

CONTROL GROUP TEST ADOPTED AS STANDARD FOR ASSERTION OF
ATTORNEY-CLIENT PRIVILEGE BY CORPORATE CLIENT

United States v. Upjohn Company, 600 F.2d 1223
(6th Cir. 1979), *cert. granted*, 445 U.S. 925 (1980)

In *United States v. Upjohn Company*¹ the Court of Appeals for the Sixth Circuit ordered Upjohn's general counsel to disclose attorney-client communications not protected under the control group test.²

In *Upjohn* the Internal Revenue Service (IRS) sought to discover documents compiled by Upjohn's general counsel through an internal investigation into questionable corporate payments made to secure foreign governmental business.³ Counsel sent questionnaires to officers and employees of the company that urged candid and confidential responses.⁴ Upjohn voluntarily made disclosures to the Securities and Exchange Commission (SEC)⁵ and to the IRS, thus prompting investigation into the federal tax implications raised by the payments.⁶

1. 600 F.2d 1223 (6th Cir. 1979), *cert. granted*, 445 U.S. 925 (1980). The court declined to consider alternative standards developed in other federal courts. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 606 (8th Cir. 1978) (en banc), *rev'g on rehearing*, 572 F.2d 596 (8th Cir. 1977); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377 (D.D.C. 1978); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974); notes 41-47 *infra* and accompanying text.

2. The control group test was formulated in *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.* *General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1952), *cert. denied*, 372 U.S. 943 (1963). The control group test limits application of the attorney-client privilege in a corporate context to those employees who will make, or play a substantial role in making, decisions in response to counsel's legal advice. Only these employees personify the corporation to an extent sufficient to assert the privilege in its behalf. See notes 31-33 *infra* and accompanying text.

3. In the proceeding before Magistrate Karr, the IRS characterized the payments made by Upjohn as bribes or kickbacks. The Company's general counsel allowed that the payments might have been for improper purposes. The Magistrate adopted the term "questionable payments." *United States v. Upjohn Co.*, [1978-1] U.S. Tax Cas. ¶ 9277, at 83,598 (W.D. Mich.).

4. 600 F.2d at 1225. Returns were made directly to counsel. [1978-1] U.S. Tax Cas. ¶ 9277, at 83,599. Summaries of subsequent oral interviews also became part of the compiled documents. Access to these records was limited exclusively to counsel. *Id.*

5. 600 F.2d at 1225. At the time the disclosures were made, Upjohn was aware that other companies were making similar disclosures. The SEC had indicated that more lenient treatment was available to corporations voluntarily disclosing their involvement with the type payments in question. [1978-1] U.S. Tax. Cas. ¶ 9277, at 83,599.

6. 600 F.2d at 1225. The IRS was concluding a routine audit of the Company's 1972 and 1973 consolidated federal income tax returns when it received a copy of the Form 8-K made to the SEC. The audit consequently was held open and the matter referred to the Revenue Service's Intelligence Division, which began an investigation for the years 1972, 1973, and 1974. The Company furnished the IRS with a schedule reflecting total payments of \$700,000, which it believed

Upjohn resisted the IRS summons⁷ claiming that the company's attorney-client privilege protected the documents.⁸ The IRS instituted suit, and the district court, in accepting the magistrate's report and recommendation,⁹ rejected Upjohn's arguments and enforced the summons. On appeal, the Sixth Circuit affirmed in part, reversed in part, remanded,¹⁰ and *held*: Only confidential communications made by employees responsible for directing corporate response to legal advice are protected under the attorney-client privilege.¹¹

The attorney-client privilege prevents disclosure of confidential communications between attorney and client.¹² The privilege is an essen-

had an effect on its tax returns. A second, less detailed schedule also was furnished, listing payments totaling \$3,700,000, which the Company claimed did not affect its tax returns. The IRS argued that there was insufficient data furnished to enable a determination regarding this second schedule. The Company allowed employee interviews to be conducted by the IRS, but did not permit questioning concerning the payments claimed to have no tax effect. [1978-1] U.S. Tax Cas. ¶ 9277, at 83,599-600.

7. See I.R.C. § 7602. This section authorizes the Secretary or his delegate to examine any books, papers, records, or other data, which may be relevant or material to an inquiry for the purpose of ascertaining the correctness of any tax return.

8. 600 F.2d at 1225. Upjohn also claimed that the documents in question were protected under the work product doctrine. The Court dismissed the claim, holding the doctrine inapplicable to administrative summons under I.R.C. § 7602 and citing *United States v. Powell*, 379 U.S. 48 (1964), as authority. 600 F.2d at 1228 n.13. While the applicability of *Powell* may be questioned and division of opinion exists regarding work product defenses, see *United States v. Bonnell*, 483 F. Supp. 1070, 1079 (D. Minn. 1979), this comment does not develop the work product aspect of the *Upjohn* holding.

