Vanderbilt Law Review

Volume 33
Issue 4 *Issue 4 - May 1980*

Article 6

5-1980

Conflicting Standards for Applying the Corporate Attorney-Client Privilege

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I. INTRODUCTION

The attorney-client privilege protects confidential communications between client and attorney from forced disclosure.[1] Dating back to at least 1577,[2] the privilege arose from the belief that it was a point of honor for the attorney to keep his client's confidences.[3] The modern rationale for the privilege, however, is the perceived need to encourage full and frank discussion between attorney and client by removing the fear of forced disclosure.[4] Thus, the privilege rests on the premise that the social benefits derived from uninhibited communication and from the attorney's access to all the facts[5] outweigh the detrimental effects of concealing information during trial.[6] This premise is untested, however, and the modern trend toward expanded discovery[7] militates toward a narrow construction

1. *See* 8 J. WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. ed. 1961):

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

2. *Id.* § 2290, at 542 n.1.

3. Early proponents of the privilege considered it personal to the attorney, rather than to the client. It served the attorney by "permitting him to keep the secrets confided in him by his client and thus preserve his honor." *In re* Colton, 201 F. Supp. 13, 15 (S.D.N.Y. 1961), *aff'd sub nom.* Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. denied,* 371 U.S. 951 (1963).

4. Canon 4 of the Code of Professional Responsibility of the American Bar Association provides that "[a] lawyer should preserve the confidences and secrets of a client." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4. Similarly, Dean McCormick has noted:

> 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.

McCORMICK, EVIDENCE § 87, at 176 (2d ed. 1972).

5. *See* Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test,* 84 HARV. L. REV. 424, 425 (1970) (stating that "[b]enefits arise under the commonly held assumption that an attorney best serves his client, and indirectly the entire society, if he has access to all relevant information"). For a discussion of a Yale study conducted to test the accuracy of this assumption, see *id.* at 425 n.7.

6. Jeremy Bentham, an especially strong critic of the attorney-client privilege, noted that the worst consequence of abolishing the privilege would be "[t]hat a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present." J. BENTHAM, *Rationale of Judicial Evidence,* in 7 THE WORKS OF JEREMY BENTHAM 473 (Bowring ed. 1842), *reprinted in* 8 J. WIGMORE, *supra* note 1, § 2291, at 549.

7. The liberal discovery policies of modern procedural rules are justified on the premise

of the privilege.[8]

The inherent conflict between broad application of the attorney-client privilege to promote open communication and limitation of the privilege to ensure judicial access to pertinent information is of particular importance in the corporate setting. Unlike the individual client, the corporation is by nature an artificial legal entity that can communicate only through agents. Courts attempting to determine the applicability of the attorney-client privilege must therefore ascertain which corporate employees are properly considered "clients" of corporate counsel.[9] The difficulty of this inquiry is compounded by the necessity of determining whether the advice sought by the corporation concerned business matters rather than strictly legal advice.[10] Finally, the vast organizational differences among corporate entities and the broad range of activities that give rise to litigation make promulgation of a uniform and just standard extremely difficult.[11]

Federal courts are split on the question of what standards should be applied to determine who is entitled to the protection of the corporation's attorney-client privilege. Judicial responses to this question run the gamut from a very comprehensive application of the privilege[12] to a narrow application protecting only the management of the corporation.[13] Because the Supreme Court has provided no guidelines for applying the corporate attorney-client privilege,[14] this area remains unpredictable for corporate attorneys.

This Recent Development traces the development of the prin-

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that "[m]utual knowledge of all the relevant facts . . . is essential to proper litigation." Hickman v. Taylor, 329 U.S. 495, 507 (1947). *See also* Advisory Committee Comments to FED. R. CIV. P. 26(b)(3).

8. *See* 8 J. WIGMORE, *supra* note 1, § 2291, at 554 (the privilege should be "strictly confined within the narrowest possible limits consistent with the logic of its principle").

9. *See generally* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04], at 38-39.

10. *Id.* ¶ 503(a)(1)[01], at 20-22. The growth of in-house corporate counsel has contributed to the problem of separating legal advice from business advice for purposes of the attorney-client privilege. Some commentators have asserted that when in-house counsel is concerned, the boundary between legal advice and business advice becomes too dim for the privilege to apply. *See, e.g.*, Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 40 U. DET. L.J. 299, 354-62 (1963). *But see* Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 353 (1972) (suggesting that "subordinate house counsel in large corporations [are] specialists so keenly aware of the dimensions of their roles that they would ordinarily abjure business admonitions better left to management or other business personnel").

