Uniform Rules of Evidence were revised to include an optional Rule 502(a) based upon a broad reading of the rationale of *Upjohn*.¹³⁸ Since the 1986 revision, the optional version of Rule 502(a) has been adopted verbatim by six states and partially by at least two others.¹³⁹ Eighteen states that have adopted the Uniform Rules have chosen to omit 502(a) entirely, preferring that there be a judicial solution.¹⁴⁰ Of course, where the issue is resolved by statute and the statute is clear, the room for judicial adoption of one test over another is limited or non-existent.

The Illinois Supreme Court was one of the first to act in the wake of *Upjohn*. In 1982, Illinois specifically rejected *Upjohn* and adopted the control-group test.¹⁴¹ The court saw the issue as a choice between two clearly different formulations of the privilege. On one hand were the subject-matter tests, personified by *Harper & Row*,¹⁴² which had been criticized as protecting "too much relevant information from discovery."¹⁴³ On the other was the control-group test, which some courts thought frustrated the purpose of the privilege by being too narrow.¹⁴⁴ The Illinois court concluded that the control-group test better balanced the concern for open discovery and the need for communication between managers and the corporation's lawyers:¹⁴⁵

The control-group test appears to us to strike a reasonable balance by protecting consultations with counsel by those who are the decision makers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery.¹⁴⁶

135. The 1974 version of 502(a) is as follows:

- (2) A representative of the client is one having authority to obtain professional legal services by a lawyer, or to act on advice rendered pursuant thereto, on behalf of the client.

JOSEPH SALTZBURG, 1 EVIDENCE IN AMERICA, ch. 24, at 1 (1994).

136. It was reported in 1994 that eleven states had adopted this version of Uniform Rule 502(a)(2). *Id.* at 7-8. By 1996 that number had dropped to six. UNIF. R. EVID. 502 (amended 1986), 13A U.L.A. 520-29 (1994).

137. *Upjohn v. United States*, 449 U.S. 383 (1981).

138. The 1986 option is as follows:

- (2) A representative of the client is (i) one having authority to obtain professional legal services by a lawyer, or to act on advice rendered pursuant thereto, on behalf of the client or (ii) any other person who, for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

SALTZBURG, *supra*, at 2.

139. UNIF. R. EVID. 502 (amended 1986), 13A U.L.A. 520-29 (1994).

140. UNIF. R. EVID. 502.

141. *Consolidated Coal v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982).

142. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970).

143. *Consolidated Coal*, 432 N.E.2d at 256.

144. *See id.* (refraining from questioning the central assumption of the earlier cases that the privilege was needed to encourage conversations between corporations and their attorneys).

145. *Id.* at 257.

146. *Id.*

In the court's view, these factors outweighed any benefit from a broader test that would provide an incentive for corporate employees to cooperate fully in investigations and to consult concerning the corporation's legal obligations. The court concluded that the control-group test provided all the incentive that was needed.¹⁴⁷

In *Fruehauf Trailer Corp. v. Hagelthorn*, a Michigan appellate court declared that *Upjohn* was "controlling" on the corporate "client side of the attorney-client relationship."¹⁴⁸ A Massachusetts federal court, sitting in diversity, found no Massachusetts state case on point. However, the district court held that if Massachusetts were to decide the issue, it would adopt *Upjohn*: "*Upjohn's* legacy is to encourage . . . a focus, in consideration of the attorney-client privilege in the corporate context, on whether the application of the privilege in circumstances of a particular case would foster the flow of information to corporate counsel regarding issues about which corporations seek legal advice."¹⁴⁹ In essence, this case construed *Upjohn*¹⁵⁰ similarly to the construction given it by the Ninth Circuit in *Admiral Insurance Co.*,¹⁵¹ in that the rationale followed in *Upjohn* was held to serve as a de facto test.¹⁵²

Florida, in *Southern Bell Telephone & Telegraph Co. v. Deason*,¹⁵³ found *Upjohn* to be "persuasive authority," and adopted a variation of the subject-matter test.¹⁵⁴ The Florida test contains five elements:

- 1) the communication would not have been made but for the contemplation of legal services; 2) the employee making the communication did so at the direction of his or her corporate superior; 3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services; 4) the content of the communication relates to the legal services being rendered, and 5) the subject matter of the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.¹⁵⁵

Thus, *Southern Bell's* conclusion was that *Upjohn* is to be followed and that *Upjohn* adopts a subject-matter test.¹⁵⁶ This puts *Southern Bell* at odds with those states that have read *Upjohn* to abjure any test and, of course, with those states that have adopted the control-group test.

An interesting variation is that put forth by the Arizona Supreme Court in

147. *Id.*

148. *Fruehauf Trailer Corp. v. Hagelthorn*, 528 N.W.2d 778, 781 (Mich. Ct. App. 1995).

149. *Command Trans. v. Y.S. Line (USA) Corp.*, 116 F.R.D. 94, 97 (D. Mass. 1987).

150. *Upjohn v. United States*, 449 U.S. 383 (1981).

151. *Admiral Ins. Co. v. United States Dist. Ct.*, 881 F.2d 1481, 1486 (9th Cir. 1988).

152. *Id.*

153. 632 So. 2d 1377 (Fla. 1994).

154. *Id.* at 1382 n.9 (citing *Upjohn*, 449 U.S. at 383).

155. *Id.*

156. *Id.*

*Samaritan Foundation v. Goodfarb*¹⁵⁷ where *Upjohn* was given a nod of approval, particularly for its rejection of the control-group test, but was not adopted.¹⁵⁸ The test developed in *Samaritan* follows a different theory from either the control-group test or the subject-matter test. *Samaritan* protects under the privilege two types of communication.¹⁵⁹ First, where an employee institutes the communication, seeking advice for a matter within the interest of the corporation, that communication is held to be within the privilege.¹⁶⁰ Where, on the other hand, the communication is initiated by counsel or by someone else in the corporation, then the communication with the employee is within the privilege only if it is the action or inaction of that employee that is the basis of imputed liability to the corporation based upon the respondeat superior doctrine.¹⁶¹ *Samaritan* excludes from the privilege all other communications from employees to corporate counsel, with the probable exception of communications from the control group. Thus, the standard adopted in *Samaritan*, though broader than the control-group test, is narrower than the subject-matter test of *Harper & Row*¹⁶² and *Diversified Industries*.¹⁶³ When one compares *Samaritan*¹⁶⁴ with *Upjohn*,¹⁶⁵ however, it is possible to read them consistently, for on the facts the questionnaires in *Upjohn* appear to have been addressed solely to those managers who could have been involved in illegal gift giving. On the other hand, the *Upjohn* decision does not declare position a significant factor.¹⁶⁶

The result is that there is no uniformity from court to court. As noted, the federal courts, while recognizing that the control-group test is not valid in federal question matters, are not in agreement as to what is valid. And the states, having more leeway, are in even greater dissonance.

Indeed, when we turn back to the federal courts, we find what should be a disturbing consequence of the dissonance. Federal Rule of Evidence 501 commands that federal courts use the state law of privilege whenever "state law

157. *Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993).

158. *Id.* at 875.

159. *Id.* at 876.

160. *Id.*

161. *Id.* at 877.

162. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970).

163. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

164. *Samaritan Found.*, 862 P.2d at 870.

165. *Upjohn v. United States*, 449 U.S. at 383 (1981).

166. *Id.* at 395. The Arizona legislature quickly overrode the ruling of the *Samaritan Foundation v. Goodfarb*, 862 P.2d 870 (1983), decision the next year, adopting Ariz. Rev. Stat. section 12-2234, B, "any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either: 1) For the purpose of providing legal advice to the entity or employer or to the employee, agent or member. 2) For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member." ARIZ. REV. STAT. § 12-2234 (1994). This is a broader privilege, almost without limits. Note, *The Extent of the Attorney-Corporate Client Privilege in Arizona*, 36 ARIZ. L. REV. 725, 744 (1994).

supplies the rule of decision [pertaining to] an element of a claim or defense . . .” in a civil action.¹⁶⁷ Thus, a federal court sitting in federal question is to apply the federal common law of privilege, whatever that may be in that court, but the same court sitting in diversity is to apply state law to that issue. And, in a federal question case in which there are joined state claims under the supplemental jurisdiction provided by 28 U.S.C. 1367,¹⁶⁸ the federal court may be called upon to apply two different rules of privilege in the same case, perhaps pertaining to the testimony of the same witness.¹⁶⁹

It is in this context that the American Law Institute has been trying its hand at writing a formula that will encourage uniformity and consistency. The task of writing the *Restatement of the Law Governing Lawyers* to date has taken a decade.¹⁷⁰ We shall now turn to the *Restatement's* most recent incarnation.

II. THE RESTATEMENT

The *Restatement* has chosen the broadest of approaches.¹⁷¹ As we shall see, it opts at least for a subject-matter test, applies the privilege to former officers and employees, removes at least one of the restrictions of *Harper & Row*,¹⁷² and expands the concept of “organization” to which the privilege applies.¹⁷³ It also attempts to clarify other issues that logically arise from the use of this privilege, some of which have little if any development in the case law.¹⁷⁴ Thus, the *Restatement*, while furnishing a coherent and complete set of rules that should assist greatly as this area of the law continues to develop, also adds some new areas of uncertainty.

Before turning to the issue on which the first part of this paper was largely focused, it should be noted that the *Restatement* focuses more broadly than solely on the corporation. Indeed, section 123 is entitled “Privilege for Organizational Client,” and the term “organization” is used throughout.¹⁷⁵ Thus, while the case law to date has arisen almost exclusively in the context of corporations, the

167. FED. R. EVID. 501.

168. 28 U.S.C. § 1367.

169. While beyond the scope of this paper, it would be interesting to attempt to resolve a situation in which, in one case, a question is asked, the answer to which is privileged as to one claim and yet not privileged as to another. How is the information to be kept from the finder of fact and given to the finder of fact at the same time? Does anyone really believe that a limiting instruction would work in such a situation? This issue was noted in *Samaritan Found. v. Goodfarb*, 862 P.2d 870, 877 (Ariz. 1993), and in Julie Elizabeth Rice, *The Attorney-Client Privilege in the Corporate Context: The Intersection of Federal and Illinois Law*, 1984 U. ILL. L. REV. 175, 187.

170. RESTATEMENT OF THE LAW GOVERNING LAWYERS (Tentative Draft No. 1, 1988).

171. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 123 (Proposed Final Draft No. 1, 1996) [hereinafter RESTATEMENT].

172. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970).

173. RESTATEMENT § 123.

174. *Id.* § 123 cmt. e.

175. *Id.* § 123.

Restatement recognizes that the principles developed in that context are to be more widely applied.

Section 123 recognizes that some decisions have questioned whether the principles developed in the corporate context should be applied beyond that context.¹⁷⁶ The *Restatement* brushes aside those questions: "Neither logic nor principle supports limiting the organizational privilege to the corporate form."¹⁷⁷ And comment *c* goes on to make clear that under the *Restatement*, the privilege applies to partnerships, unincorporated associations, trusts, estates, "charitable, social, fraternal, and other non-profit organizations such as labor unions and chambers of commerce," whether or not incorporated and whether for-profit or not-for-profit, and to sole proprietorships.¹⁷⁸

At first blush, this expansive application is startling. Yet, upon analysis, it makes eminent sense. If a business is undertaken with several principals and hundreds of employees, what value is satisfied if the attorney-client privilege is to be applied differently just because the principals chose a partnership form instead of a corporate form? The difference is truly one of form and not of substance. Similarly, if a suit is brought against the local cleaning shop with several employees, and counsel for the cleaning shop discusses the incident with one or more of those employees who were involved, what value dictates a difference in the application of the privilege depending on whether the owner had chosen to incorporate, perhaps solely to obtain the benefits of limited liability, or to remain a sole proprietorship? None appears. Similar analysis discloses no real difference between the labor union or fraternal organization that chooses to incorporate and that which, for all practical purposes, is the mirror image, choosing to remain an unincorporated association.

Turning now to the question developed in the early part of this paper: To which constituents of the organization does the privilege apply? The *Restatement* has opted for the broadest of views. In its black letter law, section 123 applies the privilege to a communication by "an agent of the organization" that "concerns a legal matter of interest to the organization . . ."¹⁷⁹ This phrasing is at least as broad as the subject-matter test of *Harper & Row*¹⁸⁰ and *Diversified Industries*¹⁸¹ and the functional analysis of *Upjohn*.¹⁸²

The *Restatement* and these cases apply the privilege to communications that concern legal matters of interest to the corporation.¹⁸³ However, while *Harper &*

176. *Id.* § 123 cmt. b.

177. *Id.* § 123 cmt. b.

178. *Id.* § 123 cmt. c.

179. *Id.* § 123(2)-(3).

180. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970).

181. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

182. *Upjohn v. United States*, 449 U.S. 383 (1981).

183. *Diversified Indus.*, 572 F.2d at 609; *Harper & Row*, 432 F.2d at 491-92.

*Row*¹⁸⁴ and *Diversified Industries*¹⁸⁵ focus on how the employee acquired the information and came to speak to the corporation's attorney, the *Restatement* simply covers all agents. Thus, the *Restatement's* main distinction is how the concept of an agent differs from the "employee" in *Harper & Row*,¹⁸⁶ *Diversified Industries*,¹⁸⁷ and *Upjohn*.¹⁸⁸

The *Restatement* recognizes that there must be balance. On the one hand there is the attorney's need to know in order to give the best possible advice and to represent the organizational client as well as possible in either a transactional or a litigation situation.¹⁸⁹ While the *Restatement* does not address it, on this side is also weighed the value of the organizational counsel's assistance to the organization in voluntary compliance investigations. The *Restatement* recognizes that, on the other hand, there is concern that an expansive privilege "afford[s] organizations 'zones of silence' that would be free of evidentiary scrutiny."¹⁹⁰

Recognizing the need for balance, the *Restatement* opts for a broad application of the privilege based upon the need of the attorney to know. Thus, when the black letter of section 123 applies the privilege to communications to counsel by "an agent of the organization," comment *d* defines "agent" to "include the organization's officers and employees," directors, "both when participating in a meeting of directors and when communicating individually with a lawyer for the corporation about the corporation's affairs," and "independent contractors with whom the corporation has a principal-agent relationship," and the agents of those independent contractors "when acting as subagents of the organizational client."¹⁹¹ Shareholders are excluded from the concept of "agent."¹⁹²

As for a partnership, "agent" includes "general partners and employees and other agents and subagents of the partnership," but excludes limited partners, who are deemed to be "analogous to shareholders of a corporation."¹⁹³ "Agents" of an unincorporated association for this purpose include officers, employees, and other contractual agents and subagents, but not mere members, except for small associations in which "members" function more like partners in a general partnership.¹⁹⁴ An "agent" in a sole proprietorship includes, in addition to the proprietor, any employee or contractual agent and subagent.¹⁹⁵

This is a broad sweep, going significantly beyond the law as developed in the

184. *Harper & Row*, 423 F.2d at 487.

185. *Diversified Indus.*, 572 F.2d at 596.

186. *Harper & Row*, 423 F.2d at 487.

187. *Diversified Indus.*, 572 F.2d at 596.

188. *Upjohn v. United States*, 449 U.S. 383 (1981).

189. RESTATEMENT § 123 cmt. b.

190. *Id.*

191. *Id.* § 123 cmt. d.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

key cases. No case known to this author focuses upon communications between independent contractors of the organizational client and organizational counsel as being a part of the organization's attorney-client privilege. Yet, existence of such privilege makes sense. Currently, many organizations utilize large numbers of temporary workers, consultants, and sub-contractors.¹⁹⁶ Indeed, it is no longer rare for a person to be an employee one day and an independent consultant the next, doing largely the same task for the organization. To limit the privilege to conversations between organizational counsel and technical employees of the organization would mean that counsel could not inquire into matters of legal interest to the organization, under cover of the privilege, from persons who very well may be the significant actors in the transaction.

The *Restatement* carries this approach forward when it examines the situation of the former officer or employee of the organization for example, someone who is no longer working for the organization because of retirement or other termination, whether or not voluntary. As the reporter's note to section 123 points out,¹⁹⁷ this issue was raised but not decided in *Upjohn*,¹⁹⁸ and the few decisions on point are in conflict.¹⁹⁹ Consistent with its broad approach, the *Restatement*, extends the privilege to "communications with a person with whom the organization has terminated, for most other purposes, an agency relationship."²⁰⁰

The *Restatement*, however, puts on this general rule what may be a significant qualification — one that clearly will be a point of litigation contention — "a former agent" is included in the concept of "agent" for privilege purposes "if, at the time of communicating, the former agent has a continuing legal obligation to the principal-organization to furnish the information to the organization's lawyer."²⁰¹ The *Restatement* then refers to the law of agency and the terms of the employment contract for a determination as to whether there is such a legal obligation.²⁰²

Comment *e* cites and the reporters note quotes the *Restatement of Agency*:

Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.²⁰³

196. Keith H. Hammonds & Kevin Kelly, *Special Report*, Business Week, October 17, 1994, at 85.

197. RESTATEMENT § 123 cmt. e rep. note.

198. *Upjohn v. United States*, 449 U.S. 383, 394 n.3 (1981). Chief Justice Burger, concurring, would have included the "former employee" in the privilege under the standard that he urged the Court to adopt. *Id.* at 403.

199. *Compare Bobkoski v. Board of Educ. of Cary Consol. School Dist.* 26, 141 F.R.D. 88 (N.D. Ill. 1992) with *In re Petroleum Products Anti-Trust*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (dictum).

200. RESTATEMENT § 123 cmt. e.

201. *Id.*

202. *Id.*

203. *Id.* § 123 cmt. e rep. note (citing RESTATEMENT SECOND OF AGENCY § 381 & cmt. e).

f. After termination. An agent may be under a duty to give information to the principal after the termination of the agency, as where he does not account to the principal until such time. See § 381. Likewise, if the agency terminates without the fault of the principal, the agent is under a duty

The reporter's note to section 123 then notes that the *Restatement of Agency*:

states a general proposition that a principal is bound by some forms of knowledge possessed by an agent, even if the agent does not convey the knowledge to the principal. It states in Comment *e* that a principal is bound by information possessed by an agent who received the information during the agency but who has terminated the principal-agent relationship before the consequences of the agent's failure to disclose the information have occurred.²⁰⁴

The reporter's note concludes that "it is unclear under those provisions what the extent may be of an agent's duty to convey information to a former principal, on the principal's request, if the information would not bind the principal."²⁰⁵

All of this demonstrates that this is one area in which section 123 has not brought clarity. It is at least arguable that, under section 123, a conversation that organizational counsel has with a former agent of the organization comes under the privilege only if: (a) the agency was terminated "without fault of the principal," and (b) the "form of knowledge" possessed by the agent would "bind" the principal. One can easily see tangential hearings on motions to compel and for protective orders into whether the agency terminated with or without "fault" of the principal, and much dispute about whether the "form of knowledge" would "bind" the principal. What "form of knowledge" would "bind" the principal, as well as what is and what is not "fault" of the principal, may very well differ from state to state.

To make the situation even worse, section 123, *after* the reference to agency law discussed above,²⁰⁶ then states:

The privilege covers communications with a lawyer for an organization by a retired officer of the organization of a matter within the officer's prior responsibilities that is of legal importance to the organization.²⁰⁷

Does the separate discussion of the "retired officer"²⁰⁸ after the discussion of agency law mean that the qualifications noted above do not apply to retired officers? Does it mean that the privilege applies to any discussion that the organization's counsel has with a retired officer, whether or not he retired "without the fault of the principal"²⁰⁹ and whether or not his "forms of

thereafter to give to the principal relevant information received by the agent when acting as such. See § 275, Comment e").

204. *Id.* § 123 cmt. e rep. note (citing RESTATEMENT SECOND OF AGENCY § 275).

205. *Id.*

206. Text accompanying note 204.

207. RESTATEMENT § 123 cmt. e.

208. *Id.*

209. *Id.*

knowledge”²¹⁰ would bind the organization? And is the situation different if the officer was terminated or resigned, but did not retire? What is the situation if he or she retired under duress and protest? Or retired “voluntarily” but under a Hobson’s choice?

It is difficult to imagine a less clear way of presenting the proposition. Instead of clarity, in this area the *Restatement* has contributed to, if not created, murkiness. The only saving thought is that, as the reporter points out, so far there have been few decisions on point.²¹¹ But now that the issue has been laid on the table by the *Restatement*, one can be certain that the issue will no longer be ignored.

