

ALTERNATIVE TEST DECLARED FOR ATTACHMENT OF ATTORNEY-CLIENT PRIVILEGE TO THE CORPORATE CLIENT

Diversified Industries, Inc. v. Meredith,
572 F.2d 606 (8th Cir. 1978)

In *Diversified Industries, Inc. v. Meredith*¹ the United States Court of Appeals for the Eighth Circuit rejected the control group test² for determining the attachment of the attorney-client privilege to a corporate client and declared an alternative standard based upon a modification of the *Harper & Row* test.³

Weatherhead, an Ohio manufacturer, sued Diversified Industries, Inc., its Missouri supplier, for allegedly bribing Weatherhead's purchasing agents.⁴ Diversified sought to shield four documents from discovery: a June 1975 memorandum instructing Diversified employees to cooperate with the law firm of Wilmer, Cutler and Pickering (hereinafter referred to as Law Firm) in its investigation of Diversified's internal affairs;⁵ the report of that investigation;⁶ corporate minutes containing discussions of that report;⁷ and a subsequent memorandum on the investigation.⁸ Defendant based its objection to plaintiff's discovery motion upon the attorney-client privilege and the work product

1. 572 F.2d 606 (8th Cir. 1978) (en banc), *rev'g on rehearing*, 572 F.2d 596 (8th Cir. 1977).

2. *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. 1962), *cert. denied*, 372 U.S. 943 (1963). The *Westinghouse* court announced the control group test for determining the application of the attorney-client privilege. This test limits the privilege to those corporate employees who personify the corporation; *i.e.*, those who stand in a position to control or take a substantial part in the actions advised by the corporate attorney, or who are authorized members of the group that has the authority to control. 210 F. Supp. at 485.

3. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971). The *Harper & Row* court rejected the control group test and concluded that:

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

Id. at 491-92.

4. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 600 (8th Cir. 1977), *rev'd on rehearing*, 572 F.2d 606 (8th Cir. 1978) (en banc).

5. 572 F.2d at 601.

6. *Id.* at 600-01.

7. *Id.* at 601.

8. *Id.*

doctrine.⁹ The district court, however, ordered disclosure.¹⁰ On application for mandamus, the Eighth Circuit upheld the trial court,¹¹ holding that neither the attorney-client privilege nor the work product doctrine afforded protection from discovery because the documents represented the work of Law Firm as an investigator rather than as an attorney.¹² Granting a petition for rehearing en banc, the court reversed the panel's determination that Law Firm had functioned only as an investigator and *held*: The attorney-client privilege extends to communications of any corporate employee if the corporation establishes that: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication to corporate counsel did so at the behest of his corporate superior; (3) the superior's request was made to facilitate the corporation's securing of legal advice; (4) the subject matter of the communication concerned the employee's employment duties; and (5) dissemination of the communication was restricted to only those who, because of the corporate structure, needed to know its contents.¹³ Upon application of this test, the court found that the privilege extended to all documents except the June 1975 memorandum.¹⁴

The attorney-client privilege is a common law doctrine¹⁵ whose

9. *Id.* The United States Supreme Court announced the work product doctrine in *Hickman v. Taylor*, 329 U.S. 495 (1947). The Court held privileged reports, mental impressions, and other writings prepared by an attorney in anticipation of litigation. *Id.* at 511. The work product doctrine is codified as FED. R. Civ. P. 26(b)(3). The distinction between the attorney-client privilege and the work product doctrine is explained in Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970):

The attorney-client privilege poses an absolute bar to discovery from counsel no matter how much the opposing litigant needs the information. It should thus be distinguished from the work-product rule, which protects information gathered by an attorney in preparing for litigation, but which can be defeated upon a showing of good cause.

Id. at 425-26.

10. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 599 (8th Cir. 1977), *rev'd on rehearing*, 572 F.2d 606 (8th Cir. 1978) (en banc).

11. *Id.* at 603. The court also held that a writ of mandamus was an appropriate means for appellate review. *Id.* at 599.

12. *Id.* at 603.

13. 572 F.2d at 609. The *Diversified* court's test represents an expanded version of the *Harper & Row* test, which is discussed *supra* note 3.

14. *Id.* at 611.

15. Although the exact source of the privilege remains uncertain, it is believed to have originated from the Roman law principle of loyalty between master and servant. *See Radin, The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928). Wigmore, in his discussion of the privilege's history, begins with the Elizabethan view that the privilege attaches to the attorney, not the client. Justification for the privilege at this time rested

modern justification rests upon the belief that it is in the best interests of justice to encourage a client to make full disclosure to his attorney.¹⁶ Without the privilege's guarantee of confidentiality, which provides the security necessary to encourage full communication,¹⁷ the flow and

upon the theory that it was "the oath and honor" of the attorney to preserve the secrets of his client. 8 J. WIGMORE, EVIDENCE, § 2290, at 543 (rev. ed. J. McNaughton, 1961). Later courts, influenced by eighteenth-century rationalism, rejected this justification, considering the privilege an obstruction of justice. *Id.* For a discussion of the history and philosophy of the privilege see Gardner, *A Re-evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279 (1963).

16. 8 J. WIGMORE, *supra* note 15, § 2290, at 543; *id.* § 2291, at 545. Wigmore states: "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent." *Id.* *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1129 (Ex. 1743), presented the view that the privilege is an outgrowth of a modern industrial economy and concluded that "[A]ll people and all courts have looked upon the confidence between the party and attorney to be so great, that it would be destructive to all business if attorneys [*sic*] were to disclose the business of their clients." *Id.* at 1225.