11. J. WEINSTEIN & M. BERGER, *supra* note 9, ¶ 503[02], at 16.

12. *See* text accompanying notes 49-63 *infra*.

13. *See* text accompanying notes 26-43 & 73-82 *infra*.

14. *See* Harper & Row Pub., Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971).

cipal tests utilized by federal courts to determine the applicability of the attorney-client privilege in the corporate setting and evaluates the various criticisms leveled at each test. After examining the recent trend toward broadening the scope of the privilege, the Recent Development analyzes decisions in the Third and Sixth Circuits that adhere to the traditional, stricter standards for invoking the privilege. Although the competing policies underlying the privilege and its limitations impede the formulation of a comprehensive standard, this Recent Development concludes that the Third and Sixth Circuit tests accord more nearly with modern concepts of liberal discovery and provide sufficient protection for the interests of the corporation.

II. Development of the Corporate Attorney-Client Privilege

Prior to 1962 the applicability of the attorney-client privilege to corporate employees was unquestioned. The seminal decision in *United States v. United Shoe Machinery Corp.*[15] held that the privilege extended to "information furnished by an officer or employee of the [corporation] in confidence and without the presence of third persons."[16] By according corporations the same protection enjoyed by individuals, the court provided an easily applied standard that attorneys and clients could rely upon. The court, however, did not confront the problems posed by the differences between individuals and corporations,[17] nor did it explain why a corporation should be entitled to such extensive protection. Moreover, the *United Shoe* test ran counter to Supreme Court dictum in *Hickman v. Taylor,*[18] in which the Court enunciated the work product doctrine.[19] In *Hickman* the Court stated that although memoranda prepared by

15. 89 F. Supp. 357 (D. Mass. 1950).

16. *Id.* at 359.

17. Among the problems raised by equating an individual with a corporation for purposes of applying the privilege are the division of corporate employees into information-providers and decisionmakers; the difficulty of conducting discovery of employees who may be widely dispersed geographically; the problem of confidentiality; and the determination whether the advice sought was legal rather than business advice. *See generally* 2 J. Weinstein & M. Berger, *supra* note 9, ¶ 503(b)[04], and text accompanying notes 9-11 *supra.*

18. 329 U.S. 495, 508 (1947).

19. The qualified immunity for an attorney's work product was codified in 1970 as follows:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Fed. R. Civ. P. 26(b)(3).

corporate counsel of interviews with the corporation's lower-level employees were not protected by the attorney-client privilege, they were entitled to the more limited immunity of the work product rule. Thus, the *Hickman* Court appeared to espouse a more limited view of the applicability of the attorney-client privilege to corporate clients than that subsequently formulated by the district court in *United Shoe.*[20]

In 1962 the District Court for the Northern District of Illinois abruptly shattered judicial complacency with the *United Shoe* test in *Radiant Burners, Inc. v. American Gas Association*[21] by completely refusing to apply the attorney-client privilege in the corporate setting. Drawing an analogy between the attorney-client privilege and the privilege against self-incrimination, the court held that both privileges were personal and therefore could be exercised only by an individual.[22] The court feared the potential abuse that a comprehensive application of the privilege might engender in the corporate setting. Moreover, the court noted that the corporation could develop a broad "zone of silence" to protect all employees' communications, whether made in preparation for litigation or not, by routing them through the attorney's office.[23] Thus, the court concluded that a corporation is not entitled to the attorney-client privilege.

Although reversed on appeal,[24] *Radiant Burners* led later courts[25] to reconsider the justifications for the attorney-client privilege and the extent to which that privilege protects communications of corporate employees. Specifically, federal courts have developed two principal tests to determine the scope of the attorney-client privilege in the corporate setting.

A. The Control Group Test

Prior to the Seventh Circuit reversal of *Radiant Burners,* the District Court for the Eastern District of Pennsylvania considered

20. *See* Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 MICH. L. REV. 360, 370-71 (1970).

21. 207 F. Supp. 771 (N.D. Ill. 1962), *rev'd,* 320 F.2d 314 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963).

22. 207 F. Supp. at 773 (citing Essgee Co. v. United States, 262 U.S. 151 (1923), and Wilson v. United States, 221 U.S. 361 (1911) as authority for denying the corporation the right to the privilege against self-incrimination).

23. 207 F. Supp. at 774-75.

24. 320 F.2d 314 (7th Cir. 1963), *rev'g* 207 F. Supp. 771 (N.D. Ill. 1962), *cert. denied,* 375 U.S. 929 (1963).