Returning to the black letter law of section 123, the *Restatement* states that the privilege applies if the communication “concerns a legal matter of interest to the organization.”²¹² This is an area of seeming continuity between the subject-matter test of *Harper & Row*,²¹³ *Diversified Industries*²¹⁴ and the *Restatement*. This term is not defined or expounded on in the comments, and it is intended to be as broad as possible. It excludes only a communication that is not of interest to the organization, though it is difficult to imagine that any such matter would arise in litigation.²¹⁵ Therefore, it would seem, any matter raised in litigation would be “of interest to the organization.” As long as a matter is raised, is relevant, or is material, it will be of interest to the organization. Thus, this language is effectively without limitation.

Of course, as comment *f* points out, if the lawyer represents the organization’s agent personally, rather than representing the organization, when he or she receives the communication, there is a different result.²¹⁶ No doubt, as comment *f* states, “a lawyer representing such an officer or employee . . . can have privileged communications with that client. But the privilege will not be that of the organization.”²¹⁷ Thus, it is possible that a communication from an agent of the organization to an attorney who represents that agent personally may be “of interest to the organization,” but because it was made to the attorney in his or her capacity as counsel for the agent personally it does not fall within the organization’s privilege. If the attorney for the agent is not also the attorney for the organization, there is no issue. On the other hand, if the attorney for the agent also represents the organization and a privileged communication from agent to

210. *Id.* § 123 cmt. e rep. note.

211. *Id.*

212. *Id.* § 123(3).

213. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970).

214. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

215. The term “litigation” as used here includes analogous situations such as congressional hearings and administrative proceedings where the privilege may be claimed.

216. RESTATEMENT § 123 cmt. f.

217. *Id.*

attorney becomes “of interest to the organization,” it is hard to imagine that there may not then be an impermissible conflict under *Model Rule 1.7*.²¹⁸

While the “legal matter of interest to the organization” easily can be held to be at least as broad as the subject-matter test, there are two significant differences in which the *Restatement* abjures limitations in the key subject matter cases. *Harper & Row*²¹⁹ included in the subject-matter test that the “employee makes the communication at the direction of his superiors in the corporation . . .”²²⁰ and *Diversified Industries*²²¹ included as a requirement that “(2) the employee making the communication did so at the direction of his corporate superior . . .”²²² Finally, in setting forth the relevant factors in arriving at its *Upjohn*²²³ decision, the Court started with: “the communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors . . .”²²⁴

The *Restatement* explicitly abandons this requirement, stating in section 123 that, for the privilege to apply, “it is not necessary that a superior organizational authority specifically direct an agent to communicate with the organization’s lawyer.”²²⁵ Rather, the agent may volunteer information to organization counsel “when reasonably related to the interests of the organization,” and counsel may “seek relevant information directly from employees and other agents without prior direction from superior authorities in the organization” and those employees and agents may respond to such a request.²²⁶

Certainly in this respect, if no other, section 123 provides a broader privilege than was heretofore thought to exist. Once again, reality supports such a view, particularly in large organizations. Where a matter comes to the attention of counsel making an investigation appropriate, it would be wasteful to require that, before the investigation is undertaken, counsel must first ask the president or, as in *Upjohn*, the chair of the board,²²⁷ to issue a directive for employees to answer questions. It also seems unduly formalistic if, when an employee approaches counsel with some information, counsel must ask him or her to be silent until counsel obtains a directive that the employee should communicate that information to counsel. Thus, the superior-directive restriction of *Harper & Row*,²²⁸

218. MODEL RULES Rule 1.13(d)-(e) cmt. [7].

219. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970).

220. *Id.* at 491-92.

221. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

222. *Id.* at 609.

223. *Upjohn v. United States*, 449 U.S. 383 (1981).

224. *Id.* at 394.

225. RESTATEMENT § 123 cmt. h.

226. *Id.*

227. *Upjohn*, 449 U.S. at 386.

228. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970).

Diversified Industries,²²⁹ and perhaps *Upjohn*,²³⁰ while having an initial appeal, is undermined by the practical demands of organizations.

The second limitation of the subject-matter test also is dropped by the *Restatement*. For the privilege to apply to a communication from a mere employee (i.e., one who is not a member of the control group), both *Harper & Row*²³¹ and *Diversified Industries*²³² require that the communication be on a matter that falls within the duties of that employee.²³³ Thus, should an office worker employed by the organization be looking out the window and observe an accident involving an organization's vehicle, any communication between that office worker and the organization's counsel concerning that accident would not be within the organization's attorney-client privilege.

The *Restatement* rejects that limitation:

Ordinarily, an agent communicating with an organization's lawyer . . . will have acquired the information in the course of the agent's work for the organization. However, it is not necessary that the communicated information be so acquired. Thus, a person may communicate . . . with respect to information learned prior to the relationship, or learned outside the person's functions as an agent, so long as the person bears an agency relationship to the principal-organization at the time of the communication and the communication concerns a matter of interest to the organization²³⁴

Such an approach, of course, simplifies the resolution of a challenge to the application of the privilege by eliminating an additional inquiry into the nature of the employee's duties. It also expands the application of the privilege significantly by bringing all employees within the privilege.

The black-letter law of section 123 does restrict the privilege to communications that are disclosed only to the client, the client's lawyer, agents of the lawyer, and agents of either "who facilitate communication between them."²³⁵ Further, the communication to be privileged can be disclosed to "other agents of the organization who reasonably need to know of the communication in order to act for the organization."²³⁶ Comment g makes clear that "those agents include persons who are responsible for accepting or rejecting a lawyer's advice on

229. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

230. *Upjohn v. United States*, 449 U.S. 383 (1981).

231. *Harper & Row*, 423 F.2d at 487.

232. *Diversified Indus.*, 572 F.2d at 596.

233. *Compare Harper & Row*, 423 F.2d at 491 ("[T]he subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.") with *Diversified Indus.*, 572 F. 2d at 609 ("[T]he subject matter of the communication is within the scope of the employee's corporate duties.").

234. The only area in which the *Restatement* abandons this approach has to do with the retired officer: "The privilege covers communications with a lawyer for an organization of a matter within the officer's prior responsibilities that is of legal importance to the organization." *RESTATEMENT* § 123 cmt. e.

235. *Id.* § 123.

236. *Id.* § 123 cmt. g.

behalf of the organization or for acting on legal assistance, such as general legal advice, provided by the lawyer.”²³⁷

Thus, if the communication is included in a press release, there is no privilege because the press are not members of the organization nor do they need the information to act for the organization.²³⁸ However, even if the communication is included in a release to all employees of the organization, there is a privilege if the lawyer’s advice is relevant to all employees in the organization.²³⁹ Anything less would eliminate the privilege by revealing the communication beyond those who need to know. However, a privileged communication by counsel to a person within the organization to whom it is appropriate to send such a communication may, in turn, be communicated by that person to others within the organization with the need to know without the privilege being waived.²⁴⁰ Thus, the *Restatement* provides a simple way to avoid any restriction on the privileged nature of counsel’s legal advice.

The “need to know” is defined to include “all agents of the organization who would be personally held financially or criminally liable for conduct in the matter . . . or who would personally benefit from it.”²⁴¹ Further, “need to know” includes those persons “whose general management and supervisory responsibilities include wide areas of organizational activities,” specifically including directors and senior officers of the organization, and to “lower echelon agents of the organization whose area of activity is relevant to the legal advice or service rendered.”²⁴²

237. *Id.*

238. *Id.*

239. Section 118 of the *Restatement* provides that the privilege applies to “(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.” *Id.* § 118. Section 119 defines “communication” to include “any expression through which a privileged person . . . undertakes to convey information to another privileged person . . .” *Id.* § 119. Section 120 includes both the client and the attorney as a “privileged person.” *id.* § 120. And section 122 defines “obtaining or providing legal assistance,” as stated in section 118(4), to require that the communication be “made to or to assist a person: (1) who is a lawyer . . . and (2) whom the client or prospective client consults for the purpose of obtaining legal assistance.” *Id.* § 122, 118(4).

Up to section 122, it appears clear that a communication from attorney to client, is within the privilege, as long as its purpose is to provide legal assistance. Read literally, section 122 appears to limit “obtaining or providing legal assistance” to a communication to the lawyer. *Id.* § 122. However, section 119 makes it clear that the authors of the *Restatement* intended the privilege to apply to “confidential communications by a lawyer to a client” without the necessity of showing that the communication “contains or expressly refers to a client communication.” RESTATEMENT § 119 cmt. i. The comment recognizes that there are some decisions that carry that requirement, but it expressly “reject[s] [them] in favor of a broader rule more likely to assure full and frank communication . . .” *Id.* The broader rule also will end the practice of counsel adding the formalistic language “this letter is based upon the confidential communications that you have made to me,” ritualistically included by good counsel to try to ensure the protection of the privilege. It is regrettable that the black-letter language of section 122 appears in conflict with this position, for that will lead to difficulties as well as inconsistencies in application.

240. *Id.* § 123 cmt. g.

241. *Id.*

242. *Id.*

In so providing, the *Restatement* spells out a requirement that can be found in the subject-matter test cases.²⁴³ Moreover, it stands as a rejection of Chief Judge Campbell's reasoning in *Radiant Burners*²⁴⁴ that there can be no corporate attorney-client privilege because of the number of persons within the definition of "client" who would obtain information that must be confidential for the privilege to exist.²⁴⁵ The client, at least for this purpose, seems to be virtually everybody associated with the organization.

Comment *j* addresses the issue of who may assert and waive the privilege belonging to the organization in making the unassailable point that the privilege "can be asserted and waived only by a responsible person acting for the organization for this purpose."²⁴⁶ The comment also addresses an issue that has arisen in a few cases: Can an agent or former agent through court order force the waiver of the organization's privilege where the agent or former agent may have need for that communication?²⁴⁷ The reporter's note recognizes that the issue has come up infrequently, though all are recent cases.²⁴⁸ The comment permits a tribunal the discretion to order production of such a communication for the benefit of the agent, if the agent establishes that: (1) "the agent properly came to know the contents of the communication"; (2) "the agent [has] substantial need of the communication"; and (3) "access would create no material risk of prejudice or embarrassment to the organization beyond such evidential use as the agent may make of the communication," and even that risk may be ameliorated by "protective orders, redaction, or other measures."²⁴⁹ This balancing of the interests of the agent and the organization appears to be appropriate, particularly where the agent generated the document in the first place.