See generally *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280 (1826) (privilege as general rule of law); *Pfizer, Inc. v. Lord*, 456 F.2d 545 (8th Cir. 1972) (privilege as a fundamental tenet of the law of evidence); *Comercio E Indus. Continental, S.A. v. Dresser Indus., Inc.*, 19 F.R.D. 513 (S.D.N.Y. 1956) (privilege as requirement for effective functioning of counsel); Gardner, *supra* note 15, at 292; Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 954 (1956).

The societal importance of the attorney-client privilege is noted in MODEL CODE OF EVIDENCE rule 210, Comment a (1942):

To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.

Id. (emphasis supplied).

Another benefit resulting from full disclosure of the client to the attorney is increased compliance with the law. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 606, 609 (8th Cir. 1978) (en banc) (criticizing the control group test for undermining this benefit), *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, 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. CAL. L. REV. 303, 306 (1977).

Commentators note, however, that these justifications for the continued existence of the privilege cannot be verified. *See, e.g.*, *Kobak, The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 339 (1972); Note, *supra* note 9, at 425. *But see* Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962) (survey of attitudes concerning the attorney-client privilege).

17. *See* *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956); *Lee Nat'l Corp. v. Deramus*, 313 F. Supp. 224, 226 (D. Del. 1970); *Grummons v. Zollinger*, 240 F. Supp. 63, 67 (N.D. Ind. 1964), *aff'd*, 341 F.2d 464 (7th Cir. 1965); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1970); *McClure*

candor of communications would be impaired.¹⁸ The privilege belongs to the client,¹⁹ protects the substance of his communication,²⁰ and requires consistent application because any departure from the rule would seriously undermine its effectiveness in future attorney-client relationships.²¹

Because the privilege prevents full disclosure to the parties, however, it conflicts with the truth-seeking policy underlying the growth of modern pretrial discovery.²² As a result, courts narrowly construe the doc-

v. Goodenough, 12 N.Y.S. 459, 460 (Sup. Ct. 1890); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 469 (1977).

18. See *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (possibility of divulgence of communications inhibits confidence required for effective legal representation); 8 J. WIGMORE, *supra* note 15, § 2291, at 545 (privilege alleviates apprehension of compelled disclosures); MODEL CODE OF EVIDENCE rule 210, Comment a (1942) (complexity of social and legal structure renders essential expert legal advice based upon the fullest freedom and honesty of communication); Note, *supra* note 17, at 469; Note, *supra* note 9, at 426.

19. See *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826) (attorney not competent to testify concerning confidential communications made by his client); *Republic Gear Co. v. Borg-Warner Corp.*, 281 F.2d 551, 556 (2d Cir. 1967) (attorney duty bound to raise privilege in any proceeding to protect confidential communications); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1970) (attorney-client privilege rule extended to client to prevent disclosure of information given his attorney); *Foster v. Hall*, 29 Mass. (12 Pick.) 89, 96 (1831) (privilege of confidence is privilege of the client, not of the attorney); *Minter v. Priest*, [1930] A.C. 558 (same); 8 J. WIGMORE, *supra* note 15, § 2290, at 543; Comment, *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation*, 39 FORDHAM L. REV. 281, 282 (1970).

This principle is codified in PROPOSED FED. R. OF EVID. 503(c), 46 F.R.D. 161 (1969), which provides that:

The privilege may be claimed by the client, his guardian or conservator, the personal representative . . . of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

Id. at 250-51.

20. *United States v. Kendrick*, 331 F.2d 110, 113 (4th Cir. 1964), *cited in* Comment, *supra* note 19, at 283 n.13 (privilege extends to the subject matter of the communication as well as to the existence of the communication).

21. See *Fisher v. United States*, 425 U.S. 391, 403 (1976) (privilege exists to encourage clients to make full disclosure to their attorneys thereby assuaging fear that damaging information will be obtained by opponent from the attorney following disclosure, to counter client's reluctance to confide in his lawyer, and to provide fully informed legal advice); Note, *supra* note 17, at 469.

22. Note, *The Corporate Attorney-Client Privilege in the Federal Courts*, 22 CATH. LAW. 138, 139-40 n.6 (1976). Aware of the conflict between these two principles of privilege and discovery, Wigmore commented that: "[The privilege's] benefits are all indirect and speculative; its obstruction is plain and concrete It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth." 8 J. WIGMORE, *supra* note 15, § 2291, at 554. Wigmore further urged that before the privilege is upheld there must be a finding that "the injury that would inure to the [attorney-client] relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation." *Id.*, § 2285,

trine²³ to apply to an individual client only upon a showing that: the client sought legal advice; the communication did not concern prospective wrongdoing; a professional legal adviser, acting as such, gave the advice; the communication was made in confidence; only the client made the communication; and the client has not waived the privilege.²⁴

The applicability of the attorney-client privilege to the corporate client went unquestioned²⁵ until 1962 when a federal district court, in *Radiant Burners, Inc. v. American Gas Ass'n*,²⁶ declared the privilege to be a personal one that could be asserted only by natural persons.²⁷

at 527 (emphasis in original). See *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) (class action of stockholders against corporation and directors seeking rescission of price paid for stock on grounds of alleged violations of state and federal securities laws and common law fraud), *cert. denied*, 401 U.S. 974 (1971). The *Garner* court, influenced by Wigmore's balancing principal, decided that "the availability of the privilege [to a corporation when sued by its shareholders should] be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance." 430 F.2d at 1103-04. See also Note, *supra* note 9, at 425-26.