25. *See, e.g.,* American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 87-88 (D. Del. 1962).

the applicability of the attorney-client privilege to the corporate setting in *City of Philadelphia v. Westinghouse Electric Corp.*[26] Influenced by the reasoning in *Radiant Burners*, the court formulated the control group test.[27] Although it refused to follow the *Radiant Burners* holding that the attorney-client privilege does not apply to corporations, the *Westinghouse* court also declined to adopt *United Shoe*'s broad application of the privilege because of the perceived conflict with *Hickman v. Taylor*.[28] Instead, the court focused on whether the corporation was seeking legal advice when the challenged communication was made. Reasoning that the communicating employee, in order to "personify" the corporation, must be able to take some action on behalf of the corporation to put the advice into effect, the court held that only those employees who are in a position to "control or even to take a substantial part in a decision about any action which the corporation may take"[29] represent the corporate client for purposes of the privilege. Employees not in such a position would merely be giving the corporate lawyer information that would enable him to advise those in control of the corporation.[30]

Following *Westinghouse*, federal courts almost uniformly adopted the control group test.[31] Proponents of this test,[32] noting its

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26. 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohib. denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

27. The district court in *Westinghouse* posed the test as follows:

> [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 tbe lawyer and the privilege would apply.

210 F. Supp. at 485.

28. 329 U.S. 495 (1947). *See* text accompanying notes 18-19 *supra*. For the argument that the *Westinghouse* court erred in its concern about a possible conflict with *Hickman v. Taylor*, see Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COM. L. REV. 873, 875 (1971).

29. City of Philadelphia v. Westinghouse Elec. Co., 210 F. Supp. 483, 485 (1962).

30. *Id.*

31. *See, e.g.*, United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), *cert. granted*, No. 79-886 (Mar. 17, 1980); *In re* Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979); Rucker v. Wabash R.R., 418 F.2d 146 (7th Cir. 1969); Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); Congoleum Indus. v. GAF Corp., 49 F.R.D. 82 (E.D. Pa. 1969), *aff'd mem.*, 478 F.2d 1398 (3d Cir. 1973).

In response to this wide acceptance of the control group test, the drafters of the Proposed Federal Rules of Evidence defined "representative of the client" for purposes of the attorney-client privilege 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). Subsequent judicial criticism of the test, however, led the drafters to omit this definition, leaving the controversy to be resolved on a case-by-case basis. *See Proposed Rules*

predictability and ease of application, first justify restriction of the privilege on the basis of the differences between individual and corporate litigants. Unlike an individual, a corporation usually has no single agent with access to all the information about the corporation's activities. Hence, the corporation's counsel, in a position to confer with a range of corporate employees, may possess a uniquely comprehensive knowledge of these activities. The plaintiff suing an individual has the relatively easy task of conducting discovery on a single person. The plaintiff suing a corporation, however, will be able to conduct comparable discovery—if at all[33]—only at much greater cost and labor.[34] A second reason for limiting the attorney-client privilege is that the two primary justifications for the privilege—the client's reliance on the confidentiality of his communications and his appreciation of the consequences of disclosure if the privilege were unavailable—may be inapplicable in the corporate setting.[35] The prospect that communications to the attorney will be kept strictly confidential is small in the corporate setting, where memoranda typically pass through several hands before reaching the attorney and are subsequently filed within access of other corporate employees. In addition, lower-level employees are likely to communicate to the attorney whatever information their superiors have instructed them to divulge without concern for whether subsequent disclosure by the attorney would tend to injure the corporation. Finally, advocates of the control group test, echoing the concerns of the *Radiant Burners* court,[36] consider the test a hedge against the abusive creation of a "zone of silence" around corporate communications.[37]

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of Evidence: Hearings on H.R. 5463 Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 222-25 (1973).

32. *See* Note, *supra* note 5 (presenting a summary of the arguments in favor of the control group test's limited standards). *See also* 8 J. WIGMORE, *supra* note 1, stating:

> [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. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

Id. § 2291, at 554.

33. The plaintiff's effort to conduct discovery of an employee's statements to counsel may be blocked if the employee has left the corporation or died, has moved beyond the reach of affordable discovery, or has forgotten the pertinent information.

34. *See* Note, *supra* note 5, at 427.

35. *Id.* at 427-29.