Further, comment *k* speaks to the problem of succession of the legal control of the organization,²⁵⁰ a common occurrence in this day of mergers, acquisitions, and spinoffs. "[A]s an entity passes to successors, the transaction carries with it authority concerning asserting or waiving the privilege."²⁵¹ This means that agents of the acquired organization who had communicated, in confidence, with attorneys for the acquired organization prior to the acquisition will find that the successor organization has the ability to claim and waive the privilege as to those communications. This can become quite crucial in a bankruptcy or receivership situation, as was demonstrated several years ago when financial institutions were

243. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

244. *Radiant Burners I*, 207 F. Supp. at 771.

245. *Id.* at 774.

246. RESTATEMENT § 123 cmt. j.

247. *Id.*

248. *Id.* § 123 cmt. j rep. note.

249. *Id.*

250. *Id.* § 123 cmt. k.

251. *Id.*

taken over by the Resolution Trust Corporation after those institutions collapsed, many of which were involved in scandal.²⁵²

Finally, comment *l* provides that inside and outside counsel are to be equated for the purposes of the privilege.²⁵³ This provision follows a long line of cases that have assumed the equivalency of the two relationships for purposes of the privilege.²⁵⁴ Although there have been recent cases that have concluded that the sometimes overlapping roles of in-house counsel had eliminated the privilege in a particular instance,²⁵⁵ the *Restatement* decided not to create any broad exception to the privilege leaving decisions to case-by-case analysis. The simple logic of a lawyer is that a lawyer has great appeal in an area already confused by rules aimed at subtle differences in various relationships. Further, any rule that discriminated against in-house counsel could easily be avoided, although at some expense in outside counsel fees and wasted time. The *Restatement's* authors clearly have been sensible in this area.

The *Restatement's* expansive rendition of the attorney-client privilege in the organizational setting, of course, has its costs. Material collected by an organization's counsel from organizational employees will be privileged and not discoverable by others, whether opposing parties in litigation or governmental agencies who attempt to enforce statutes and regulations. And when those employees have "forgotten" the incident or the details of the incident by the time opposing counsel or government investigators visit with them, justice will be frustrated. But even this state of affairs presupposes that opposing counsel, or counsel's agent, is able to talk to such persons at all.

III. NO-CONTACT RULE

This section will first explore the history and justifications for a no-contact rule before examining some of the modern issues that the *Restatement* tries to resolve. Finally it will evaluate these efforts and explore some of the new issues that may be created by the *Restatement* before concluding that the narrow construction of the no-contact rule counter balances to some degree the broad attorney-client privilege.

The ethics of lawyering have long provided that "a lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter

252. See *Tekni-Plex Inc. v. Tang*, 89 N.Y.2d 123 (1996) (concerning conflict of interest issues that developed out of succession); see also Geoffrey C. Hazard, *It Pays to be Alert about Unforeseen Conflicts*, NAT'L L.J., Feb. 3, 1997, at A19 (discussing similar issues).

253. RESTATEMENT § 123 cmt. 1.

254. *Id.* § 123 cmt. 1 rep. note.

255. *Id.*; *In re Grand Jury Subpoena*, 561 F. Supp. 1247 (E.D.N.Y. 1982); *United Jersey Bank v. Wolosoff*, 483 A.2d 821 (N.J. Super. Ct. App. Div. 1984).

with him, but should deal only with his counsel.”²⁵⁶ This was the language of *ABA Canon of Professional Ethics 9*,²⁵⁷ first adopted in 1908. It was carried forward into the *Model Code of Professional Responsibility*²⁵⁸ in 1969 and then into the *Model Rules of Professional Conduct* in 1983.²⁵⁹ *Model Rule 4.2*, which is almost identical to that of DR 7-104(A)(1), is as follows: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”²⁶⁰

The *Model Rules* for the first time dealt explicitly with the organization as a client. *Model Rule 4.2* states:

In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.²⁶¹

This formulation has led to many issues on which the courts are split.²⁶² “Having managerial responsibility” is a broad concept and can be applied to

256. MODEL CODE Canon 9.

257. CANONS OF PROFESSIONAL ETHICS, adopted by the American Bar Association in 1908.

258. MODEL CODE DR 7-104(A)(1).

259. MODEL RULES Rule 4.2.

260. MODEL CODE DR 7-104(A)(1). The differences are three. First, DR 7-104(A)(1) provides that the lawyer shall not “communicate or cause another to communicate . . .” MODEL CODE Rule DR 7-104 (A)(1). The “cause another to communicate” language was dropped in *Model Rule 4.2*, as it is covered by *Model Rule 8.4(a)*. MODEL RULES Rule 4.2, 8.4(a). Secondly, the term “party” in DR 7-104(A)(1), while first used in *Model Rule 4.2* was changed to “person” in 1995. Compare MODEL RULES Rule 4.2 with MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (Discussion Draft 1983). The distinction is that some courts construed “party” to require that there be actual litigation before either *Model Code DR 7-104(A)(1)* or *Model Rule 4.2* had application. *Weider Sports Equip. Co. v. Fitness First, Inc.*, 912 F. Supp. 502 (D. Utah 1996)(applying the Utah Rules of Professional Conduct as adopted in 1993, the court ruled: “Rule 4.2 . . . only has application when the communication is with a ‘party’ which means after litigation has commenced.”). The amendment to “person” made clear that the rule applies outside of the litigation context. See *LAWYERS’ MAN. PROF. CONDUCT* 149, 150 (1995). Third, the heading to DR 7-104 is “Communicating With One of Adverse Interest.” MODEL CODE DR 7-104. Thus, the prohibition of DR 7-104(A)(1) would appear not to apply to direct contact with a non-adverse party. The heading to *Model Rule 4.2* is “Communication With Person Represented by Counsel,” which clearly makes the rule applicable whenever a person is represented by counsel, whether or not that person is adverse to the client represented by the lawyer involved in the communication. MODEL RULES Rule 4.2.

261. MODEL RULES Rule 4.2 cmt. 4. The comment goes on: “If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.” *Id.*

262. Benjamin Lloyd Lindquist, *Ethical Considerations in Model Rule 4.2’s Application to the Corporate Litigant*, 20 J. LEGAL PROF. 267, 274 (1996).

someone who supervises one or more others, or it may be limited to the control group of the organization.²⁶³

The policy reasons behind the no-contact rule is stated in the *Model Code* in broad terms:

The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in a matter by a lawyer
²⁶⁴

The *Restatement* presents three reasons: (1) to “protect against overreaching and deception of non-clients”;²⁶⁵ (2) to “protect the relationship between the represented person and that person’s lawyer”;²⁶⁶ and (3) to “assure the confidentiality of the person’s communications with the lawyer.”²⁶⁷

From the standpoint of the organization, the no-contact rule serves another very useful purpose; it “safeguards against the disclosure of information which [sic] could be used against the [organization] as an admission under either [most state rules] or the federal rules regarding evidentiary admissions.”²⁶⁸ This purpose should be viewed in terms of Federal Rule of Evidence, mirrored in the Uniform Rules of Evidence, that “a statement by a party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship,” is admissible as against the hearsay rule.²⁶⁹ Thus, it is in the interest of the organization to keep counsel for other parties away from agents of the organization so that those agents do not furnish to counsel for other parties statements that can then be admitted in litigation against the

263. *Id.*

264. MODEL CODE EC 7-18.

265. One court has remarked that the no-contact rule “prevents unprincipled attorneys from exploiting the disparity in legal skills between attorney and lay people,” *Papanicolaou v. Chase Manhattan Bank*, 720 F. Supp. 1080, 1082 (S.D.N.Y. 1989), and, not so nefariously, “prevents a lawyer from circumventing opposing counsel to obtain unwise statements from the adversary party.” *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990). See Comm. on Professional Ethics, Ass’n Bar of City of New York, No. 80-46, 6 (1980) (“[T]he attorney [if present can] aid his client both to avoid procedural pitfalls and to present truthful statements in the most favorable manner.”); Krulewitch, *Ex Parte Communications with Corporate Parties*, 82 Nw. U. L. REV. 1274, 1278 (1988) (“[A]lthough an attorney cannot instruct the client to lie or even distort the truth, through proper representation, an attorney [who is present at the interview] can ensure that the client uses clear language to fairly present [his or her] position.”).

266. Some courts point out that the no-contact rule prevents an attorney from causing a rift between an opposing attorney and his or her client. *Polycast Tech.*, 129 F.R.D. at 625; *United States v. Guerrero*, 675 F. Supp. 1430, 1437 n.14 (S.D.N.Y. 1987).

267. RESTATEMENT § 158 cmt. b.

268. Catherine L. Schaefer, *A Suggested Interpretation of Vermont’s DR 7-401(A)(1): The Employment Attorney’s Perspective on Contacting Employees of an Adverse Business Organization*, 18 VT. L. REV. 95, 98 (1993); see also Benjamin Lloyd Linnquist, *Ethical Considerations in Model Rule 4.2’s Application to the Corporate Litigant*, 29 J. LEGAL PROF. 267, 269 (1996).

269. FED. R. EVID. 801(d)(2)(D); UNIF. R. EVID. 801(d)(2).

organization, whether or not the organization is able to rebut the statement with contradictory or impeaching evidence.