23. This principle is well established by a number of cases. See, e.g., *United States v. Goldfarb*, 328 F.2d 280, 282 (6th Cir. 1964) (privilege is exception and should be limited to its purpose); *Federal Sav. & Loan Ins. Corp. v. Fielding*, 343 F. Supp. 537, 546 (D. Nev. 1972) (privilege arises only when attorney acts as independent legal adviser, not business adviser); *In re Colton*, 201 F. Supp. 13, 15 (S.D.N.Y. 1961) (privilege upheld only if properly raised); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) (privilege strictly construed in accordance with its object); *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 396, 364 P.2d 266, 288, 15 Cal. Rptr. 90, 112 (1961) (privilege suppresses relevant information); *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal. App. 2d 41, 58, 69 Cal. Rptr. 480, 492 (1968) (privilege bars public access to public affairs); *Foster v. Hall*, 29 Mass. (12 Pick.) 89, 97 (1831) (privilege prevents full disclosure of the truth); *In re Richardson*, 31 N.J. 391, 396-97, 157 A.2d 695, 698 (1960) (privilege is not absolute); 8 J. WIGMORE, *supra* note 15, § 2291, at 554.

24. 8 J. WIGMORE, *supra* note 17, § 2292, at 554. For a discussion of each aspect of the definition see *id.* §§ 2294-2299 (legal advice sought), § 2298 (prohibition against protecting communications of wrongdoing), §§ 2300-2304 (advice by legal adviser acting in that capacity), §§ 2311-2316 (confidentiality), §§ 2317-2320 (communication made by the client), §§ 2327-2329 (waiver)

25. E.g., *United States v. Louisville & Nashville R.R.*, 236 U.S. 318 (1915); *A.B. Dick Co. v. Marr*, 95 F. Supp. 83 (S.D.N.Y. 1950), *aff'd*, 197 F.2d 498 (2d Cir. 1951), *cert. denied*, 344 U.S. 878 (1952); 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE*, ¶ 503(b)[04], at 41 (1977). For a complete listing of cases holding that the attorney-client privilege belongs to the corporate client, see *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 319-20 n.7 (7th Cir. 1963). This general acceptance of the right of the corporation to claim the privilege also seems well established by a series of cases that concerned application of the privilege to in-house counsel. See *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463 (S.D.N.Y. 1956); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954); *Leonia Amusement Corp. v. Loew's Inc.*, 13 F.R.D. 438 (S.D.N.Y. 1952); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950); Comment, *supra* note 19, at 287-88.

26. 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).

27. *Id.* at 773.

Though the Court of Appeals for the Seventh Circuit quickly reversed,²⁸ its ruling failed to resolve the fundamental problem inherent in the corporate claim to the attorney-client privilege: the problem of identifying the client. Because a corporation is not an individual but an entity that speaks through its board of directors, agents, and employees,²⁹ the real question is who among this myriad of individuals is the corporation.³⁰ The federal courts developed three basic approaches to the question.

Judge Campbell analogized the attorney-client privilege to the privilege against self-incrimination and cited *Wilson v. United States*, 221 U.S. 361 (1911), and *Essgee Co. v. United States*, 262 U.S. 151 (1923), as authority for denying the corporation the right to the privilege against self-incrimination. 270 F. Supp. at 773.

Aside from his concern about the personal nature of the attorney-client privilege, Judge Campbell felt that a corporate privilege easily could be abused. 207 F. Supp. at 774. He recognized that a grant of privilege to the corporation immediately raises the question of determining who the client is when the corporation asserts the privilege. Noting that an individual is not able to claim the privilege through an agent because, if so permitted, he could "increase the scope of the protection afforded to him" and "profane" the privilege, he reasoned that a corporation should not be permitted to do what the individual client could not do. *Id.* The composition of boards of directors, in his opinion, supported this conclusion. Because boards are often composed of members who serve simultaneously on several boards, it is unrealistic to assume that their communications would be made with the intent of confidentiality and, even if so made, that disclosure could be avoided. Failure to maintain confidentiality abuses the privilege and undermines one of the basic tenets of the privilege's rationale. *Id.* Finally, Judge Campbell asserted that "where corporations are involved, with their large numbers of agents, masses of documents and frequent dealing with lawyers, the zone of silence grows large." *Id.* He concluded that the zone-of-silence approach presented a potential means of insulating corporate activities and as such gave corporations an advantage not held by the individual client. *Id.* at 775. *See also* *America Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85 (D. Del. 1962), in which the court, although disagreeing with the Judge Campbell's decision, restated his concern. "This court [*American Cyanamid*] does not feel a corporation should be able to insulate vital facts by using the privilege in a perverting manner." *Id.* at 88 n.12.

28. 320 F.2d 314 (7th Cir.). "A corporation is entitled to the same treatment as any other 'client'—no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought, it may protect itself from disclosure, absent its waiver thereof." *Id.* at 324. *See, e.g.*, *Bell v. Maryland*, 378 U.S. 226, 263 (1964) ("A corporation, like any other 'client,' is entitled to the attorney-client privilege."). The Proposed Federal Rules of Evidence included corporation within its definition of client entitled to assert the privilege: "A 'client' is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." PROPOSED FED. R. EVID. 503(a)(1), 46 F.R.D. 161, 249-50 (1969).

29. *See, e.g.*, *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164 (D.S.C. 1975). *See also* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 88, at 178-79 (2d ed. 1972).