36. 207 F. Supp. 771 (N.D. Ill. 1962), *rev'd,* 320 F.2d 314 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963); *see* text accompanying notes 22-23 *supra.*

37. *See* Simon, *The Attorney-Client Privilege as Applied to Corporations,* 65 YALE L.J. 953 (1956):

> Where corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large. Few

Critics of the control group test[38] rely on three main contentions. First, detractors argue that to equate only the corporation's "control group" with the individual is artificial and unrealistic. The corporation consists of both information-providers and decisionmakers who are not typically embodied in one person. Exclusion of nonmanagement information-providers from protection of the privilege ignores the necessity for corporate counsel to obtain information available only from lower-level employees before counseling the decisionmakers. Counsel is therefore presented with a "Hobson's choice."[39] By interviewing only those who control the corporation, counsel risks being unable to obtain all the information needed to prepare his case. If he seeks the information from nonmanagement employees, however, he risks forced disclosure due to the inapplicability of the privilege. Thus, the attorney may be inhibited in his pursuit of all the facts.

Second, critics question whether the control group test can be easily applied so as to create a dependable guide on which clients and attorneys may rely.[40] Given the vast number of documents involved in corporate litigation, the diversity of the situations calling for attorney consultation, and the difficulty of determining the communicant's authority and control, it is impossible for a court to apply a completely objective standard. Consequently, application of a "bright line" test for determining the coverage of the attorney-client privilege must still be accompanied by some subjective reasoning.[41]

Third, detractors of the control group test argue that application of an objective standard does not eliminate the possibility of abuse of the privilege.[42] Because an objective test concentrates on identifying the communicant rather than on scrutinizing the nature of his communication, it is arguably easier for abuse to escape detection under the control group test than under a more subjective weighing of all the facts. In addition, it is unlikely that forcing an attorney who routinely rubber-stamps all communications routed

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. It is this risk, and this challenge, that underlie a number of attorney-client privilege problems peculiar to corporations.

Id. at 955-56.

38. *See* Kobak, *supra* note 10; Pye, *Fundamentals of the Attorney-Client Privilege*, PRAC. LAW. Nov. 1969, at 15.

39. This argument for a broad privilege has been tendered by many commentators. *See, e.g.*, Weinschel, *supra* note 28, at 876. *See also* note 71 *infra*.

40. *See* Kobak, *supra* note 10, at 368.

41. *Id.*

42. *See* text accompanying notes 22-23 & 36-37 *supra*.

through his office to divulge what he knows about a particular memorandum will prove to be a valuable discovery tool.[43] Thus, reliance on the control group test as an effective means of preventing abuse of the privilege may be misplaced.

Beset by such strong and persistent criticism, some courts began to question the efficacy of the control group test. Taking into consideration the potential for injustice that application of any arbitrary standard involves, these courts searched for a more meaningful set of factors for determining whether a particular communicant represents the corporate client.

B. The Subject Matter Test

The first case to reconsider the control group test was *Harper & Row Publishers, Inc. v. Decker.*[44] In considering whether the privilege protected debriefing memoranda given to corporate counsel by several lower-level employees, the court rejected as inadequate the control group test.[45] In its place the court formulated a new test based on two criteria: whether the employee's communication to the attorney was directed by his superior; and whether the subject matter of the communication concerned the performance of his duties as employee.[46] The court thus endorsed a broad application of the attorney-client privilege, based not upon the employee's ability to direct further actions of the corporation on counsel's advice, but rather upon a determination that those in control had authorized the employee to communicate the information to the attorney. The test was so broad, however, that it potentially could extend the privilege to any employee in the corporation, except those whose access to information was purely "fortuitous."[47]

The *Harper* standard responds to a principal criticism of the control group test—that it attempts to equate the essentially irreconcilable concepts of the individual and the corporation—by recognizing that the corporation's information-providers may not be identical to its decisionmakers. Opponents of the *Harper* test, however, criticize it on several grounds. First, because of its broad ap-

43. *See* Miller, *The Challenges to the Attorney-Client Privilege,* 49 VA. L. REV. 262, 267 n.21 (1963).

44. 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided court,* 400 U.S. 348 (1971).

45. 423 F.2d at 491.

46. *Id.* at 491-92. *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.

47. The fortuitous witness exception is necessary to avoid a conflict with Hickman v. Taylor, 329 U.S. 495 (1947). *See* text accompanying notes 18-19 *supra.*

plication to employees at all levels of the corporate structure, the test has the potential of creating a "zone of silence"[48] that could shield vast amounts of information from discovery. This criticism appears particularly apt in light of the expanded scope of discovery espoused by the Federal Rules of Civil Procedure.[49] Second, it is questionable whether such a broad application fulfills the underlying rationale for the privilege: the encouragement of full and frank communication with the attorney.[50] The confidentiality of an employee's communication is often doubtful because it may pass through a number of hands before reaching the attorney. Hence, the availability of the privilege may give the employee little incentive to consult corporate counsel. In addition, the existence of nonlegal reasons for seeking the advice of an attorney may outweigh any fear on the part of the corporation that the privilege will not apply.[51] In the face of such uncertainty whether the attorney-client privilege actually achieves open communication in the corporate setting, the harm to opposing parties caused by insulating so much information from discovery is significant.