9. [1978-1] U.S. Tax Cas. ¶ 9437 (W.D. Mich.). The district court of the United States for the district where the person summoned by the IRS resides has jurisdiction to compel attendance and production of the documents called for in the summons. See I.R.C. §§ 7402(b), 7604(a).

10. 600 F.2d at 1227-28. The case was remanded for a determination as to which communications in question were made by members of Upjohn's control group and for a denial of enforcement of the summons with respect to these communications. *Id.*

11. *Id.* at 1225. The *Upjohn* court defined a corporation's control group as "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given." *Id.* at 1226.

12. See 8 J. WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. ed. 1961). Wigmore defines the privilege in the following manner:

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

Id.

The roots of the privilege are traced to Roman law and date back at least to 1577 as part of the English common-law doctrine. Justification for an exception to a general duty to disclose the truth was found initially in the "oath and the honor" of an attorney not to divulge the secrets of his client. Stricter judicial developments in 18th century England dismantled other exemptions based on pledges of secrecy, but a concurrent rationalism shifted the attachment of the privilege

tial part of the attorney-client relationship¹³ because only a fully informed counsel can render effective legal advice.¹⁴ The client must be able to entrust all relevant information to counsel without fear that adversaries can compel disclosure to his detriment.¹⁵

The privilege has been criticized as an obstruction to full disclosure of the truth¹⁶ and as a contradiction to the expanded rules of discovery.¹⁷ Nonetheless, the privilege has remained a recognized element of our judicial system.¹⁸ Because of the barrier it creates to discovery of

from the attorney to the client. Based on the premise that an attorney's silence was necessary to elicit the client's trust, the privilege developed further and became a recognized doctrine of modern common law. *Id.* § 2290, at 542-43.

13. 600 F.2d at 1225. Judge Merritt, in describing the privilege, states:

[I]t is an intrinsic part and a necessary incident of the attorney-client relationship. The legal profession has an intimate relationship with its clients and an important role in the administration of our system of justice. Privacy is the necessary context of the relationship between the individual and his lawyer.

Id. Dean McCormick has commented:

Our adversary system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosures regarding professional business. Loyalty and sentiment are silken threads, but they are hard to break.

C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 87, at 176 (2d ed. 1972).

14. 600 F.2d at 1226. After citing *Fisher v. United States*, 425 U.S. 391, 403 (1976), to support the point that the privilege is based in part on the encouragement it gives clients to fully inform their attorneys, Judge Merritt states that "finding the truth and achieving justice in an adversary system are best served by fully-informed advocates . . ." *Id.* See 8 J. WIGMORE, *supra* note 12, § 2290, at 543; *id.* § 2291.

Additional support for the privilege comes from the notion that to the extent lawyers are more fully informed by their clients there will result greater compliance with the law. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 606, 609 (8th Cir. 1978) (en banc), *rev'g on rehearing*, 572 F.2d 596 (8th Cir. 1977); Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901, 913-14 (1969); Miller, *Getting to the Bottom or Digging Your Own Grave: The Applicability of the Attorney-Client Privilege and Work Product Doctrines to Internal Corporate Investigations*, 9 COLO. LAW. 945, 949 (1980); Miller, *The Challenges to the Attorney-Client Privilege*, 49 VA. L. REV. 262, 268-69 (1963); Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 S. CALIF. L. REV. 303, 306 (1977). See notes 86-87 *infra* and accompanying text.

15. C. MCCORMICK, *supra* note 13, § 87, at 175; 8 J. WIGMORE, *supra* note 12, § 2290, at 543; *id.* § 2291, at 545. This security is a necessary step toward achieving justice in an adversary system because a client first must be confident of counsel's unqualified loyalty and commitment. See 8 J. WIGMORE, *supra* note 12, § 2290, at 543; *id.* § 2291, at 545; Gardner, *A Re-evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 292 (1963); Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 954 (1956).

16. See, e.g., 8 J. WIGMORE, *supra* note 12, § 2291, at 554; Morgan, *Foreward*, MODEL CODE OF EVIDENCE 26-27 (1942).

17. See FED. R. CIV. P. 26-37.

18. See *Fisher v. United States*, 425 U.S. 391, 403 (1976) (confidential disclosures by a client

the truth, however, courts have adopted a narrow construction in an attempt to confine the privilege to its purpose.¹⁹ In *Hickman v. Taylor*²⁰ the Supreme Court recognized the tension between the principles of broad discovery and privileged communications, but advocated that they must coexist.²¹

Courts generally have applied the attorney-client privilege to corporations.²² In 1950 the district court for Massachusetts established general guidelines applicable for a corporate claim to the privilege. The

to an attorney made in order to obtain legal advice are privileged); ABA CANONS OF PROFESSIONAL ETHICS No. 4 (lawyer should preserve the confidences and secrets of a client).