30. *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85 (D. Del. 1962). The court commented that "it is difficult, if not impossible to determine who speaks for the corporation." *Id.* at 88 n.12. *See also* 2 J. WEINSTEIN & M. BERGER, *supra* note 25, ¶ 503(b)[04], at 38-40.

Prior to *Radiant Burners*, the courts assumed the attorney-client privilege to protect the communications of all officers and employees of the corporation.³¹ *United States v. United Shoe Machinery Corp.*³² exemplified this approach. In the course of establishing a rule for determining the proper application of the privilege,³³ Judge Wyzanski suggested that the privilege extended to the communications of any corporate personnel that had not been disclosed to the public.³⁴ While the *United Shoe* approach tended to promote the goal of full disclosure between client and attorney and proved easy to administer,³⁵ it conflicted with dicta in *Hickman v. Taylor*³⁶ in which the Supreme Court indicated a willingness to limit the scope of the privilege.³⁷

Thereafter, a second approach emerged in *City of Philadelphia v. Westinghouse Electric Corp.*³⁸ Influenced by *Hickman*³⁹ and mindful of the warning in *Radiant Burners*⁴⁰ that the corporate privilege invites abuse,⁴¹ the *City of Philadelphia* court held that the privilege applies only when the corporation seeks legal advice and only to communica-

31. 2 J. WEINSTEIN & M. BERGER, *supra* note 25, ¶ 503(b)[04], at 41.

32. 89 F. Supp. 357 (D. Mass. 1950); see 2 J. WEINSTEIN & M. BERGER, *supra* note 25, ¶ 503(b)[04], at 41.

33. The court held that the privilege applies only if:

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

89 F. Supp. at 358-59.

34. *Id.* at 359. *United Shoe* was followed in *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 794 (D. Del. 1954); see *United States v. Aluminum Co. of America*, 193 F. Supp. 251, 252 (N.D.N.Y. 1960).

35. 2 J. WEINSTEIN & M. BERGER, *supra* note 25, ¶ 503(b)[04], at 41.

36. 329 U.S. 495 (1947).

37. *Id.* at 508. The Court remarked that communications of corporate employees secured by corporate counsel in anticipation of litigation were not privileged attorney-client communications because the employees were eyewitnesses to the subject matter of the litigation. *Id.* See 2 J. WEINSTEIN & M. BERGER, *supra* note 25, ¶ 503(b)[04]. The Court noted, however, that such communications might fall within the work product doctrine subject to discovery only upon good cause. 329 U.S. at 508. For a discussion of the work product doctrine, see note 9 *supra*.

38. 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).

39. 210 F. Supp. at 485.

40. See notes 25-28 *supra* and accompanying text.

41. 210 F. Supp. at 484; see note 27 *supra*.

tions made by persons in a position to control or partake in the corporation's decision to act upon advice of counsel.⁴² For nearly a decade, courts followed the "control group" test with little refinement or examination.⁴³ Acceptance of the test appeared so uniform that the drafters of the 1969 Proposed Federal Rules of Evidence considered it the controlling standard.⁴⁴

In 1970 the Seventh Circuit, in *Harper & Row Publishers, Inc. v. Decker*,⁴⁵ found the control group test inadequate. It adopted a standard that expanded the privilege's protection to the communications of non-control group personnel who, at the request of their superiors, made disclosure to corporate counsel concerning their duties as employees.⁴⁶ The precedential value of *Harper & Row* remained unclear, however, due to affirmance without opinion by an equally divided Supreme Court.⁴⁷

42. 210 F. Supp. at 485. In announcing this test, the court criticized Judge Wyzanski's broad definition in *United Shoe* of those corporate employees who are entitled to the protection of the privilege. *Id.*; see notes 31-35 *supra* and accompanying text. The court also rejected tests based upon an employee's rank or title since terminology varies among corporations. 210 F. Supp. at 485.

43. Kobak, *supra* note 16, at 363; see *Rucker v. Wabash R.R.*, 418 F.2d 146 (7th Cir. 1969); *Virginia Elec. and Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970); *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82 (E.D. Pa. 1969); *Ortiz v. H.L.H. Products Co.*, 39 F.R.D. 41 (D. Del. 1965); *Garrison v. General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963).

44. Kobak, *supra* note 16 (citing PROPOSED FED. R. EVID. 503(a)(3)), commented: "For purposes of the attorney-client privilege Rule 503(a)(3) defines a '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.'" *Id.* at 363-64. In 1971 the definition of the representative of the client in terms of the control group approach came under attack. The drafters eliminated the definition leaving the matter for a case-by-case resolution. 2 J. WEINSTEIN & M. BERGER, *supra* note 25, ¶ 503[01], at 11-13. See also *Proposed Rules of Evidence: Hearings on H.R. 5463 Before the Special Subcomm. on Reform of Federal Crim. Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 222-25 (1973) for a summary of this debate.

45. 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971). See also *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964) (when employee is required to communicate with counsel in ordinary course of business, employee statement is that of employer for privilege purposes).

46. 423 F.2d at 591-92. The limitation to communications concerning an employee's duties was designed to prevent a corporation's use of the privilege to shield communications of employees who fortuitously witness events that may create corporate liability. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 606, 609 (8th Cir. 1978) (en banc); cf. 423 F.2d at 491 (communications at issue not in the nature of bystander witness accounts). Attorney interviews of employee/ bystanders may be subject to the work product rule. 572 F.2d at 609 n.2; see notes 9 & 37 *supra* and accompanying text.