On review, the Supreme Court affirmed *Harper* without opinion by an equally divided vote[52] and put an end to hopes that the nation's highest court would resolve the federal courts' confiict over the scope of the corporate attorney-client privilege. Thus, debate surrounding *Harper* continued, and federal courts remained free to accept either the control group test or the subject matter test or to formulate other standards.

In *Diversified Industries, Inc. v. Meredith*[53] the Eighth Circuit rejected the control group test largely because it objected to the artificial distinction between information-providers and decisionmakers imposed by that test. The court refused, however, to apply the *Harper* standard's broad protection. Instead, the *Diversified* court modified the *Harper* test along the lines suggested by Judge Weinstein[54] by requiring the corporation to satisfy a five-part test: first, the employee must have made the communication for the purpose of securing legal advice; second, the communication must have been made at the request of the employee's superior; third, the superior requesting the communication must have done

48. *See* text accompanying note 23 *supra.*
49. *See* FED. R. CIV. P. 26.
50. *See* text accompanying notes 4-6 *supra.*
51. For a fuller discussion of this question, see Note, *supra* note 5, at 428.
52. Decker v. Harper & Row Pub., Inc., 400 U.S. 348 (1971).
53. 572 F.2d 606 (8th Cir. 1978), *rev'g on rehearing en banc* 572 F.2d 596 (8th Cir. 1977).
54. 2 J. WEINSTEIN & M. BERGER, *supra* note 9, ¶ 503(b)[04], at 45-47.

so for the purpose of obtaining legal rather than business advice; fourth, the communication must pertain to the employee's performance of his duties; and last, access to the communication must be restricted to those who, because of their position within the corporate structure, need to know the information.[55] By means of this modified test, the *Diversified* court sought to effectuate the purposes underlying the attorney-client privilege.[56]

Applying the Weinstein test, the court accepted Dean Wigmore's proposal[57] that, absent a showing to the contrary, a matter presented to a legal advisor is prima facie presented for purposes of obtaining legal advice. Finding no contrary showing, the court concluded that the information was given to the corporation's attorneys to obtain legal advice. In addition, the court summarily found the remaining requirements of the Weinstein test satisfied.[58] Thus, the court applied the privilege very broadly, holding that most of the requested documents were protected.

In recognizing the dichotomy between lower-level employees and management, the *Diversified* test attempts to strike the delicate balance between the corporation's need for protection of disclosures made for the purpose of obtaining legal advice and the need of the opposing litigant to obtain information within the corporation's control. The test has been criticized, however, as failing to define adequately the scope of the privilege.[59] Although the court placed the burden of proving each element of the test on the corporation because it has greatest access to the facts, the court also

55. The *Diversified* court defended its test as follows:

> This modified *Harper & Row* test will better protect the purpose underlying the attorney-client privilege. Under this test, the mere receipt of routine reports by the corporation's counsel will not make the communication privileged, either because the communication will have been made available to those who do not need to know or because the communication was not made for the purpose of securing legal advice. Moreover, application of the attorney-client privilege will do little to further encourage this type of communication since they [*sic*] will continue to be made for independent business reasons. By confining the subject matter of the communication to an employee's corporate duties, we remove from the scope of the privilege any communication in which the employee functions merely as a fortuitous witness.

572 F.2d at 609.

56. *Id.*

57. Wigmore formulated as a generalized test:

> [T]he most that can be said by way of generalization is that a matter committed to a professional legal adviser 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.

8 J. WIGMORE, *supra* note 1, § 2296, at 567 (emphasis in original).

58. 572 F.2d at 610.

59. *See* 1979 WASH. U.L.Q. 265, 278-80.

allowed that burden to be met by a prima facie showing that the matter had been committed to an attorney.[60] Thus, the court shifted the nearly insurmountable burden of disproving the prima facie case to the individual adversary, who rarely has the resources to discover the necessary information. In addition, subsequent courts applied the standard unevenly[61] and thereby removed the predictability that is a major reason for formulating any objective test.[62] Finally, the same criticisms directed at the *Harper* subject matter test, such as its potential for abuse and its conflict with the liberal discovery policy of the Federal Rules of Civil Procedure,[63] are applicable to the *Diversified* test.