19. See *United States v. Upjohn Co.*, 600 F.2d 1223, 1227 (6th Cir. 1979), cert. granted, 445 U.S. 925 (1980); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950); 8 J. WIGMORE, *supra* note 12, § 2291, at 554.

20. 329 U.S. 495 (1947).

21. *Id.* at 507-08. Justice Murphy noted in his opinion, "And as Rule 26b provides, further limitations come into existence as the inquiry . . . encroaches upon the recognized domain of privileges." *Id.* at 508.

22. See, e.g., *United States v. Louisville & Nashville R.R.*, 236 U.S. 318 (1915); MODEL CODE OF EVIDENCE rule 209(a) (1942); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04], at 38 (1979). Applicability of the privilege to corporations was challenged by the district court for Northern Illinois in *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill.), opinion supplemented, 209 F. Supp. 321 (N.D. Ill. 1962), rev'd, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929 (1963). See notes 28-30 *infra* and accompanying text. In reversing, Chief Judge Hastings included a long list of cases holding corporations entitled to the privilege. 320 F.2d at 319-20 n.7. The issue has not been litigated since *Radiant Burners*. Corporate claim to the privilege also has been held appropriate when asserted in regard to in-house counsel. See *Herbert v. Lando*, 73 F.R.D. 387 (S.D.N.Y. 1977); *Hasso v. Retail Credit Co.*, 58 F.R.D. 425 (E.D. Pa. 1973); *Georgia-Pacific Plywood Co. v. United States Plywood Co.*, 18 F.R.D. 463 (S.D.N.Y. 1956); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950); Comment, *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation*, 39 FORDHAM L. REV. 281, 287-90 (1970). For an article outlining the obligations of outside counsel in serving a corporate client, see Van Dusen, *The Responsibility of Lawyers: Advising Management Under the ABA Code of Professional Responsibility*, 46 N.Y.S.B.J. 565 (1974).

Applying the attorney-client privilege has posed conceptual difficulties for courts. See, e.g., *United States v. Upjohn*, 600 F.2d 1223, 1226 (6th Cir. 1979), cert. granted, 445 U.S. 925 (1980) (application of privilege to corporate clients poses a somewhat different problem); C. McCORMICK, *supra* note 13, § 87, at 178 (question arises as to who speaks for corporation for purposes of the privilege); Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 341 (1972) (issues raised in applying privilege to corporations have vexed litigants and courts).

The problem is perhaps best stated by Judge Campbell in *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill.), opinion supplemented, 209 F. Supp. 321 (N.D. Ill. 1962), rev'd, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929 (1963). In struggling with whether a corporation is an appropriate claimant of the privilege, he finds the court "presented with the anomalous situation of determining what persons within the corporate structure hold its confidence and may properly be considered as its *alter ego* and therefore the 'client.'" *Id.* at 774 (emphasis in original). See notes 28-30 *infra* and accompanying text.

court in *United States v. United Shoe Machinery Corp.*²³ implied that communications of any corporate employee, which were not disclosed publicly, were entitled to conditional protection.²⁴ Commentators and courts criticized this rule²⁵ because it contradicted the general notion of expanded discovery formulated in *Hickman v. Taylor*.²⁶

Twelve years later, in *Radiant Burners v. American Gas Association*,²⁷ the district court for Northern Illinois declared that only natural persons could assert the attorney-client privilege.²⁸ The Court of Appeals for the Seventh Circuit reversed,²⁹ thus settling the issue of a corpora-

23. 89 F. Supp. 357 (D. Mass. 1950).

24. *Id.* at 358-59. The court stated the privilege would apply if:

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

Id. The court refused to extend the privilege to some of the documents because the communications were not made for the purpose of securing legal advice. *Id.* at 360-61.

25. *See, e.g.*, *United States v. Aluminum Co. of Am.*, 193 F. Supp. 251 (N.D.N.Y. 1960) (part of interoffice communication between non-legal personnel that contained legal advice was privileged); *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792 (D. Del. 1954) (corporation as client could be represented by employees, officers, directors, and outside counsel). *See also* Simon, *supra* note 15, at 959-60; Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COMM. L. REV. 873, 875 (1971).

26. *See* notes 20-21 *supra* and accompanying text. *See also* Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 370-71 (1970).