47. Kobak, *supra* note 16, at 365.

Of the three approaches, courts continue to favor the control group test for its certainty and ease of application.⁴⁸ The few courts espousing the *Harper & Row* approach have largely failed to provide the guidelines necessary to improve its usefulness.⁴⁹ Still other courts apply various combinations of the control group and *Harper & Row* tests,⁵⁰ or proceed on a case-by-case basis.⁵¹ This "balkanization of

48. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 606, 608 (8th Cir. 1978) (en banc) (commenting that the control group test is the most widely used); Kobak, *supra* note 16, at 363 ("Until recently, federal courts have slavishly followed the ruling in *Westinghouse*").

See *Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968) (test is whether a person has authority to control, or substantially participate in, decision regarding action to be taken on advice of lawyer, or is authorized member of group that has such power); *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, the rule more likely to be recognized as reasonable by the parties, and the rule most consonant with the purposes of the attorney-client privilege is the control group test"); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 35-36 (D. Md. 1974) (when corporation seeks to invoke privilege, communications must be between counsel and corporation's control group); *Honeywell Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970) (corporation claiming privilege bears the burden of proving employees are control group members); *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82 (E.D. Pa. 1969) (privilege unavailable to employee member of study group lacking ultimate decisionmaking responsibility); *Garrison v. General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963) (officers, directors, and department heads considered members of corporate control group).

Some courts did not specifically apply the control group test, but indicated that the availability of the attorney-client privilege to the corporation depends on the position in the corporation of the employee making the communication. *Rucker v. Wabash R.R.*, 418 F.2d 146 (7th Cir. 1969) (no privilege since the employees were not of such rank as to qualify as representatives of the corporation); *Leve v. General Motors Corp.*, 43 F.R.D. 508, 510 (S.D.N.Y. 1967) (privilege extends to a communication by an executive); *Ortiz v. H.L.H. Products Co.*, 39 F.R.D. 41 (D. Del. 1965) (no privilege for communication by foreman).

49. See *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 456 (N.D. Ill. 1974) (dissemination of communication between corporation lawyer and corporate employee to employees directly concerned with such matters does not waive the privilege), *aff'd without opinion*, 534 F.2d 330 (7th Cir. 1976); *Hasso v. Retail Credit Co.*, 58 F.R.D. 425, 428 (E.D. Pa. 1973) (memorandum prepared by employee acting on instructions of branch manager defendant's in-house counsel privileged); *Rockwell Mfg. Co. v. Chicago Pneumatic Tool Co.*, 57 F.R.D. 111, 113 (N.D. Ill. 1972) (letter prepared for patent counsel privileged); *Panduit Corp. v. Burndy Corp.*, [1971] 172 U.S.P.O. (B.N.A.) 46, 47 (furnishing copies of communications to nonmembers of corporate control group does not constitute waiver of privilege).

50. *Duplan Corp. v. Deering Milliken Inc.*, 397 F. Supp. 1146 (D.S.C. 1974); *Dunn Chem. Co. v. Syborn Corp.*, 1975-2 TRADE CAS. ¶ 60,561 (S.D.N.Y. Oct. 9, 1975). Both these cases apply a dual approach: the control group test and *Harper & Row* test. The *Duplan* court limited the privilege, first, to communications to or from a member of the corporate control group or an employee acting at the direction of a control group member, and second, to communications incident to a request for legal advice. 397 F. Supp. at 1163, 1165. The court further noted that the "main consideration is whether the particular representative of the client, to whom or from whom the communication is made, is involved in rendering information necessary to the decisionmaking process concerning a problem on which legal advice is sought." *Id.* at 1165. In *Ferrigan v.*

[the] attorney-client privilege"⁵² undermines the very rationale upon which the privilege rests—that the best interests of justice require that the client feel free to communicate with counsel without fear of disclosure, and that this guarantee demands certainty in application.⁵³

The panel decision in *Diversified Industries v. Meredith*⁵⁴ acknowledged both the control group and *Harper & Row* tests, but found it unnecessary to apply either. The court concluded that Law Firm had acted as an investigator rather than as an attorney. Thus, *Diversified* was not entitled to the privilege.⁵⁵ In dissent Judge Heaney criticized

Bergen Brunswick Corp., 77 F.R.D. 455 (N.D. Cal. 1978), the court found statements privileged if the employee was a control group member or if the employee made the communication at the direction of superiors and the subject matter of the communications concerned the performance of employment duties. *Id.* at 459. In *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35, 40 (E.D.N.Y. 1973), the court considered determinative the nature and content of the communications, the extent of disclosure within the corporation, and the relationship of the employee to the communication and to the corporation. Still another formulation emerged in *In re Ampicillin Antitrust Litigation*, 1978-1 TRADE CAS. ¶ 62,043 (D.D.C. Mar. 20, 1978), in which the court focused solely on the communication and its relationship to the legal question leading the corporation to seek the advice of counsel. *See Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242 (D.C. Cir. 1977) (court found that the privilege did not apply to information shared with third parties, but noted that the privilege extended to an agency's communications with its attorney); *Attorney-General of the United States v. Covington & Burling*, 430 F. Supp. 1117 (D.D.C. 1977); *FTC v. Lukens Steel Co.*, 1977-1 TRADE CAS. ¶ 61,372 (D.D.C. Feb. 17, 1977). Both cases acknowledged the split between the two tests.

51. *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35, 40 (E.D.N.Y. 1973); *see Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir. 1963).