Thus, the subject matter test, as formulated in *Harper* and modified in *Diversified,* has proven no more immune to serious criticism than the control group test. Moreover, the Supreme Court's silent affirmance of *Harper* provides no guidance to lower federal courts addressing the applicability of the attorney-client privilege and the scope of its protection. Hence, it is understandable that decisions since *Harper* have shown no uniformity in defining applicable standards and that the well-considered standards in *Diversified* have failed to fulfill their initial promise.

III. Recent Application of the Corporate Attorney-Client Privilege

Despite predictions that the Supreme Court's affirmance of the subject matter test had spelled the demise of the control group test,[64] several subsequent decisions reveal continued acceptance of the control group standard by the majority of federal courts.[65]

60. *Id.* at 279. The author points out that Wigmore formulated his test with individuals, not corporations, in mind, and that *United Shoe* indicated that the privilege applied to all employees of the corporation. Thus, the author contends that "[b]y 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." *Id.* at 279 n.81.

61. *See, e.g.,* SEC v. Dresser Indus., 453 F. Supp. 573, 576 (D.D.C. 1978) (refusing to consider other elements of the *Diversified* test after determining that the corporation had failed to show that its communication had been made for the purpose of securing legal advice); SEC v. Canadian Javelin Ltd., 451 F. Supp. 594, 597-98 (D.D.C. 1978) (refusing to apply test because employee not acting as agent of the corporation when communication was made); *In re* Ampicillin Antitrust Litigation, [1978-1] Trade Cas. ¶ 62,043, at 74, 510-11 (D.D.C. Mar. 20, 1978) (formulating new test along lines of *Diversified*).

62. *See* text accompanying note 32 *supra.*

63. *See* text accompanying note 49 *supra.*

64. *See, e.g.,* 22 Syracuse L. Rev. 759, 769 (1971) (concluding that "[t]here is little doubt that this ruling has effectively delivered the death blow to the 'control group' test in our federal courts").

65. *E.g., In re* Grand Jury Subpoena, 599 F.2d 504 (2d Cir. 1979) (agreeing with Judge Weinstein that the matter conferred on must pertain to legal, not business, advice, but re-

These decisions address the most common criticisms voiced by detractors of the control group test and express concern about striking the balance between protection of the corporation's confidential communications and compliance with the modern trend toward expanded discovery.

A. *Third Circuit:* In re Grand Jury Investigation

In *In re Grand Jury Investigation*[66] the Third Circuit found that the work product doctrine of *Hickman v. Taylor*[67] applied to most of the questionnaires and interview memoranda prepared by the corporation's outside counsel when its audit department discovered evidence of illicit payments. Because the government had shown good cause[68] to remove the documents of a deceased corporate employee from the qualified immunity of the work product rule, however, the court went on to decide whether those documents could qualify for the absolute protection of the attorney-client privilege. In holding that the attorney-client privilege did not apply, the court articulated several justifications for adopting the control group test.

After recounting the development of the attorney-client privilege in the corporate setting, the Third Circuit began its analysis with the basic premise that "it is socially desirable to protect, at a minimum, communications made by a person who has the authority to take part in a decision about any action to be taken in response to the solicited advice."[69] Extension of the protection beyond that minimum, the court reasoned, would depend on whether such an extension would further the policy of frank communication underlying the privilege.

Responding to criticism of the control group test, the court initially considered the individual-corporate structure dichotomy. The court recognized the need for corporate attorneys to secure information from lower-level employees, but questioned whether the availability of the attorney-client privilege enhanced the attorney's

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fusing to reach the issue of what employees may properly represent the client because it found the communications protected under the work product doctrine of *Hickman v. Taylor*). *See also In re* Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979), and notes 66-75 *infra*; United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), and notes 76-83 *infra*.

66. 599 F.2d 1224 (3d Cir. 1979).

67. 329 U.S. 495 (1947).

68. Because the employee was dead, his testimony could not be duplicated by the government in the course of discovery. Thus, suppression of his recorded testimony, which was in the hands of corporate counsel, would work a hardship on the opposing party. This fact sufficed to take the testimony out of the work product protection of *Hickman v. Taylor* and FED. R. CIV. P. 26(b)(3). *See* notes 18-19 *supra*.