However, there are considerations the other way. The *Restatement* notes that requiring that conversations be three-way and through counsel for the organization is “often more expensive, delayed, and inconvenient than direct communication,” and it “limits client autonomy by requiring that both communication and consent be through lawyer initiative.”²⁷⁰ Those reasons are later expanded, noting that, “under a very broad rule,” costs of litigation would be increased, for the party opposing the organization would be required to obtain information solely through formal discovery.²⁷¹ Further, “employees may be unwilling to speak as freely or candidly at a deposition in the presence of the lawyers for their employer as in an informal, pretrial interview.”²⁷² The *Restatement* calls these costs “unacceptable” and finds “no justification for permitting one party thus to control entirely the flow of information to opposing parties.”²⁷³

Others have recognized more particularized costs. For example, there is the following list assembled by one court:

First . . . the discovery process, formal or informal, should not be unnecessarily inhibited. Second, . . . methods that assist in reducing discovery costs and providing reasonable alternatives should be supported. Third, . . . contemporary litigation is costly and often the “little guy,” plaintiff or defendant, is at a distinct disadvantage in the process. Fourth, in certain types of litigation against a corporation a pattern of treatment of employees may be critical to proof of a claim. . . . Fifth, private litigation is an important means of controlling abuses of corporate power and restraining abuses of law. . . . [Sixth], an unwise extension of confidentiality restricts access to information and prevents courts from being fully effective in ferreting out the truth of a disputed claim. [Seventh], witnesses may be more willing to discuss a matter informally than in the adversarial context of formal discovery.²⁷⁴

The *Restatement* recognizes this conflict of values, but concludes: “Nonetheless, the rule is universally followed in American jurisdictions.”²⁷⁵

With these conflicting values, there should be no surprise that the cases, and the ethics opinions, are split on the issues left unresolved under *Model Rule 4.2* and particularly its comment 4, as applied to the organization client.²⁷⁶

Thus faced with conflicting decisions, the *Restatement* endeavored to clarify

270. RESTATEMENT § 159 cmt. b.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560, 565 (D. Utah 1990).

275. RESTATEMENT § 158 cmt. b.

276. These conflicting cases are noted in the reporter's note to section 159 of the *Restatement* and in the literature. Lindquist, *supra* note 262, at 274.

the definitional problems of *Model Rule 4.2*. It begins by stating the general no-contact proposition in section 158:

- (1) A lawyer representing a client in a matter may not communicate about the subject of the representation with a person, as defined in § 159, whom the lawyer knows to be represented by another lawyer in the matter²⁷⁷

More importantly, section 159 defines the represented person as follows:

Within the meaning of § 158, a person includes:

- (1) a natural person represented by a lawyer; and
 (2) with respect to an organization represented by a lawyer, a person who is connected with the organization and:
- (a) who supervises, directs, or regularly consults with a lawyer representing the organization concerning the matter or who has power to compromise or settle the matter;
 - (b) whose acts or omissions may be imputed to the organization for purposes of civil or criminal liability in the matter; or
 - (c) whose statements, under applicable rule[s] of evidence, would have the effect of binding the organization with respect to proof of the matter.²⁷⁸

This definition differs significantly from *Model Rule 4.2*, solving most, if not all, of the identified problems.

Before addressing these issues, however, it should be noted that there is no definition of “organization” known to the author in Chapter 6 (“Representing Clients—In General”) of the *Restatement*, and more specifically in Topic Two (“Representing Organizational Clients”) of Chapter 6.²⁷⁹ As no general definition section known to this author has as yet appeared in the *Restatement* drafts, it may be assumed that the definition of “organization” in section 123²⁸⁰ applicable to the attorney-client privilege in the organization setting is applicable throughout the *Restatement*. Thus, the discussion of the no-contact rule may be equally applicable to corporations, partnerships, unincorporated associations, estates, trusts, and sole proprietorships.²⁸¹

Second, it should be noted that there is no necessary parallelism between the attorney-client privilege and the no-contact rule. Section 159 states that “a broad attorney-client privilege for intra-corporate communications . . . does not by itself require a complete ban on contact with entity employees and agents”²⁸² This view is reiterated in section 162.²⁸³

277. Exceptions omitted as unnecessary to the current stage of the discussion.

278. RESTATEMENT § 159.

279. *Id.* at ch. 6.

280. RESTATEMENT § 123 cmt.c.

281. It would be good to have this definitional issue resolved before the *Restatement* is finally adopted.

282. RESTATEMENT § 159 reporter’s note.

283. *Id.* § 162 cmt. c (“When confidentiality duty does not extend to the subject matter of the confidential

*Upjohn*²⁸⁴ supports that view. Justice Rehnquist made it clear that the attorney-client privilege does not shield the facts themselves from discovery; it only prevents lawyers from revealing confidences.²⁸⁵ Courts that have cited *Upjohn* as a no-contact case, such as *Hewlett-Packard Co. v. Superior Court*,²⁸⁶ are in error.

Section 159's definition improves on *Model Rule 4.2* in several ways. It includes "persons having a managerial responsibility" within the coverage of the organizational privilege.²⁸⁷ This leads to questions about the meaning of "managerial responsibility." The *Restatement* resolves those issues by creating a functional test: "managerial responsibility" includes a person "who supervises, directs, or regularly consults" with organization counsel "concerning the matter" and a person "who has power to compromise or settle to matter."²⁸⁸ Thus, it should exclude even high level officers who do not deal directly with the organization's counsel on the matter, while including relatively low ranking managers who have the power to settle or compromise. An example is a local branch manager who has the authority to manage legal matters of a certain type and a certain size. Thus, a manager's protection is based on his similarity in function to an individual client.

The reason for this prohibition is that "such persons are likely to have confidential information concerning the matter, much of which would be immune from discovery under the attorney-client privilege . . . and the work-product doctrine," and the fear that direct contact by counsel for another party would risk that the person being communicated with, without counsel for the organization being present, "would be unable to distinguish between properly discoverable facts and protected information."²⁸⁹ Moreover, protecting these persons from direct contact "seeks to prevent improvident settlements and impairment of the relationship of trust and confidence with the lawyer"²⁹⁰

There are cases under *Model Rule 4.2* and *Model Code DR 7-104(A)(1)* that have construed those provisions along the lines of the *Restatement's* language.

information itself (as it does extend, for example, to th[at] of trade secrets), the lawyer may inquire into factual information even though the agent may also have conveyed that information to a lawyer in a confidential communication. For example, the lawyer may inquire into the same facts the agent discussed in confidence with the principal's lawyer. However, the lawyer may not seek to examine the agent's copy of correspondence with such a lawyer or otherwise ask the agent what the agent told a lawyer for the principal.").

284. *Upjohn v. United States*, 449 U.S. 383 (1981).

285. *Id.* at 395 ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.").

286. *Hewlett-Packard Co. v. Superior Court*, 252 Cal. Rptr. 14, 16 (1988).

287. MODEL RULES Rule 4.2 cmt. 4.

288. RESTATEMENT § 159.

289. *Id.* § 159 cmt. c.

290. *Id.*

For example, *Niesig v. Team I*²⁹¹ includes “employees implementing the advice of counsel,” among those protected by the no-contact rule,²⁹² while *In re Opinion 668*²⁹³ interpreted *Model Rule 4.2* to include “those employees trusted with conducting a suit or claim on behalf of a corporation.”²⁹⁴

While this functional approach adds some clarity to the definition and is nicely tailored to the purpose of the ban, there is one serious drawback. The language “the matter” focuses upon the particular negotiation or litigation. In some situations, “the matter” may be of such great significance that top organizational officials deal directly with counsel. In other situations, “the matter” may be relatively low level, to be handled within the responsibility of a branch manager. Thus, in different matters the person or persons within the organization who fall within this prohibition will differ. This potential inconsistency of application poses an interesting problem for opposing counsel. They will need to ascertain who in the organization deals with the organization’s counsel and who has the authority to settle or compromise without inadvertently violating the no-contact rule. This may be easy in some situations, but could be quite difficult in others.

This situation leads to an issue not tackled by the *Restatement*: Which counsel has the burden of complying with the no-contact rule? The few cases on point are split.²⁹⁵ The Kentucky Supreme Court, for example, held that the defendant organization had the burden of notifying opposing counsel as to which of defendant’s employees, in its view, fell within the no-contact rule.²⁹⁶ The Middle District of Florida, on the other hand, put that burden on counsel opposing the organization.²⁹⁷ Given the problems for opposing counsel in identifying exactly whom would be protected under the *Restatement*, it seemingly would have made sense to place at least some burden of disclosure on the organization’s attorney in this matter.

Section 159 places a second group within the no-contact rule: those “whose acts or omissions may be imputed to the organization for purposes of civil or criminal liability in the matter,”²⁹⁸ language picked up directly from the *Model Rules*.²⁹⁹ Section 159 notes that “such a person has acted in the matter on behalf of the organization and, save for the separate legal character of the organizational form, would often be directly named as a party in a lawsuit involving the

291. *Niesig v. Team I*, 558 N.E.2d 1030 (N.Y. 1990).

292. *Id.* at 1035.

293. *In re Opinion 668*, 663 A.2d 959 (N.J. 1993).

294. *Id.* at 962-63.

295. *Compare K-Mart Corp. v. Helton*, 894 S.W.2d 630 (Ky. 1995) (holding that responsibility falls on the attorney of those to be contacted) with *Lang v. Reedy Creek Improvement Dist.*, 888 F. Supp. 1143 (M. D. Fla. 1995) (holding the burden is on the inquiring lawyer).

296. *K-Mart Corp.*, 894 S.W.2d at 631.

297. *Lang*, 888 F. Supp. at 1148.

298. RESTATEMENT § 159.

299. MODEL RULES Rule 4.2 cmt.4.

matter.”³⁰⁰ For example, where an organization’s truck driver is involved in an accident that is the basis of the law suit, this provision prohibits counsel for the other person from contacting the truck driver, whether or not the law suit has been filed. As comment *d* points out, this provision applies “even if facts are disputed concerning the person’s actions, such as whether they are properly imputed to the organization or whether they were the cause of the harm alleged.”³⁰¹ Comment *d* indicates that this provision is another attempt to create a functional equivalency between the individual client and the members of an organization client.³⁰²

There are similar problems in section 162. The problem arises where opposing counsel does not know who is guilty of the act or omission that may be imputed to the organization and be the basis of a liability. How far can counsel go in contacting persons in order to explore that issue? For example, where counsel believes that negligence may have occurred in the operating room, but does not know who was negligent or even if there had been negligence at all, can counsel contact those who were there and explore the possibilities? Neither *Model Rule* 4.2 nor section 159 would seem to prohibit such contact. But once counsel begins to zero in on a theory based upon the action or inaction of one or more persons, contact must cease. The interesting question will arise later, when counsel tries to use a statement obtained from a person whom counsel interviewed prior to knowing who, if anyone, was negligent. Logically, and analogously to government investigation of someone not yet a “target,” until counsel has reason to believe that any employee’s action or inaction is the arguable basis of liability of the organization, the no-contact rule should have no application. However, once counsel learns enough to have reason to believe otherwise, the contact should cease.³⁰³ Any statements gathered while contact was permissible should be useable.

While this formulation is logical, the administration probably will be difficult. The question is how courts will determine whether counsel formed his or her theory of negligence before, after, or during the relevant interview. Any relevant internal memoranda or records would be privileged, and courts would be forced to speculate on when thoughts formed in counsel’s mind.

Third, *Model Rule* 4.2 prohibits counsel for another party from contacting directly a person within an organization “whose statement may constitute an admission on the part of the organization.”³⁰⁴ This language has led to inconsistent decisions because the term “admission” has at least two meanings.³⁰⁵ One

300. RESTATEMENT § 159 cmt. d.

301. *Id.*

302. *Id.*

303. *Id.* § 159(b).