52. Note, *supra* note 22, at 142.

53. *See* notes 16-21 *supra* and accompanying text. *See also* Note, *supra* note 9, at 426. In support of the control group test the author commented:

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. An ad hoc approach to privilege pursuant to a vague standard achieves the worst of possible worlds: harm in the particular case because information may be concealed; and a lack of compensating long-range benefits because persisting uncertainty about the availability of the privilege will discourage some communications.

Id.

54. 572 F.2d 596 (8th Cir. 1977), *rev'd on rehearing*, 572 F.2d 606 (8th Cir. 1978) (en banc).

55. *Id.* at 603. The court commented:

We find it unnecessary to decide whether the persons interviewed by the Firm's representatives should be considered as "clients" because we are persuaded that Law Firm was not hired by *Diversified* to provide legal services or advice. It was employed solely for the purpose of making an investigation of facts and to make business recommendations with respect to the future conduct of *Diversified* in such areas as the results of the investigation might suggest. The work that Law Firm was employed to perform could have been performed just as readily by non-lawyers aided to the extent necessary by a firm of public accountants. Thus *Diversified* has failed to satisfy one of the requisites of a successful claim of attorney-client privilege.

Id.

this holding.⁵⁶ More importantly, he proposed a modification of the *Harper & Row* test for applying the attorney-client privilege to corporations.⁵⁷ On rehearing en banc, the court adopted Judge Heaney's position on both the investigator-attorney issue and the modified *Harper & Row* test.⁵⁸

Now writing for the court, Judge Heaney acknowledged the predominance of the control group test,⁵⁹ but immediately cited its critics.⁶⁰ In particular, he expressed concern that the test's restriction of the privilege to personnel in a decisionmaking position in the corporation failed to reflect the realities of corporate life.⁶¹ Limiting the privilege to communications of top level executives could chill corporate counsel's ef-

56. *Id.* at 605 (Heaney, J., concurring and dissenting) (agreeing with the majority that mandamus was a proper form of review and that Diversified had not waived its privilege by its surrender of certain documents to the SEC)

57. *Id.* at 606. Judge Heaney recommended that the control group test be rejected and replaced by the *Harper & Row* test with modifications suggested in 2 J. WEINSTEIN & M. BERGER, *supra* note 25, ¶ 503(b)[04], at 45-47 (1975). Judge Heaney viewed the following requirements as essential: that the lawyer was acting as legal advisor when the communication was made, that the subject matter be the performance by the employee of the duties of his employment, and that the communication was not disseminated beyond those with a need to know. 572 F.2d at 606 (Heaney, J., concurring and dissenting), *see* note 24 *supra* and accompanying text.

58. 572 F.2d at 609-10. The court upon rehearing left untouched the earlier holding on the availability of mandamus as a means of appellate review and the rejection of extending the attorney-client privilege to the June 1975 memorandum. *Id.* at 607; *see* 572 F.2d at 599, 603.

59. 572 F.2d at 608. The court cited *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 400 (D.C. Va. 1975), in which the court noted the major reasons for the control group test's predominance: its ease of application, its narrowness of scope, its allowance for wider discovery, and its general consonance with the purposes underlying the privilege. *Id.* *See* Note, *supra* note 9, at 426 (arguing that the value of the control group test lies in its establishment of a "bright-line" test, which increases certainty and eases judicial administration). *But see* Kobak, *supra* note 16, at 368-70 (criticizing the view that the control group test provides a bright-line rule and questioning whether any test can provide such certainty when "so heterogeneous are the contexts in which an attorney's services are sought that no objective test can replace the need for thought and judgment." *Id.* at 368).

60. 572 F.2d at 608 (citing Kobak, *supra* note 16); Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COM. L. REV. 873 (1970); Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759 (1971); Comment, *supra* note 19.

61. 572 F.2d at 608; *see* Burnham, *Confidentiality and the Corporate Lawyer*, 56 ILL. B.J. 542 (1968), which comments that the *Westinghouse* court in formulating the control group test: seemed unwilling to think except in terms of individuals—the kind of individual client who makes a privileged disclosure to his attorney and then, on the basis of the attorney's legal advice, decides what action to take. The corporation . . . thus could have a privilege only to the extent that particular individuals within the corporation possess all the characteristics of the individual clients just described, making disclosures on the one hand and then deciding . . . what action to take.

Id. at 546-47; Note, *supra* note 19, at 291, *See* Comment, *supra* note 19, at 291.

fort to obtain from middle management or nonmanagement personnel information necessary to render competent legal advice.⁶² The control group test, Judge Heaney concluded, discourages the very process of full and frank disclosure the attorney-client privilege was designed to promote.⁶³

Finding the control group test inadequate, the court declared the *Harper & Row* test to be a more reasonable and effective standard because its focus on subject matter, instead of on personnel, better advances the free flow of information to corporate counsel from all employees.⁶⁴ As a result, the corporation would be encouraged to seek legal advice before initiating potentially illegal practices, and the corporate attorney would be better able to advise his client on such practices.⁶⁵

While declaring *Harper & Row* to be the better test, the court acknowledged its inherent potential for abuse.⁶⁶ Of major concern is the possibility that corporations might begin to routinely funnel communications through their attorneys to facilitate subsequent claims to the attorney-client privilege.⁶⁷ To thwart such schemes, the court adopted an approach, suggested by Judge Weinstein,⁶⁸ that would require corporations claiming the privilege to prove: that the employee making the communication did so at the request of his superior, that the subject matter of the requested communication concerned the employment duties of the employee, that the superior making the request did so for the purpose of securing legal advice, and that the communication's confidentiality was maintained to an extent consistent with both the nature

62. 572 F.2 at 608-09 (citing Weinschel, *supra* note 60, at 876). If counsel did seek communications from those outside of the control group, his revelation that their communications would not be privileged would most likely lessen their willingness to cooperate.