27. 207 F. Supp. 771 (N.D. Ill.), *opinion supplemented*, 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

28. In holding the privilege inapplicable to corporations, Judge Campbell voiced three basic concerns. First, in analogizing the attorney-client privilege to the right against self-incrimination, he felt the privilege to be a personal one and cited cases denying a corporation the right against self-incrimination. 207 F.Supp. at 773 (citations omitted). Second, he noted problems in ascertaining the client's identity when a corporation asserts the privilege. *Id.* at 774. Finally, he concluded that with the number of employees and the large amount of documents necessarily involved in the corporate structure, a high potential for abuse existed through an expanded "zone of silence." *Id.* at 774-75.

Professor Simon coined the term "zone of silence." *See* Simon, *The Attorney-Client Privilege as Applied to Corporations*, *supra* note 15, at 955. The author used the phrase to describe the insulating effect that could result from attorneys dealing frequently with large numbers of corporate employees and masses of corporate documents. He commented: "Few judges—or legislators either, for that matter—would long tolerate any common law privilege that allowed corporations to insulate *all* their activities by discussing them with legal advisers." *Id.* at 955-56 (emphasis added).

29. 320 F.2d 314 (7th Cir. 1963). *See* note 22 *supra*.

tion's right to claim attorney-client protection. The decision did not, however, address the district court's concerns about the identity of the corporate client or the potential for corporate abuse of the privilege.³⁰

The court in *City of Philadelphia v. Westinghouse Electric Corp.*³¹ limited the broad language of *United Shoe* when it stated that a corporation is entitled to protection only as to communications between an attorney and members of its control group.³² The employees who sufficiently personify the corporation to assert the privilege are those who will make, or play a substantial role in, a decision based on legal advice given by counsel.³³ After *Westinghouse* many courts adopted the control group test and limited the privilege to members of upper management levels.³⁴

A new test with a different emphasis emerged in *Harper & Row Publishers, Inc. v. Decker*,³⁵ as the Seventh Circuit Court of Appeals rejected the control group test.³⁶ Focusing on the subject matter in-

30. See note 28 *supra*. See also *American Cyanamid Co. v. Hercules Powder Co.*, 211 F.Supp. 85, 88 n.12 (D. Del. 1962).

31. 210 F.Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

32. 210 F.Supp. at 485. See note 2 *supra* and accompanying text.

33. *Id.* In defining the test the court stated:

[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.

Id. See also 47 GEO. WASH. L. REV. 413, 418 (1979).

34. See *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82, 84-85 (E.D. Pa. 1969) (directors of research not members of control group); *Hogan v. Zletz*, 43 F.R.D. 308, 315 (N.D. Okla. 1967) (group leader not deemed to be within control group), *modified on other grounds sub nom.* Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); *Garrison v. General Motors Corp.*, 213 F.Supp. 515, 518 (S.D. Cal. 1963) (employees authorized to communicate confidential information held to be outside control group for purposes of applying attorney-client privilege). The Proposed Federal Rules of Evidence adopted control group language by defining representative of the client as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." PROPOSED FED. R. EVID. 503(a)(3), 46 F.R.D. 161, 250 (1969). See McLaughlin, *The Treatment of Attorney-Client and Related Privileges in the Proposed Rules of Evidence for the United States District Courts*, 26 THE REC. 30, 32-33 (1971). But see note 39 *infra*.

35. 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971). Justice Douglas took no part in the decision. See also *D. I. Chadbourne, Inc. v. Superior Court*, 60 Cal.2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964), which formulated a similar test.

36. 423 F.2d at 491-92. The control group test's flaws are most apparent in an antitrust case, like *Harper & Row*, where middle level employees are involved in the wrongdoing. Without information regarding the activities of these employees, counsel's service to the corporate client could be substantially impaired. The artificial limitations imposed by the control group test undermine

volved, the court held protected those communications, made at the direction of an employee's superior, that dealt both with the legal problem at hand and the related duties of the questioned employee.³⁷ An equally divided Court did not resolve the conflict between *Harper & Row* and *Westinghouse*, however, because it affirmed the *Harper & Row* decision without opinion.³⁸

Court decisions rendered after *Harper & Row* reflected the split of authority on the appropriate standard to ascertain the extent of protection afforded corporate communications with counsel.³⁹ Several courts combined various principles embodied in both the control group and *Harper & Row* tests to adjudicate the particular fact patterns before them.⁴⁰ In *Duplan Corp. v. Deering Milliken, Inc.*⁴¹ the court decided that a privileged document was one that was sent to or from a control group member, or a representative necessary to the decisionmaking

the principles on which the attorney-client privilege rests. See Comment, *The Privileged Few: The Attorney-Client Privilege as Applied to Corporations*, 20 U.C.L.A. L. REV. 288, 302-03 (1972); 15 TULSA L.J. 390, 395 (1979). Concerning the realities of corporate structure, one commentator notes: "In a complex corporate structure it is unreasonable to assume that upper management can provide all the information the attorney requires." *Id.* Another author criticizes: "Too often middle management executives who probably do not qualify for inclusion in the control group, as the courts have defined it, have responsibilities for making recommendations which are ratified verbatim by the higher echelon management which would be part of the so-called 'control group'" Mauer, *Privileged Communications and the Corporate Counsel*, 28 ALA. LAW. 352, 375 (1967).