304. MODEL RULES Rule 4.2 cmt. 4.

305. Some courts, in administering *Model Rule* 4.2, have tried to draw bright lines. In *Orlowski v. Dominick’s Finer Foods, Inc.*, 937 F. Supp. 723, 728 (N.D. Ill. 1996), the court drew a bright line to include under the no-contact rule all managers except those who were bound by collective bargaining contracts,

meaning, in line with the pleading admission or an admission under Federal Rules of Civil Procedure,³⁰⁶ is binding on a party and takes the issue out of the case in the sense that contrary evidence will not be admitted.³⁰⁷ The other meaning is that of an evidentiary admission, which can be contradicted or impeached.³⁰⁸

The drafter of *Model Rule 4.2* stated that it is the evidentiary admission that was intended: any statement of "those who can hurt or bind the organization" in the matter in litigation.³⁰⁹ That categorization, of course, would bring every employee under the ban, for the statement of any employee, if contrary to the interests of the organization, could "hurt" the organization. And some courts have so held.³¹⁰ Other courts have held that "admission" in *Model Rule 4.2* and the definition of "party" under *Model Code DR 7-104(A)(1)* apply only to a statement that has such binding effect that contrary or impeaching evidence would not be admitted.³¹¹

In its black letter law, section 159 of the *Restatement* would reject the broader view of the ban, changing the language to include only those "whose statements, under the applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter."³¹² This provision would be applicable only to those situations, under hoary doctrines of evidence law "still in force in some jurisdictions for certain purposes," in which "some agents and employees have the power to make statements that bind the principal, in the sense that the principal may not introduce evidence contradicting the binding statement."³¹³ But, "that is not the accepted rule under modern evidence law."³¹⁴

Another troublesome issue concerns the situation in which an organization, or its lawyer, instructs employees or agents of the organization not to speak with opposing counsel.³¹⁵ Such an instruction may be binding upon the agent in that the organization may discharge or otherwise discipline an agent for breach of the

deciding that the action of those in the latter category could not impute liability to the organization. Similarly, in a suit brought by female police officers claiming sexual harassment, the court held that police officers above a certain rank were automatically protected by the no-contact rule. *Carter-Herman v. City of Philadelphia*, 897 F. Supp. 899, 903 (E.D. Pa. 1995). But in *K.L. v. Edgar*, 945 F. Supp. 167, 169 (N.D. Ill. 1996), a suit on behalf of mental patients, the court held all staff of the institution were within the no-contact rule as the action of any of them could be imputed to the organization.

306. FED. R. CIV. P. 36.

307. *Id.*

308. FED. R. EVID. 801(d)(2).

309. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 2 THE LAW OF LAWYERING: A HANDBOOK OF THE MODEL RULES OF PROFESSIONAL CONDUCT § 4.2:105, at 734 (1994 Supp).

310. *Cagguila v. Wyeth Labs, Inc.* 127 F.R.D. 653, 654 (E.D. Pa. 1989).

311. *Niesig v. Team I*, 558 N.E.2d 1030, 1035 (N.Y. 1990); *Lang v. Superior Court*, 826 P.2d 1228 (Ariz. Ct. App. 1992).

312. RESTATEMENT § 159.

313. *Id.* § 159 cmt. e.

314. *Id.*

315. Section 123 defines "agent" for the purpose of the application of the attorney-client privilege to the corporate client, and does so quite broadly. *Id.* § 123 cmt. c. As was noted *supra* notes 222-24, there is no definition of the term specifically applicable to section 159.

instruction, but the *Restatement* does not deem it to be a limitation upon a lawyer for another party who is seeking evidence.³¹⁶ Thus, a violation by counsel for another party of this veil of secrecy that the organization is trying to create should not be the basis of either disqualification or discipline.

A large issue tackled by the *Restatement* concerns former agents of the organization. The current law as to agents that have retired, quit, or have been otherwise terminated is in disarray. *Model Rule 4.2* makes no reference to former officers, employees, or other agents of the organization.³¹⁷ Some courts have read *Model Rule 4.2* to exclude from its no-contact ban any former employee, no matter his or her former rank or position.³¹⁸ Other courts have gone in the opposite direction and applied full no-contact protections to former employees.³¹⁹ Still other courts draw a line so as to apply the no-contact rule to those former employees who held confidential positions, or whose conduct is the subject of litigation in question,³²⁰ or to those former employees who have been "extensively exposed to confidential information" concerning the matter in litigation and opposing counsel knows or should reasonably know that fact.³²¹

The black letter law of section 159 is of little help, though its use of the present tense, "a person who is connected with the organization,"³²² could be read to exclude all former employees from the no-contact rule. However, at least some former employees are to be included within the ban.³²³ The example that the *Restatement* uses, "a former employee who continues regularly to consult about the matter with a lawyer for the ex-employer," is to be within the ban of section 159.³²⁴ This example also is of little help, for a former employee who "continues regularly to consult about the matter" appears to be a present agent for the purpose of that matter.

Help is obtained, however, in section 162, to which comment *g* of section 159 makes reference. Section 162(2) states the following:

(2) Unless otherwise provided by law, [a] lawyer representing a client in a matter may not communicate concerning the subject of the representation with

316. *Id.* § 159 cmt. f.

317. MODEL RULES Rule 4.2.

318. See *The Estate of Mary Schwartz v. H.B.A. Mgmt. Inc.*, 673 So. 2d 116, 119 (Fla. App. 1996) (allowing contact "even where the [former] employee's negligence could be imputed to the party"); *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723, 728 (N.D. Ill. 1996) ("[F]ormer employees, including former managers, are not encompassed by Rule 4.2, and may freely engage in communications with Plaintiffs' counsel."); *Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992) ("[B]ecause former employees may not speak for or bind the corporation, ex parte communications with former employees are not prohibited."); CAL. R. PROF. CONDUCT 2-100 (1989) (exempting all former agents or employees from the no-contact rule).

319. See *Terra Int'l Inc. v. Mississippi Chem. Co.*, 913 F. Supp. 1306, 1315 (N.D. Iowa 1996) ("[F]ormer employees who are . . . represented by the former employer's counsel, or any counsel, are . . . off limits under the language of the rules.")

320. *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988).

321. *Camden v. State of Maryland*, 910 F. Supp. 1115, 1122 (D. Md. 1996).

322. RESTATEMENT § 159.

323. *Id.* § 159 cmt. g.

324. *Id.*

a person whom the lawyer knows is likely to possess extensive and relevant trade secrets, confidential client information, or similar legally protected information of another party interested in the matter that is confidential with respect to the lawyer's client.³²⁵

This provision is applicable to "a narrow set of instances: a lawyer must not communicate at all with an agent or similar person whom the lawyer knows is likely to have a principal's relevant trade secrets, confidential client information, or similar confidential information."³²⁶ This concept is further restricted by the statement that the ban is "generally limited to members of a principal's litigation team — agents or others retained by a principal as expert witness, expert consultant . . . , paralegal assistant, or in a similar capacity."³²⁷

The examples given in section 162 are a "former employee of an adversary who, as recently former member of adversary's litigation team possessed extensive confidential information about the matter,"³²⁸ "opposing party's non-lawyer trial assistant,"³²⁹ "lawyer's secretly hired adjuster for opposing party's insurer with whom lawyer was negotiating settlements,"³³⁰ and "opposing party's expert witness."³³¹ Where a person had less-than-extensive exposure to confidential information of a principal, such as from dealings with a lawyer, the cases have refused to apply the no-contact ban to former employees.³³² Comment *b* makes clear that "confidentiality duties based only on contract are not within the Section."³³³ Thus, it is clear that an organization cannot prevent a lawyer from talking with former employees simply by including a duty of confidentiality in those employee's contracts, although speaking with a lawyer for another person might constitute an actionable breach of contract by the former employee.

The comments to section 162 go on to give various examples: an expert witness retained by another party to testify or to consult "who, in the course of that work, has received confidential information," non-lawyer personnel of a law firm representing an opposing party, a treating physician where a doctor-patient privilege is in effect, and an attorney for another party when inducing him or her to violate his or her duty of confidentiality to his or her client.³³⁴

Thus, the *Restatement* has opted for a relatively narrow no-contact rule. Under the *Restatement*, counsel is prohibited from contacting solely (1) those persons

325. *Id.* § 162.

326. *Id.* § 162 cmt. b.

327. *Id.*

328. *Id.* § 162 rep. note (citing *MMR/Wallace Power & Indus. v. Thames Assoc.*, 764 F. Supp. 712 (D. Conn. 1991)).

329. *Id.* (citing *Williams v. Trans World Airlines, Inc.*, 558 F. Supp. 1937 (W.D. Mo. 1984)).

330. *Id.* (citing *Esser v. A. H. Robbins Co.*, 537 F. Supp. 197 (D. Minn. 1982)).

331. *Id.* (citing *County of Los Angeles v. Superior Court*, 271 Cal. Rptr. 698 (Cal. Ct. App. 1990)).

332. *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988); *Lang v. Superior Court*, 826 P.2d 1228 (Ariz. Ct. App. 1992) (cited in RESTATEMENT § 162 rep. note).

333. RESTATEMENT § 162 cmt. b.

334. *Id.* § 162 cmts. g, h.

who supervise, direct, or regularly consult with counsel concerning the matter or have the power to compromise or settle the matter; (2) those persons whose acts or omissions may be imputed to the organization for purposes of civil or criminal liability in the matter; and (3) those persons whose statements, under the rules of evidence, would bind the organization so that it could not introduce evidence to the contrary. The *Restatement* would bar contact with former employees only in two very limited situations: (1) where the person is still a consultant as to that matter; and (2) where the person, when employed, had been a part of the organization's litigation team and in that capacity had obtained extensive confidential information about the matter. Thus, the *Restatement* leaves a large area in which counsel for another party may contact employees of the organization, though, as is developed above,³³⁵ the boundaries of those areas are fraught with danger.

IV. ORGANIZATIONAL PSYCHOLOGY

The question remains: How much good does the narrow no-contact rule do when there is a broad privilege available to the organization and its counsel? The case stories with which this paper began, *Samaritan Foundation*³³⁶ and *Xerox v. IBM*, lead one to be cautious. True, there may be the disgruntled employee and the whistleblower who at some point and in some form will come forward.³³⁷ But those appear to be exceptional situations. It is more likely that employees, out of loyalty to their organization or out of fear of retaliation, develop selective memories so that contact with them, either informally or in deposition, is of little benefit in unfolding their knowledge. While there are no statistical studies to prove the point, this author believes that the norm is the loyal employee with a selective memory, and the exception is the person who, when questioned by an attorney for another party, is willing to put into jeopardy his or her company or his or her job. That appears to be the lesson of *Samaritan Foundation*³³⁸ and *Xerox v. IBM*.³³⁹ The norm may not be as true, however, among former employees, who have less to fear and probably less of a basis for continued loyalty, which certainly would be true of those who were involuntarily separated.