63. *Id.* at 609. In addition, Judge Heaney believed that the absence of the privilege for those outside the control group would deter corporate attempts at self-policing. *Id.* *But see* Note, *supra* note 9, at 425.

64. 572 F.2d at 609. The court commented: "The *Harper & Row* test provides a more reasoned approach to the problem by focusing upon *why an attorney was consulted, rather than with whom the attorney communicated.*" (emphasis added). *Id.*

65. *Id.*

66. *Id.* (citing Note, *supra* note 60, at 766). *See* Note, *supra* note 9, at 426; note 27 *supra*. *But see* Kobak, *supra* note 16, at 370-71 (arguing that "a more pliant approach" than the control group test will not automatically lead to abuse, and stating further that if a corporation does intend concealment, the control group test is as easy to circumvent as a less strict approach).

67. *See, e.g., In re Ampicillin Antitrust Litigation*, 1978-1 TRADE CAS. ¶ 62,043, at 74,511 (D.D.C. Mar. 20, 1978); 572 F.2d at 609; 2 J. WEINSTEIN & M. BERGER, *supra* note 25, ¶ 503(b)[04], at 44-45; Note, *supra* note 9, at 426; Note, *supra* note 60, at 776.

68. 2 J. WEINSTEIN & M. BERGER, *supra* note 25, ¶ 503(b)[03], at 45-47 (1975).

of the corporate decisionmaking process and the rationale underpinning the attorney-client privilege.⁶⁹

Applying this test to the facts of the case, the court found that Diversified, by virtue of its commission of the investigation to an attorney, had made a *prima facie* showing of its intent to secure legal advice.⁷⁰ In rather conclusory fashion the court also found that Diversified had satisfied the other requirements of the modified *Harper & Row* test.⁷¹ Accordingly, the court held privileged the report and all communications subsequent to it, leaving only the initial memorandum unprotected.⁷²

The dissenting judges accepted the modified *Harper & Row* test as the appropriate standard for defining the corporate attorney-client privilege,⁷³ but disagreed with the court's application of the test.⁷⁴

69. 572 F.2d at 609; 2 J. WEINSTEIN & M. BERGER, *supra* note 25, ¶ 503(b)[04], at 45-47.

70. 572 F.2d at 610 (citing 8 J. WIGMORE, *supra* note 15, § 2296):

It is not easy to frame a definite test for distinguishing *legal from nonlegal advice*. . . . [T]he most that can be said by way of generalization is that a matter committed to a professional legal advisor is *prima facie so committed for the sake of the legal advice* which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.

Id. (emphasis in original).

71. 572 F.2d at 610-11. The court found that: the resolution authorizing the investigation specifically instructed employees to cooperate with Law Firm; an examination of the report indicated that Law Firm only asked employees for information that was within the scope of their employment; and Diversified had maintained the requisite confidentiality. *Id.*

72. *Id.*

73. Judge Henley commented:

If I were able to accept the majority's premise that Diversified employed Law Firm as its attorney to give it legal advice or to perform legal services, I would not, at least to a point, have any trouble with the adoption of a modified *Harper & Row* test to be applied in identifying corporate personnel whose communications would be considered as falling within the attorney-client privilege. . . .

Id. at 613 (Henley, J. concurring and dissenting); Judge Gibson: "The majority opinion describes the controversy that exists as to what communications, by which corporate agents are protected by the attorney-client privilege. I am pleased to concur in Judge Heaney's analysis." *Id.* at 616 (Gibson, J., concurring and dissenting). Judge Bright: "Although reluctant to express an opinion on the merits because of my view that the controversy is moot, I agree in the main with the dissenting views of Judge Henley." *Id.* at 617 (Bright, J., dissenting).

74. Judge Henley, agreeing with the panel decision, *see* notes 61-62 *supra* and accompanying text, argued that Law Firm had not acted as a legal adviser, but as an investigator. 572 F.2d at 614 (Henley, J., concurring and dissenting). Judge Gibson felt that Diversified had waived its privilege, as it applied to parts of the 1975 report, by incorporating them into the minutes of several board meetings. Because shareholders have common law and statutory rights to discover those minutes, they lacked the requisite confidentiality. *Id.* at 616-17 (Gibson, J., concurring and dissenting). Judge Bright, who felt the controversy was moot because Weatherhead had obtained

Judge Henley criticized the majority's presumption that Diversified, by its commission of the investigation to Law Firm, had made a prima facie showing of intent to secure legal advice. He argued that such a presumption placed an insurmountable burden on the party seeking discovery⁷⁵ and disagreed with the court's finding that Law Firm's investigation represented legal work.⁷⁶

With its modifications of the *Harper & Row* test, the *Diversified* court hoped to provide an alternative preferable to both the control group and *Harper & Row* tests. Compared to the *United Shoe*, the control group, and the *Harper & Row* tests, the *Diversified* approach is more realistic in its recognition of the legal needs of the corporation and the role of the corporate attorney.⁷⁷ The *Diversified* test also more effectively balances the corporation's need for confidential disclosure to counsel with the plaintiff's need for discovery.⁷⁸ Whether the *Diversified* test will be able to effectuate its objectives, however, is open to question for two reasons.