For articles generally critical of the control group test, see Burnham, *Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois*, 56 ILL. B. J. 542 (1968); Heininger, *The Attorney-Client Privilege As It Relates to Corporations*, 53 ILL. B.J. 376 (1965); Weinschel, *supra* note 25; Note, *The Attorney-Client Privilege: A Look at Its Effect on the Corporate Client and the Corporate Executive*, 55 IND. L.J. 407 (1980).

37. 423 F.2d at 491-92. The court stated:

[A]n employee of the 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.

Id.

38. 400 U.S. 348 (1971). Justice Douglas took no part in the decision.

39. The control group language used in the Proposed Federal Rules of Evidence was eliminated, at least in part, because of this uncertainty and the criticism leveled at the control group test after the *Harper & Row* decision. 2 J. WEINSTEIN & M. BERGER, *supra* note 22, ¶ 503[01], at 14.

40. See *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455 (N.D. Cal. 1978); *Dunn Chem. Co. v. Syborn Corp.*, [1975-2] Trade Cas. (CCH) ¶ 60,561 (S.D.N.Y.); *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35 (E.D.N.Y. 1973). See notes 41-47 *infra*.

41. 397 F.Supp. 1146 (D.S.C. 1974).

process, and incident to a request for legal advice.⁴²

In *Diversified Industries, Inc. v. Meredith*⁴³ the court formulated a five-step test modifying *Harper & Row*.⁴⁴ The *Diversified* test, while favoring the subject matter approach, prohibited use of the attorney's office as a regular stop along the route of intracorporate communication in order to facilitate a later claim to the privilege.⁴⁵ In *In re Ampicillin Antitrust Litigation*⁴⁶ the court focused on the communicant's belief that the information provided was a necessary element in the solution of a legal problem.⁴⁷

A standard less rigid and arbitrary than the control group test gained support in the district courts of the Second, Fourth, Ninth, and District of Columbia Circuits,⁴⁸ and the Courts of Appeals for the Seventh and Eighth Circuits.⁴⁹ The Court of Appeals for the Third Circuit halted this trend and firmly adopted the control group test.⁵⁰ The Sixth Circuit followed with its *Upjohn* holding.⁵¹ The conflict among the circuits was thus crystallized and attorneys were compelled to surmise which communications from a corporate client would be privileged under the attorney-client rule.⁵²

42. *Id.* at 1165.

43. 572 F.2d 606 (8th Cir. 1978) (en banc), *rev'g on rehearing*, 572 F.2d 596 (8th Cir. 1977).

44. The *Diversified* court stated:

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

Id. at 609. The court was influenced by Judge Weinstein's suggested standard as set out in 2 J. WEINSTEIN & M. BERGER, *supra* note 22, ¶ 503(b)[04], at 40-41.

45. 572 F.2d at 609. For an article analyzing the *Diversified* decision, see 1979 WASH. U.L.Q. 265.

46. 81 F.R.D. 377 (D.D.C. 1978).

47. *Id.* at 387.

48. See notes 40-47 *supra*. See also Nat'l L. J., Mar. 31, 1980, at 3, col. 3 (report of amicus curiae briefs submitted in petition for certiorari, *Upjohn Co. v. United States*, by American Bar Association and American College of Trial Lawyers advocating rejection of control group test).

49. See notes 35, 43 *supra*.

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

51. *United States v. Upjohn Co.*, 600 F.2d 1223 (6th Cir. 1979), *cert. granted*, 445 U.S. 925 (1980).

52. The resulting uncertainty undermines a basic principle behind the value of the attorney-client privilege, namely, that a client must be able to ascertain, prior to disclosure to counsel, that

The Court of Appeals for the Sixth Circuit, in *United States v. Upjohn Company*,⁵³ recognized the conceptual difficulty in applying the attorney-client privilege to the corporate client⁵⁴ and chose to focus its analysis on the particular corporate employees who claimed the privilege.⁵⁵ The court, applying the control group test,⁵⁶ rejected Upjohn's argument that communications by all of its employees were privileged as confidential between attorney and client.⁵⁷ The Sixth Circuit held that statements by those not responsible for shaping corporate policy in response to counsel's advice⁵⁸ were not entitled to protection because these communications were not made by the client.⁵⁹ The court, narrowing the scope of protection, sought to promote free and confidential communication between corporate decisionmakers and counsel,⁶⁰ while guarding against unjust exclusion of evidence.⁶¹

The court reasoned that restricting the privilege⁶² would discourage management from disclosing to counsel, through agents, its limited knowledge of a particular transaction.⁶³ The court stated that by per-

a confidential communication will be protected from subsequent discovery. Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 426 (1970) ("If the privilege is to achieve its purpose of encouraging communications, the communicants must be able to discern at the stage of primary activity whether the communication will be privileged."). See notes 16-18 *supra* and accompanying text. Cf. 33 VAND. L. REV. 999, 1009 (1980) (uneven application of standard removes predictability that is major reason for formulating any objective test for attachment of attorney-client privilege).