This intuition is borne out by literature available in the social sciences. Beginning with the seminal work of Professor Solomon E. Asch in the early

335. Text accompanying notes 278 through 326.

336. *Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993).

337. See *Washington State Physicians v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993) (describing how a loaded gun, which was not turned over in response to discovery requests, was received by plaintiff's counsel in a plain envelope with no indication of its sender); Myron Levin, *Smoking Gun; The Unlikely Figure Who Rocked the U.S. Tobacco Industry*, L.A. TIMES, June 23, 1996, at D-1; (Richard Leiby, *Smoking Gun*, WASH. POST, June 23, 1996, at F-1).

338. *Samaritan Found.*, 862 P.2d at 870.

339. *Xerox Corp. v. Int'l Business Machines Corp.*, 64 F.R.D. 367 (S.D.N.Y. 1974).

1950s,³⁴⁰ social sciences explored the influence of group pressure on individual judgment. A dramatic experiment by Asch illustrates the point. He conducted an experiment with several college students, none of whom knew each other.³⁴¹ He asked each, in the presence of the others, to compare the length of a vertical line with three other lines.³⁴² All but one of the students was instructed in advance to give the same wrong answer, one that was clearly wrong.³⁴³ The single naive subject was asked his opinion last: one third of those naive subjects gave the same obviously wrong answer in the majority of the trials.³⁴⁴ Three quarters were incorrect in at least one trial.³⁴⁵ This experiment clearly demonstrates the force of group pressure and the need to conform.³⁴⁶ Professors Dorwin Cartwright and Alvin Zander point out that if the pressure to conform was so great when the subject was giving an opinion among strangers and where there was no overt social pressure on him or her to conform, “one would surely expect these pressures to be even stronger in more natural settings and with respect to matters having greater significance for the participants.”³⁴⁷

Cartwright and Zander conclude that “it is clear that groups can, and often do, apply pressures on their members so as to bring about a uniformity of beliefs, attitudes, values, and behavior.”³⁴⁸ They put forth four functions that are served by such behavior:

- (a) to help the group accomplish its goals, (b) to help the group maintain itself as a group, (c) to help the members develop validity or “reality” for their opinions, and (d) to help members define their relations to their social surroundings.³⁴⁹

To insure conformity, there are rewards and punishment. Rewards include “indications of esteem and acceptance,” such as “school honor rolls, bonus payments for high production in industry, and awards for good citizenship in the

340. SOLOMON E. ASCH, *SOCIAL PSYCHOLOGY* (1952).

341. *Id.* at 451.

342. *Id.*

343. *Id.* at 454.

344. DORWIN CARTWRIGHT & ALVIN ZANDER, *GROUP DYNAMICS* 139-40 (3d ed. 1968) (providing a full report of Asch's experiment and his results).

345. *Id.*

346. *Id.*; Solomon E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments, in GROUPS, LEADERSHIP AND MEN* (Harold S. Guetzkow ed., 1951); Phillip B. Applewhite, *ORGANIZATIONAL BEHAVIOR* 38-41 (1965) (reporting on experiments by several other investigators confirming Asch's results); J. Richard Hackman, *Group Influences on Individuals, in HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY*, 148-83 (M. Dunnette, ed., 1976); Marilyn B. Brewer & Roderick M. Kramer, *The Psychology of Intergroup Attitudes and Behavior*, 36 *ANNUAL REV. OF PSYCHOLOGY* 219 (1985).

347. CARTWRIGHT & ZANDER, *supra* note 344, at 139-40.

348. *Id.* at 141; APPLEWHITE, *supra* note 346, at 36-49 (1965) (noting that a group often exerts pressures on its members to conform to its norms).

349. CARTWRIGHT & ZANDER, *supra* note 344, at 142; APPLEWHITE, *supra* note 346, at 37.

community.”³⁵⁰ Punishments for deviants include “unpleasant consequences” such as exclusion from the group, or, while not expelled, a lack of respect or attention to the deviant’s ideas or opinions.³⁵¹

As an example of group pressures to conform, Cartwright and Zander refer to a “commonly observed” example where “members of a work group agree, perhaps implicitly, on an acceptable rate of production and apply strong pressures on anyone who dares to deviate from this standard.”³⁵² They go on to quote a clerical worker’s description of what happens when someone deviates from this standard:

First we would talk about her unfairness among ourselves. If that did not reach her, we talked about her where she could overhear us. If she still did not change, one of us would approach her in the lounge and ask her if she was trying to kill our jobs. That usually did the trick.³⁵³

They also cite the example, as reported by William S. White, of what happened to Senator Joseph McCarthy when he fell out of favor with his fellow Senators for what became more and more clearly deviant behavior and particularly after the committee investigating him reported unfavorably on his behavior:

Again and again when McCarthy rose to speak there was in the chamber that rarest of all demonstrations, a demonstration of conscious disorder and inattention. Tolerance is a long rope here, a very long one. But give a man enough rope
³⁵⁴

Muzafer Sherif examined these principles in terms of perceived threats from an outside group. While he is mainly concerned with the dynamics of leadership in such situations, he observes:

When members of a group correctly or incorrectly perceive threat, unjust treatment, or invasion of their rights by another group, opinion in their group is consolidated, slogans are formulated, and decisions are made for effective measures.³⁵⁵

From his work, Sherif posits certain hypotheses:

1. When members of two groups come into contact with one another in a series of activities that embody goals which [sic] each urgently desires but which [sic] can be attained by one group only at the expense of the other, competitive

350. CARTWRIGHT & ZANDER, *supra* note 344, at 144.

351. *Id.* at 144-45 (citing SURVEY RESEARCH CENTER, *Participation in Voluntary Committees* (1956) and Edward E. Sampson & Arlene C. Brandon, *The Effects of Role and Opinion Deviation on Small Group Behavior*, 27 *SOCIOMETRY* 261 (1964)).

352. CARTWRIGHT & ZANDER, *supra* note 344, at 232.

353. *Id.* at 141.

354. *Id.* (quoting William S. White, *Who Really Runs the Senate?* HARPER’S MAGAZINE, Dec. 1966, at 35-40).

355. MUZAFER SHERIF, IN *COMMON PREDICAMENT* 13 (1966).

activity toward the goal changes, over time, into hostility between the groups and their members.

2. In the course of such competitive interaction toward a goal available only to one group, unfavorable attitudes and images (stereotypes) of the out-group come into use and are standardized, placing the out-group at a definite social distance from the in-group.

3. Conflict between two groups tends to produce an increase in solidarity within the groups.³⁵⁶

These principles have been applied to the business world in various investigations. For an extended period, Robert I. Katz observed top management of a successful medium-sized corporation and concluded, *inter alia*, the following:

— Identification with the Company. Each of the top executives felt that his personal reputation, both on the job and among his “outside” friends and acquaintances, was dependent upon the reputation and performance of the company — not simply of his own department.

— Penalties for Deviant Behavior. Top management penalized one another, and men lower in the organization, by withdrawing support, realigning responsibilities, etc., for nonobservance of the norms of consultation, free interchange, and sublimation of personal and departmental interests to over-all company welfare.³⁵⁷

Robert K. Merton examined how these principles of social behavior are used by organizational hierarchy to control the organization by influencing the behavior of its members.³⁵⁸ Merton concluded that the key is “increased emphasis on the reliability of behavior, i.e., representing a need for accountability and predictability of behavior,” through the “institution of standard operating procedures and by ensuring that procedures are followed.”³⁵⁹ The consequences are:

a reduction in personalized relationships (organization members are viewed not as individuals but as possessors of positions), an increase in the internalization of rules (procedures take on the positive values initially accruing to the goals they were designed to achieve), and a narrowing of the range within which decisions are made (categories for thinking through a problem are decreased). In turn, and as a result, behavior becomes more rigid, an intense *esprit de corps*

356. *Id.* at 81. Sherif reports the results of other investigators, from which he drew various conclusions, including “Groups [threatened by other groups] closed ranks to pull together cohesively to win; bickering among members diminished.” *Id.* at 98.

357. Robert I. Katz, *Executive Teamwork: Top Management Coordination in a Medium-Sized Company* (unpublished doctoral dissertation, Harvard Business School, 1956, as reported in LAWRENCE ET AL., *ORGANIZATIONAL BEHAVIOR AND ADMINISTRATION* 574-75 (1961)).

358. ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (2d ed. 1957); *see also* Louis B. Barnes, *Classical Organizational Theory*, in *ORGANIZATIONAL BEHAVIOR AND ADMINISTRATION* (Paul Lawrence, Louis Barnes & Jay Lorsch eds., 3d ed. 1976) (summarizing Merton’s work).

359. Barnes, *supra* note 358, at 504.

develops, and a propensity to defend organization members from outside attack is increased.³⁶⁰

A recent work focuses on how these principles are applied in the workplace to overcome principles of personal morality to do collective harm.³⁶¹ Professor John M. Darley concludes that "through participation in the organization, the individual has undergone a conversion process and become an autonomous participant in harmful actions."³⁶² Darley focuses upon "corporate crime," which he defines as "crime perpetrated by an organization against either the general public, that segment of the public that uses the organization's products, or the organization's own workers."³⁶³ Darley goes on: "A generally accepted definition of corporate crime, proposed by Marshall Clinard, is 'a form of collective rule breaking in order to achieve the organizational goals'."³⁶⁴ Clinard, a seminal figure in the field, encases a critical realization in this definition, the recognition that some crimes are committed because they fulfill an organization's goals."³⁶⁵

Examples given are: the Ford Pinto, "sold for years by a company in which many executives were aware that it had a gas tank likely to rupture in low-speed rear-end crashes and incinerate its passengers"; Robins Corporation, "marketing a contraceptive product that it knew caused disastrous medical consequences to many who used it"; Morton Thiokol executives "who were aware of the dangers to the space shuttle O-rings at low launch temperatures," which resulted in the Challenger disaster; "defense contractors who have delivered military weapons systems to the Defense Department with faked safety and effectiveness tests and substandard internal electronic components"; corporate executives "who continued to have shipyard workers work with asbestos long after its carcinogenic properties were known to the officials"; and government executives "who kept uranium miners at work long after the dangers of that occupation were known to the bureaucrats."³⁶⁶

One key to reaching such a result, Darley points out, is diffusion of responsibility and fragmenting information, so that those who have responsibility can claim a lack of information and those with information have no responsibility to act on it.³⁶⁷ Unpleasant information, such as information about product dangers, is abnormal information and thus given no place in the normal flow of information,

360. *Id.* at 504-05.