69. 599 F.2d at 1235.

ability to obtain that information. From the standpoint of the employee, the court argued, even the existence of a privilege does not ensure confidentiality, since the decision whether to release the information to other employees, or to waive the privilege altogether in the event of wrongdoing by the communicating employee, rests with the corporation's decisionmakers. On the other hand, if no wrongdoing is present, the employee would have little reason to fear disclosure even in the absence of the privilege. Thus, the court concluded that application of the attorney-client privilege to employees outside the corporation's control group would have little effect on the attorney's ability to obtain information.[70]

The Third Circuit also rejected the suggestion that absence of the privilege would make the attorney less inclined to seek out information detrimental to the corporation's interests, but necessary for preparation of a thorough defense.[71] Pointing to *Hickman v. Taylor,* the court noted that information discovered in the course of preparation for litigation would be protected by the qualified immunity of the work product doctrine, which adequately balances the interests of the corporation against the liberal policies of discovery. Conversely, the court felt that corporate counsel should not be concerned about the unprivileged nature of communications absent the prospect of litigation.[72] Finally, in reply to concerns that denial of the privilege would discourage the corporation from conducting internal investigations to uncover illicit behavior,[73] the court emphasized that the risk of civil or criminal liability for noncompliance with laws regulating corporate activities sufficiently ensures such investigations even without the certainty of confidentiality.[74] In conclusion, the Third Circuit joined the majority of the circuits in adopting the control group test.[75]

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70. *Id.* at 1236.

71. *Id. See, e.g.,* Diversified Indus., Inc. v. Meredith, 572 F.2d 606 (8th Cir. 1978), *rev'g on rehearing en banc* 572 F.2d 596 (8th Cir. 1977). The court posed the dilemma:

> The attorney dealing with a complex legal problem "is thus faced with a 'Hobson's choice.' If he interviews employees not having 'the very highest authority,' their communications to him will not be privileged. If, on the other hand, he interviews *only* those with 'the very highest authority,' he may find it extremely difficult, if not impossible, to determine what happened."

572 F.2d at 609 (quoting Weinschel, *supra* note 28, at 876).

72. 599 F.2d at 1237.

73. *See, e.g.,* Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 609 (8th Cir. 1978) *rev'g on rehearing en banc* 572 F.2d 596 (8th Cir. 1977); REPORT OF THE COMMITTEE ON THE FEDERAL COURTS OF THE NEW YORK COUNTY LAWYERS ASS'N 7-10 (April 1970), *cited in* 2 J. WEINSTEIN & M. BERGER, *supra* note 9, ¶ 503[01], at 12 n.1.

74. 599 F.2d at 1237.

75. The court stated:

> By adopting the majority approach, we would move the federal courts one step closer to

B. *Sixth Circuit:* United States v. Upjohn Co.

The Sixth Circuit first addressed the question of the scope of the corporate attorney-client privilege in *United States v. Upjohn Co.*[76] In *Upjohn* the Internal Revenue Service sought disclosure of questionnaires and interview memoranda prepared by corporate counsel as part of a management-induced investigation of alleged illicit payments to foreign officials. Rejecting the subject matter approach of *Diversified,* the Sixth Circuit restricted protection of the attorney-client privilege to communications made hy the corporation's control group.

The *Upjohn* court began its analysis with an examination of the policies underlying the attorney-client privilege, pointing in particular to the recognized purpose underlying the attorney-client relationship[77]—promoting justice by encouraging full disclosure.[78] Noting the problems involved in equating the individual and the corporate client because of the division of duties within the corporation,[79] the court examined the functions of various levels of corporate employees and concluded that only top management personnel possess characteristics sufficiently comparable to those of the corporation as a whole.[80] Therefore, the Sixth Circuit applied the attorney-client privilege only to communications made by such upper-level employees.

In adopting the control group test, the court directed several criticisms at the subject matter test. First, the court noted that adherence to the subject matter standard encourages top management to remain ignorant of damaging facts. In addition, the court emphasized that lower-level employees would be likely to bypass corporate management and consult directly with the attorney. Thus, the anomalous situation would be created in which the only person within the corporation cognizant of all the relevant facts would be the attorney protected by the privilege. Such a situation,

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a uniform rule . . . .

. . . .

In sum, we find no persuasive reason to deviate from the approach taken by the majority of the federal courts. We believe that the control-group test is both broad enough and fiexible enough to accommodate the needs of a corporate client.

Id.

76. 600 F.2d 1223 (6th Cir. 1979).

77. *See* note 4 *supra.*

78. 600 F.2d at 1225-26. The court stated that "[t]his policy of promoting full disclosure to counsel serves to implement the notion inherent in the first principle, that finding the truth and achieving justice in an adversary system are best served by fully-informed advocates loyal to their client's [*sic*] interests." *Id.* at 1226.