53. 600 F.2d 1223 (6th Cir. 1979), *cert. granted*, 445 U.S. 925 (1980).

54. *Id.* at 1226. The court noted, "Since corporations are inanimate, artificial entities, the attorney-client relationship is conceptually more difficult, and its underlying principles are less obvious. As clients, corporations can communicate to attorneys only through agents." *Id.* See also note 22 *supra*.

55. The court was first concerned with identifying who among the employees "personified" the corporation to an extent sufficient to initiate and pursue the attorney-client relationship. In deciding who could invoke the privilege the court stated: "It is only the senior management, guiding and integrating the several operations, which can be said to possess an identity analogous to the corporation as a whole." *Id.* After this determination, attention is turned to whose communications within the relationship qualify for protection under the privilege. See also note 33 *supra*.

56. See note 11 *supra*.

57. 600 F.2d at 1225.

58. *Id.*

59. *Id.* The court remanded for a determination of which communications were made by members of Upjohn's control group, and ordered denial of the enforcement with respect to these communications. *Id.* at 1227-28.

60. *Id.* at 1227.

61. *Id.* The court also rejected Upjohn's claim that the documents were protected under the work-product doctrine. *Id.* at 1228 n.13. See note 8 *supra*.

62. 600 F.2d at 1227. See also notes 2, 11 *supra*.

63. 600 F.2d at 1227.

mitting this type of indirect communication, a situation develops in which only a corporate counsel has the complete record of details relating to any of these transactions.⁶⁴

Judge Merritt, writing for the court, stated that under the subject matter approach senior managers would purposely disregard important information, which sound business practice requires them to know and use.⁶⁵ Potentially harmful reports would accumulate exclusively in the legal department,⁶⁶ and managers would remain uninformed on questionable transactions.⁶⁷ This policy would expand protection available to intracorporate communications without serving either the interests of corporate morality or stockholder equity.⁶⁸

Echoing criticism leveled at the subject matter test by earlier courts,⁶⁹ Judge Merritt saw a need to limit the scope of the corporate attorney-client privilege because of the bar it placed on disclosures of the truth.⁷⁰ The privilege can achieve its objective without placing a severe burden on discovery when, as in *Upjohn*, corporate agents who know the details of a transaction are located in a foreign country.⁷¹ The subject matter test would render any communication between these agents and the corporation's attorney undiscoverable.⁷² The resultant "zone of silence,"⁷³ the court concluded, would be too broad.⁷⁴

The *Upjohn* court reasoned that limitations embodied in the control group test would promote corporate morality and sound business policy, protect shareholder interests, and assure access to relevant facts in litigation stemming from corporate misconduct.⁷⁵ The court also pre-

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* The court stated:

The "subject matter" test encourages senior managers purposely to ignore important information they have good business reasons to know and use. Corporate counsel should not be the exclusive repository of unpleasant facts. The law should not encourage corporate managers to shield themselves from information about possibly illegal transactions. Such purposeful ignorance does not serve the interests of moral corporate conduct or the protection of stockholder equity.

Id.

69. See notes 31-34 *supra* and accompanying text.

70. 600 F.2d at 1227.

71. *Id.*

72. *Id.*

73. See note 28 *supra*.

74. 600 F.2d at 1227.

75. See notes 65-70 *supra* and accompanying text.

sumed that expediency and predictability would result from a test with greater ease of application.⁷⁶

A closer analysis of the court's opinion, however, creates doubt whether the control group test effectively achieves these goals. One criticism frequently leveled at the control group test is its failure to recognize the nature of the modern corporate structure.⁷⁷ Complex and departmentalized internal organizations cause senior corporate management, or control group members, to rely heavily on information provided to them by middle and lower level employees.⁷⁸ Often top executives endorse decisions and recommendations without further consideration.⁷⁹ When preparing for actual or potential litigation, counsel must summon information from all available sources even though only the company's higher echelon of management will respond to the advice of counsel.⁸⁰ The control group test, by protecting only the communications of this small group of employees, prohibits those who actually possess relevant information from making privileged disclosures to counsel at a time when the corporation's need to be fully informed is greatest.⁸¹