361. John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS* 13 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

362. *Id.*

363. *Id.* at 15.

364. *Id.*

365. *Id.*

366. *Id.* at 15-16, citing studies of each.

367. Darley, *supra* note 361, at 17-21.

e.g., that dealing with sales, markets, and profits.³⁶⁸ Thus, those who are able to act do so with their eyes shut to that which would keep them from the goals of the organization. As Darley states, "If a product is producing a profit for the corporation, then one can see a great advantage in the corporation's 'not knowing' that the product is dangerous when it in fact knows it full well."³⁶⁹

Moreover, while persons are assigned formal responsibilities for safety monitoring, they "are more informally instructed to disregard those responsibilities, or simply learn to disregard them under time demands to complete other activities more directly connected with production."³⁷⁰ They are "socialized not to make the [safety] tests and to fake the record entries about them."³⁷¹

As a stark example of selective ignorance, Darley refers to a documented conference between Morton Thiokol engineers and officials and NASA officials having to do with whether the cold-weather launch of the Challenger shuttle be scrubbed because of the danger of O-ring seal failure.³⁷² At first the Morton Thiokol engineers recommended scrubbing, and with such a recommendation the NASA officials could not authorize the launch.³⁷³ The NASA officials pressured the engineers to change their recommendation.³⁷⁴ The Morton Thiokol personnel caucused and decided that one of their engineers would change his engineer's hat to a management hat, and then made a "management decision" to override their own engineers and recommend the launch.³⁷⁵ This is an example of how selective ignorance works.

When selective ignorance is not enough, there is the threat of punishment. When production of the Dalkon Shield was to begin at the Robins Corporation ChapStick plant, Robins was "already aware of several safety concerns" and "deep in the process of denial and fabrication."³⁷⁶ The quality control supervisor at ChapStick, doing the job to which he was assigned, ran some tests and found that bacteria could enter the sterile uterus through the strings of the Dalkon Shield device.³⁷⁷ When he reported these findings to his superior, his superior "was anything but pleased" and told him that the strings were not his responsibility.³⁷⁸ When the quality control supervisor replied that "he could not, in good conscience, keep quiet about something that he felt could cause infection in the women who wore the Shield," his superior replied: "Your conscience doesn't pay your salary," and that "if he valued his job he would do as he was told and

368. *Id.* at 19.

369. *Id.* at 18.

370. *Id.* at 19.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* at 19-20.

376. *Id.* at 24.

377. *Id.*

378. *Id.*

forget about the string.”³⁷⁹ The quality control supervisor, however, continued to protest, going over his superior’s head.³⁸⁰ His protests were rebuffed and he was “let go” in a corporate reorganization some years later.³⁸¹

While we can assume that the unhappy consequences of cases such as the Ford Pinto, Dalkon Shield, and the Challenger O-rings were not intended once the responsible individuals have knowledge, they are faced with “choosing the least bad option.”³⁸² Harm has already occurred. Thus some guilt and liability are already a reality:

To those responsible . . . it must seem that the disastrous outcomes were foreseeable once evidence for the disasters has accumulated. Some rather bizarre dynamics ensue. If the organizational decision makers admit, to themselves and others, that harmful outcomes are actually occurring in the present, then because it will seem to them that these outcomes were foreseeable, they will feel culpable for “knowingly” allowing them to happen. And they will certainly feel that others will think the negative consequences were foreseeable and condemn them for allowing them to occur. This dynamic creates a strong pressure for the decision makers to deny that the harmful outcomes are genuine, or genuinely caused by the product in question.³⁸³

Subordinates may then “interpret that denial as a tacit instruction to lie about the existence of those harms or minimize the role of the organizational action in producing them.”³⁸⁴ Thus, “begins the process of ‘the cover-up,’ a frequent occurrence in organizational harm-doing”³⁸⁵ Darley states that “organizational studies give us an enormous number of examples of corporations attempting to cover up harm-doing.” And, he concludes, “there is a great deal of pressure on” individuals within an organization to cover up.³⁸⁶

These stories illustrate the point of Darley’s study: persons within an organization act for the good of the organization. Those who get tempted to act in accordance with their individual consciences are faced with punishment; and once involved, it is very difficult to extricate oneself, and “almost instinctively, one conceals evidence of disasters from outsiders, out of loyalty to one’s co-workers”³⁸⁷

Based upon this research, it is quite clear that the psychological drive to conform to what appears to be best for the organization, and the drive to cover up wrongful acts, would carry forth to those instances in which employees of the

379. *Id.*

380. *Id.*

381. *Id.* at 17, 24.

382. *Id.* at 26.

383. *Id.* at 26-27.

384. *Id.* at 27.

385. *Id.*

386. *Id.*

387. *Id.* at 31.

organization are questioned by counsel for some party in opposition to the organization, an out-group that threatens the organization to some greater or lesser extent.

V. CONCLUSION

The literature and research of social psychology support the intuitive conclusion that *Samaritan Foundation*³⁸⁸ and *Xerox v. IBM*³⁸⁹ do not represent the unusual. Thus, the chances of current employees of an organization cooperating with opposing counsel, even in depositions, to reveal the truth of what happened are slim, except, of course, for the person who is willing to be expelled from the group (i.e., fired) for the sake of his or her own conscience. Those are the exceptional people, and the history of what happens to them is too well known to be ignored except by the most courageous or foolhardy. While it is good to have a narrow no-contact rule, which permits counsel for other parties to interview more employees or an organizational party than would otherwise be the case, one needs to have his or her head in the sand to believe that this will be of any significant value, save for the exceptional situation.

Consideration must then be given to the purpose of the litigation system: to approach the truth and thus do justice in accordance with the truth,³⁹⁰ or to play those litigation games that hide the truth. If it be the latter, then of course the obstacles to truth seeking are in themselves of value. If it be the former, then there must be a value justification for each obstacle to truth finding.

This is not the place to question the values behind the attorney-client privilege, which this author happens to believe strongly support its truth-hiding consequences. But it is the place to question whether the harmful extension of that privilege worked by the Supreme Court in *Upjohn*³⁹¹ is justified by the benefit to be obtained. Clearly the *Upjohn* rule, when weighed in the reality of employee action and reaction, does much to hide the truth, no matter the breadth of the no-contact rule.

*Upjohn*³⁹² makes sense, at most, in the context in which it was decided: to encourage an honest internal audit of the organization when a violation of public law is suspected and, through the audit, correct its ways. Even this justification is suspect, however, as organizations also are driven to this result by lessened penalties for conducting such audits and enhanced penalties for not having an audit apparatus in place.³⁹³

388. *Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993).

389. *Xerox Corp. v. International Bus. Mach. Corp.*, 64 F.R.D. 367 (S.D.N.Y. 1974).

390. See *Washington State Physicians v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993) (imposing sanctions for less than full disclosure, discarding the argument that it was common practice in the industry).

391. *Upjohn v. United States*, 449 U.S. 383 (1981).

392. *Id.*

393. See JEFFERY M. KAPLAN, JOSEPH E. MURPHY & WINTHROP M. SWENSON, *COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES: PREVENTING CRIMINAL AND CIVIL LIABILITY* § 4:01 (1997) (outlining the many advantages of internal compliance programs and self reporting under Chapter Eight of the United States

As far as *Upjohn*³⁹⁴ is applied beyond that context, its justification is of course much diminished, and, in this author's view, its justification is overridden by its costs. Those costs are demonstrated in *Samaritan Foundation*.³⁹⁵ If the attorney-client privilege had been applied to bar the uncovering of the statements given to counsel, truth would have been successfully hidden (at least to that extent), and injustice would have occurred. And, as the social psychology literature demonstrates, that is the norm with which we must live.

The ALI is now proposing, through the *Restatement*, that the *Upjohn*³⁹⁶ rule become universal among the states. It is not too much to imagine how this became a part of the *Restatement*. The ALI was once thought of, perhaps naively, as an objective, disinterested body of 3,000 leading law professors, judges, and private practitioners who left their clients outside and struggled for a restatement of the law based upon their own consciousness of what the law is, or should be in the sense of what is right. If that were ever true, it is clearly not true today. The lobbying of insurance-industry lawyers to shape the *Restatement of the Law Governing Lawyers* in accordance with the interest of their clients was both open and shameless.³⁹⁷ The article that reported this situation brought a response that all that was done by the insurance industry was asking the reporters to consider some alternatives and to urge that the ALI process be opened up to more of such lobbying efforts.³⁹⁸ This author, a member of the ALI, can report that he received directly three letters from "old friends" he had not seen in decades who were now insurance counsel, urging him to vote in accordance with their views. In this light, one may suspect the result reached in section 123 as being less than clearly disinterested.

Thus, it is this author's view that the no-contact rule adopted in the *Restatement* is to be commended as far as it attempts to be narrow, but that the total picture that emerges from the *Restatement* is to be regretted in view of reality. By adopting *Upjohn*³⁹⁹ beyond its context, the *Restatement* acts to help truth-hiding, not truth-finding. It is hoped that state courts, as they consider whether to adopt and follow the *Restatement*, realize that *Upjohn*⁴⁰⁰ applied beyond its context leads to injustice and in so realizing, reject section 123 of the *Restatement* as it is written.

Sentencing Guidelines). Even more, the justification of the Supreme Court is itself suspect. Karen Donovan, *Ethics for 'Independent' Probes: Can Lawyers Serve as Both Disterested Fact Finders and Advocates for Clients?*, NATIONAL LAW JOURNAL, July 14, 1997, at A1.

394. *Upjohn v. United States*, 449 U.S. 383 (1981).

395. *Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993).

396. *Upjohn*, 449 U.S. at 383.

397. See Jonathan Groner, *Insurance Lobby Aims at Normally Staid ALI*, LEGAL TIMES, June 10, 1996, at 1 (reporting the wide range of lobbying techniques used on the ALI in their drafting of *Restatement of Law Governing Lawyers*).

398. William T. Barker, *Insurers Weren't Only Ones Lobbying ALI*, LEGAL TIMES, June 24, 1996, at 26.

399. *Upjohn*, 449 U.S. at 383.

400. *Id.*