79. *See* text accompanying note 9 *supra.*

80. 600 F.2d at 1226.

stated the court, would be detrimental to the stockholders' interest in sound management[81] and the opposing litigant's interest in discovery.[82] Finally, because the privilege creates an absolute bar to discovery, the court concluded that the privilege should be limited in scope, protecting the corporation's interest in open communication while allowing a minimum of abuse. Rejecting the subject matter test because of its tendency to create a broad "zone of silence," the *Upjohn* court adopted the control group test.[83]

In response to the Sixth Circuit decision, Upjohn filed a petition for certiorari[84] in which it contended that, because modern corporations typically operate over a wide geographical area, a uniform rule is needed to end the uncertainty surrounding the privilege. In support of the subject matter test, Upjohn pointed to the criticisms aimed at the control group test, including the bifurcated nature of the corporate structure, which, taken in conjunction with a narrow interpretation of the attorney-client privilege, severely impedes corporate counsel's ability to obtain all relevant information.[85] Thus, Upjohn called upon the Supreme Court to provide guidelines for lower federal courts in determining the applicability of the attorney-client privilege to corporate clients.

IV. Comment and Conclusion

The conflicting policies that characterize the corporate attorney-client privilege problem impede development of an objective standard capable of easy application. Considerations such as the nature of the advice received from the attorney, the range of situations giving rise to litigation, and the number and location of employees of the corporation for whom the privilege is sought influence the determination of the scope of the privilege. This determination, however, must not be made on an ad hoc basis.[86]

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81. *Id.* at 1227.

82. In the instant case, although some employees possessed the same knowledge as corporate counsel, their dispersal throughout many foreign countries made discovery nearly impossible. *Id.*

83. *Id. See also* text accompanying notes 22-23 *supra.*

84. Petitioner's Brief for Certiorari, United States v. Upjohn Co., __ U.S. __ (19__) (copy on file with the *Vanderbilt Law Review*). The United States Supreme Court granted Upjohn Company's petition for certiorari on March 17, 1980. Upjohn Co. v. United States, Docket No. 79-886 (March 17, 1980).

85. Petitioner's Brief, *supra* note 84, at 11-12.

86. As one commentator has noted, "an ad hoc approach to [the] 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 benefit because persisting uncertainty about the availability of the privilege will discourage some communications." Note, *supra* note 5, at 426. *But see* Note, *The Attorney-Client Privilege: Fixed Rules,*

On the contrary, if the client is to feel confident of free and open communication with his attorney—the only real justification for retaining the privilege—he must be able to predict with reasonable certainty that the privilege will be applied to protect his disclosures. Because the privilege provides absolute immunity from discovery, however, its application should be limited so that it does no more than protect the corporate client.

Although *In re Grand Jury Investigation* recognized the validity of the corporation's claim to the attorney-client privilege, it argued convincingly for a restriction of the privilege to those employees who exercise the authority to act upon the advice of the attorney. Especially compelling was the court's contention that the privilege is largely illusory for lower-level employees and thus provides little incentive for them to make damaging disclosures to corporate counsel.[87] Opponents of the control group standard have sought to justify extension of the scope of the privilege by citing the differences between employees with an intimate knowledge of routine activities and those with the discretion and authority to direct these activities when supplied with information. If, as the Third Circuit suggests, this dual nature actually has little impact on whether the privilege aids corporate counsel in preparing for litigation, the balance tips strongly in favor of limiting the privilege to prevent undue hardship to opposing litigants.

Concern about possible abuses of the attorney-client privilege and about the tremendous difficulties in conducting pretrial discovery of numerous and widely dispersed lower-level corporate employees characterized the Sixth Circuit decision in *Upjohn*. The court reasoned that only top management personnel, who both confer with counsel and act upon his advice, truly represent the corporation as "the client." Therefore, it concluded that only such personnel could invoke the protection of the attorney-client privilege. This consideration strengthens the argument for expanding and facilitating discovery by limiting the scope of the privilege to the corporation's control group.

The division among the federal courts concerning appropriate application of the privilege undermines the privilege's sole justification of ensuring open communication with corporate counsel. 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. Delineating the difficul-

Balancing, and Constitutional Entitlement, 91 HARV. L. REV. 464 (1977); 23 VAND. L. REV. 847 (1970).

87. *See* text accompanying note 70 *supra*.

ties faced by large national and multinational companies, Upjohn's petition for certiorari asks the Supreme Court to provide guidelines for applying the attorney-client privilege to assist companies in formulating policies and obtaining the best possible legal advice. The Supreme Court, however, should reject the liberal standards advocated by Upjohn and adopt the control group test. This test, while sufficiently protecting the corporation's interests by immunizing communications made by its management from discovery, limits the adverse effects of excluding information needed at trial from discovery. By adopting the control group test, the Supreme Court could resolve the controversy that has divided the federal courts for nearly two decades and ensure that the attorney-client privilege achieves its intended purpose.

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