76. Judge Merritt voiced concern with the complexity arising from a corporate system of delegated responsibility and compartmentalized organization. 600 F.2d at 1226. Other courts have noted the advantage of an objective test. *See, e.g.,* Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975) ("the rule more easily applied by the Court, the rule more easily understood by lawyers . . . is the control group test"). Once the control group is identified, there remains little for the court to do except decide which communications were made in furtherance of the rendering of legal advice. The subject matter test, on the other hand, requires the multiple determinations established in note 37 *supra*. *But see* Kobak, *supra* note 22, at 368 ("So heterogenous are the contexts in which an attorney's services are sought that no objective test can displace the need for thought and judgment."); Comment, *supra* note 36, at 300 ("An equitable application of the policies behind the privilege should not be sidestepped on the grounds of expediency alone.").

77. *See e.g.,* 47 GEO. WASH. L. REV. 413, 424 (1979); 15 TULSA L.J. 390, 394-95 (1979).

78. *See* Maurer, *supra* note 41, at 374-75. The *Upjohn* court noted the "guiding and integrating" function of senior management. *See* note 61 *supra*. It is difficult to conceive of a large corporate structure, particularly with foreign subsidiaries such as those operated by Upjohn Co., where top management does not depend to a great degree on information from below and even encourages active communication from employees lower in the structure.

79. Maurer, *supra* note 36, at 374-75.

80. Kobak, *supra* note 22, at 340, commented: "If there is any single place where society needs the buffer of legal advice to separate the whims of a client from immediate gratification, that place is the boardroom of the modern corporation." It follows that a counsel more fully informed from all levels of the corporation will offer more accurate advice. *See also* notes 13-15 *supra* and accompanying text.

81. 47 GEO. WASH. L. REV. 413, 425 (1979).

Applying the *Upjohn* rationale⁸² to the realities of the corporate environment creates an anomalous situation for three reasons. First, because communications from certain employees are not entitled to protection, counsel may find it more difficult to elicit information from corporate employees who recognize the potential legal consequences.⁸³ More importantly, attorneys fearing subsequent discovery will be reluctant to seek out unprivileged information even though it is vital to rendering a complete legal opinion.⁸⁴ Counsel thus must either base advice on speculation or risk forced disclosure of information helpful to the client's adversary.⁸⁵ Neither choice appears consonant with sound business policy.

Second, the control group test, as formulated in *Upjohn*, may deter internal investigations aimed at identifying possible wrongdoing or halting questionable activities.⁸⁶ The corporation's control group will hesitate to order these self-policing programs without reasonable assurance that the liability they seek to avoid will not be incurred automatically.⁸⁷ The noncompliance that may follow will dismantle a standard

82. See notes 62-74 *supra* and accompanying text.

83. One author has argued that an employee's reluctance to inform is motivated more by fear of higher management's displeasure with the reported activities than with concern for application of the privilege. Note, *supra* note 52, at 429. A definite attachment of the privilege coupled with an urging by management for candid and confidential response, as in *Upjohn*, would serve to mollify these apprehensions. *But see In re Grand Jury Investigation*, 599 F.2d 1224, 1236 (3d Cir. 1979) (because the corporation could waive the privilege, lower level employees always confide in counsel at their own risk).

For an article proposing the institution of an executive privilege, see Note, *The Attorney-Client Privilege: A Look at Its Effect on the Corporate Client and the Corporate Executive*, 55 IND. L.J. 407 (1980).

84. See generally Weinschel, *supra* note 25, at 875-76.

85. *Id.* The author terms this dilemma a "Hobson's choice." By whatever description, it is clear that the corporation's position is detrimentally affected.

86. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 606, 609 (8th Cir. 1978) (en banc), *rev'g on rehearing*, 572 F.2d 596 (8th Cir. 1977); Miller, *supra* note 14, at 268-69; Miller, *supra* note 14, at 949; Note, *supra* note 14, at 306. *But see In re Grand Jury Investigation*, 599 F.2d 1224, 1237 (3d Cir. 1979) (the risk of criminal or civil liability for noncompliance with laws regulating corporate activities sufficiently ensures such investigations even without the certainty of confidentiality).