First, the court's application of the test appears inconsistent with the reasoning that guided its formulation. To prevent abuse of the privilege, the court placed on the corporation asserting the privilege the burden of demonstrating the various elements of the test. Assignment of this burden to the claimant corporation is clearly justified because, be-

the information it sought from Diversified's involuntary disclosures to SEC, agreed with Judge Henley on the merits. *Id.* at 617 (Bright, J., dissenting).

75. 572 F.2d at 614 (Henley, J., concurring and dissenting). Judge Henley indicated that he did not think Dean Wigmore meant to place the burden on the party seeking disclosure in every instance where a matter is entrusted to a lawyer.

The difficulty is that, at least in many instances, the party seeking disclosure does not know in advance and has no way of knowing why the matter in question was turned over to the lawyer, or why the communications were developed, or what they amounted to or contained. Thus, apart from in camera proceedings, such as the one that was had in this case, there is no way for the party seeking disclosure to meet the prima facie case of privilege mentioned by Wigmore.

Id.

76. *Id.* at 614-16. Judge Henley based his conclusion upon the material that Judge Meredith, the district court judge, considered in camera. *Id.* at 614.

77. *Id.* at 609; Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 S. CAL. L. REV. 303, 309 (1977) (greater access to counsel resulting from expanded availability of the privilege increases corporate compliance with the law).

78. See 572 F.2d at 608-09; notes 16-23 *supra* and accompanying text. The court in *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d at 321 (citing 56 N.W. U. L. REV. 235, 241 (1961)), commented that "since the privilege does not exist out of deference to any personal right, but rather because of policy considerations designed to facilitate the workings of justice, it is fully applicable in the broad sense to corporations." See Note, *supra* note 77, at 308 n.29.

tween the two parties, the corporation has superior access to the evidence relevant to the claim.⁷⁹ The court, however, counteracted its proposed safeguard against abuse by allowing a corporation to meet its burden through a prima facie showing that the matter was committed to an attorney. A corporation could easily meet this burden without a showing of any actual intent to seek legal advice by merely channeling its office memos through corporate counsel. The person seeking discovery would then have to ferret out and prove a clear absence of such intent, a burden that rarely could be met.⁸⁰ While nominally shifting to the corporation the burden of proving the availability of the privilege, the court failed to shift the burden in fact.⁸¹

Second, critical to any test of attorney-client privilege is the existence of a fixed standard upon which corporations and corporate counsel can rely.⁸² Whether the *Diversified* test provides the necessary certainty is questionable in light of its treatment by subsequent courts. In *SEC v. Dresser Industries, Inc.*,⁸³ the court cited *Diversified* for the proposition that a corporation claiming the privilege must prove that the communication was made for the purpose of securing legal advice. Finding Dresser's claim to the privilege "vague and conclusory," the court rejected it without considering the other elements of the *Diversified* test.⁸⁴ In *SEC v. Canadian Javelin*,⁸⁵ the court, while recognizing the *Diversified* test as an extension of *Harper & Row*, found it unnecessary to apply either test because the employee was not acting as an agent of the corporation in his communications with counsel.⁸⁶ The District Court

79. See note 75 *supra* and accompanying text.

80. *Id.*

81. Aside from the problems previously mentioned in regard to the court's adoption of Wigmore's prima facie test, it should also be noted that the test was formulated primarily with individuals, not corporations, in mind. See 8 J. WIGMORE, *supra* note 15, § 2296, at 567 n.2 (listing cases supporting the test's formulation). Furthermore, the test was formulated at a time when the legal community generally assumed under *United Shoe*, see notes 31-35 *supra* and accompanying text, that the privilege applied to all employees of the corporation. See *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771, 774-75 (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). By removing Wigmore's test from its simple context and applying it without the careful analysis characteristic of the remainder of the opinion, the court unravelled its carefully woven fabric.

82. 572 F.2d at 608-09.

83. 453 F. Supp. 573 (D.D.C. 1978).

84. *Id.* at 576.

85. 451 F. Supp. 594 (D.D.C. 1978).

86. *Id.* at 597-98.

for the District of Columbia in *In re Ampicillin Antitrust Litigation*,⁸⁷ after describing *Diversified* as a rejection of both the control group and *Harper & Row* tests,⁸⁸ declined to follow the *Diversified* approach and proposed its own test.⁸⁹

The *Diversified* court, therefore, not only failed to effectively balance the need for confidentiality in the attorney-client relationship with the need for disclosure of relevant evidence, but further added confusion to an area of law already lacking clarity.

87. 1978-1 TRADE CAS. ¶ 62,043 (D.D.C. Mar. 20, 1978).

88. *Id.* at 74,510.

89. The *Ampicillin* test requires that:

(1) The particular employee or representative of the corporation must have made a communication of information which was *reasonably believed to be necessary to the decision-making process* concerning a problem on which legal advice was sought;

(2) The communication must have been made for the purpose of securing *legal* advice;

(3) The subject matter of the communication to or from an employee must have been related to the performance by the employee of the duties of his employment; and

(4) The communication must have been a confidential one. . . .

Id. at 74,510-11 (emphasis in original).

The *Ampicillin* court considered its test "more limited [than the *Diversified* test] in that it requires a close relationship between the communication and a decision on the legal problem (or at least a reasonable belief of such a relationship) rather than a request by a superior to an employee that the communication be made." *Id.* at 74,510 n.6a. On close analysis, this may be a distinction without a difference. The pertinent elements of the *Diversified* and *Ampicillin* tests both aim at insuring that the communication was made for the purpose of securing legal advice.