87. The potential for this abuse is particularly high when government investigations are concerned. The threat of forced disclosures supported by broad agency powers may force management into the position where it prefers to let the agency do its own discovery, resulting in a decrease in company sponsored fact finding. In *Upjohn* the situation is particularly noteworthy as one agency offers lenient treatment for voluntary disclosure, thus encouraging an internal investigation, when another agency, armed with the disclosure, seeks to impose a potentially large liability.

of corporate morality predicated on internal initiative.⁸⁸

Finally, because the control group test compels corporations to resist a broad policy of self-investigation, the opposing party, forced to conduct its own fact finding, faces the same burden on discovery that the court in *Upjohn* sought to avoid.⁸⁹ Confronted with a costly and time consuming process of fact gathering, the party may abandon litigation and thwart the aim that the restrictions on the attorney-client privilege in corporate context were designed to promote.⁹⁰

In *Upjohn* communications sought by the IRS were made to the company's general counsel at the request of the board chairman. These confidential and voluntary communications assumed a vital role in the company's effort to eliminate corporate wrongdoing.⁹¹ The failure of the *Upjohn* court to distinguish this fact pattern from one that abused the privilege and the court's unwillingness to analyze fully the applicability of other standards⁹² illustrates the danger inherent in an objective test. Public policy requires a test that can be equitably applied based on the facts of a particular case and the concerns that confront corporate management.⁹³

88. Thus unchecked, corporate wrongdoing may adversely affect stockholders' interest to a greater degree through loss of goodwill, strained public relations, and payment of larger monetary penalties. The treble damage awards in an antitrust case, for example, can amount to a significant, if not dangerous, reduction in a company's net worth. See Burnham, *supra* note 36, at 546.

89. See notes 70-74 *supra* and accompanying text.

90. The *Upjohn* court determined that limiting the amount of Company amassed evidence available to the IRS would be detrimental, if not destructive, to the position taken by the IRS. Yet, should the Company be forced to forego its own fact finding, the IRS would be subject to this same limitation. And should the IRS decline to undertake the burden of discovery, the violation would continue unchecked, leaving the policy of compliance with the law unaddressed.

91. The issue of waiver was addressed by the court only by way of footnote. See *United States v. Upjohn Co.*, 600 F.2d 1223, 1227 n.12 (6th Cir. 1979), *cert. granted*, 445 U.S. 925 (1980).

92. See 15 TULSA L.J. 390, 401 (1979). The court dismissed the *Diversified* decision without analysis, and failed to mention other tests developed since *Harper & Row*.

93. One commentator in a policy discussion asked the question: "If a corporate employee has the power to render a corporation liable for damages, why should he not also have the power to make a confidential communication to counsel?" McLaughlin, *supra* note 34, at 33.

Another commentator has stated the policy argument in the following manner:

It would better serve the interests of society to encourage a desire for legal advice at whatever level that desire exists within a corporation. An employee who lacks power may not be wanting in zeal. If such an earnest soul perceives a problem while acting within the scope of his employment and subsequently secures legal advice, the communication ought to be privileged, even if the outcome is determined by those to whom he reports. The potential for social benefit inherent in the communication does not vary drastically with the status of its narrator.

Kobak, *supra* note 22, at 368.

The *Harper & Row* subject matter test⁹⁴ has received criticism normally reserved for the control group test of *Westinghouse*.⁹⁵ Critics of the subject matter approach demonstrate its potential for abuse and its creation of an impediment to discovery.⁹⁶ Courts, in response to the inadequacy of both the control group and the subject matter tests, have attempted to develop standards that address the policy of expanded factual disclosure through discovery and the structural and regulatory framework within which the modern corporation must operate.⁹⁷ Judges, however, have not followed these hybrid tests.⁹⁸ Consequently, executives and attorneys are unable to rely on consistent judicial application of an attorney-client privilege rule in their corporate planning. In addition, the current split among the circuits encourages federal forum shopping.⁹⁹

The Supreme Court, in its review of *Upjohn*, should not be satisfied to affirm or reject the lower court's holding. Instead, the Court should formulate a standard that combines the need for corporate self-regulation with a policy of fair adjudication.¹⁰⁰

94. See note 37 *supra*.

95. See note 36 *supra* and accompanying text.

96. See, e.g., Note, *supra* note 52; 33 VAND. L. REV. 999 (1980).

97. See notes 77-81 *supra*.

98. Only the *Ampicillin* court relied in large part on the formulations in *Duplan*. See notes 41-42 and 46-47 *supra*.

99. See 33 VAND. L. REV. 999, 1014 (1980) ("If the privilege is to have any utility, corporations must be able to determine which disclosures will be protected without being forced to predict opposing counsel's forum choice.").

100. The Supreme Court rejected the control group test in reversing the 6th Circuit, and remanded the work product aspect. 49 U.S.L.W. 4093 (U.S. Jan. 13, 1981) (No. 79-886). The Court, while calling for a case-by-case analysis of a corporate claim to the privilege, did formulate a standard that offers useful guidelines. The Court extended protection to confidential communications concerning the employees' corporate duties when "the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." *Id.* at 4096 (emphasis added). To hold otherwise would "frustrat[e] the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 4095.