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# THE ATTORNEY-CLIENT PRIVILEGE AS APPLIED TO CORPORATE CLIENTS

**A**FTER SIXTY-SIX YEARS of struggle and controversy surrounding the application of the attorney-client privilege to corporate clients<sup>1</sup> the United States Supreme Court has taken one step in laying many questions to rest. *Upjohn Co. v. United States*<sup>2</sup> was accepted by the Court to resolve differences in the circuits as to how far the privilege extends horizontally and vertically within the corporate structure. This comment discusses the ramifications of extending the privilege to an entity which operates only through its agents, the history of the privilege, the effect of the *Upjohn* decision and the questions which remain as yet unsolved.

## I. THE PRIVILEGE

The attorney-client privilege is a legal device by which a client may prevent discovery of, or testimony concerning, disclosures made by the client to his attorney and any subsequent discussion thereof. While the client may be called upon to testify as to underlying facts within his knowledge, the privilege protects those communications produced by the attorney-client relationship.<sup>3</sup> Further, the lawyer may not be required to testify as to, or produce documents of, those communications which were intended to remain confidential as between legal adviser and client. The client alone has the power to assert or waive this protection although, in practice, the attorney may claim the privilege on her client's behalf. The privilege, however, does not protect otherwise discoverable information simply because it is placed in the hands of an attorney.<sup>4</sup>

Wigmore has set forth a widely cited eight-element test for determining whether matter falls within the ambit of the privilege.

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 the legal adviser
8. except the protection be waived.<sup>5</sup>

Thus, a client seeking legal advice, or his attorney, may not be judicially

<sup>1</sup> In *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318 (1915), the Court first recognized, by implication, that the attorney-client privilege applies to corporate clients.

<sup>2</sup> 101 S. Ct. 677 (1981).

<sup>3</sup> *Id.* at 685.

<sup>4</sup> McCORMICK, EVIDENCE § 90, at 185 (Cleary 2d ed. 1972).

<sup>5</sup> 8 J. WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. ed. 1961). Wigmore's text contains a full discussion of each element.

forced to divulge what he and the attorney have discussed as it relates to such legal advice. Note the emphasis on *legal* advice. If one who happens to also be an attorney performs clerical or ministerial services,<sup>6</sup> or functions primarily as a business adviser, no protection exists to prevent discovery of communications between "counselor and client."<sup>7</sup>

The burden of proving that information should not be disclosed rests on the party asserting the privilege. One writer suggests that the method of meeting this burden requires an affirmative answer to two questions: First, does the communication occur for the socially desirable purpose of securing legal advice or legal services prior to a proposed transaction; and second, could the existence or nonexistence of the privilege significantly affect the likelihood that the communication would be made?<sup>8</sup> These questions go to the essence of the rationale for the privilege. Even if answered affirmatively, some topics are forever precluded from protection. There is no privilege when the client discusses the contemplation of a crime, a fraud,<sup>9</sup> or a tort.<sup>10</sup> When the privilege may be claimed, however, its protection is absolute.

## II. THE HISTORY OF THE PRIVILEGE

In substance, the attorney-client privilege has been recognized since the sixteenth century.<sup>11</sup> It provides an exception to the general duty to permit discovery of pertinent information sought by opposing counsel. Originally, the privilege inured to the attorney as a point of honor<sup>12</sup> and operated to ensure the confidentiality of evidence as does the modern work product doctrine.<sup>13</sup>

Over the last 200 years, this theory has been replaced with a policy placing the privilege in the client instead of the legal adviser.<sup>14</sup> The theory behind this shift is to encourage the client to speak freely and without ap-

<sup>6</sup> *United States v. Bartone*, 400 F.2d 459 (6th Cir. 1968).

<sup>7</sup> The presumption is, according to Wigmore, that one consults an attorney for legal advice. 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.

WIGMORE, *supra*, note 5, § 2296, at 566, 567.

<sup>8</sup> Koback, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. R. 339, 341 (1972).

<sup>9</sup> *United States v. Rosenstein*, 474 F.2d 705 (2d Cir. 1973); *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972).

<sup>10</sup> *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C., 1975), *aff'd*, 540 F.2d 1215 (4th Cir. 1976).

<sup>11</sup> Evidence suggests that the privilege existed unquestioned in the reign of Queen Elizabeth I. WIGMORE, *supra* note 5, § 2290, at 542.

<sup>12</sup> *Id.* at 543.

<sup>13</sup> See text accompanying notes 22-23 *infra*.

<sup>14</sup> WIGMORE, *supra* note 5, § 2290, at 542-43.  
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prehension to one whom he consults for advice concerning legal affairs. "The proposition is that the detriment to justice from a power to shut off inquiry to pertinent facts in court will be outweighed by the benefits to justice (not to the client) from a frank disclosure in the lawyer's office."<sup>15</sup> There is the further, practical rationale that the privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."<sup>16</sup>

These policies have been codified for lawyers in the American Bar Association Code of Professional Responsibility. Accordingly, the attorney is ethically bound to guard the client's communications. Ethical Consideration 4-1 states:

A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

For all of its positive aspects, because it runs counter to the policy of full disclosure, the privilege has been confined within narrow boundaries. "Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principles."<sup>17</sup> Within the framework of the protection rests an admonishment that its invocation be limited to those truly privileged matters. Herein one finds the tension which breeds controversy.

Questions regarding the extent of the immunity from discovery arise in the context of pre-trial discovery as well as in-court evidence and testimony. The Federal Rules of Civil Procedure provide that "parties may obtain discovery regarding any matter not privileged"<sup>18</sup> without going further to specify what constitutes non-privileged matter. Governing the discovery rules in this context are the Federal Rules of Evidence.<sup>19</sup> Rule 501 states, in pertinent part, that the privilege "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>20</sup> (In actions based on state

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<sup>15</sup> MCCORMICK, *supra* note 4, § 87 at 175 (recognized in *Hunt v. Blackburn*, 128 U.S. 464 470 (1888)).

<sup>16</sup> *Trammel v. United States*, 445 U.S. 40, 51 (1980).

<sup>17</sup> WIGMORE, *supra* note 5, § 2292, at 554.

<sup>18</sup> FED. R. CIV. P. 26(b)(1).

<sup>19</sup> 4 MOORE'S FEDERAL PRACTICE ¶ 26.60 [1] at 26-225, 227 (2d ed. 1948).

<sup>20</sup> Rule 503 dealing directly with the attorney-client privilege as well as all other rules governing specific exercises of privilege have been deleted in favor of one broad rule. Rule 503 would have codified the control group test.

laws or claims, the state interpretation of privilege governs.)<sup>21</sup> Legislative deference to the courts has engendered a judicial process which seeks to define the limits of the privilege in a manner consonant with a system favoring broad disclosure. This process has achieved only some success, as the cases that follow point out.

Before direct discussion of the corporate client's right to claim the privilege, it is necessary for the sake of clarity to briefly distinguish the attorney-client privilege from the work product doctrine. *Upjohn* deals with both and they are related in the sense that the practitioner may advance both as a means of protecting her clients and her work. The work product doctrine safeguards the work of the counselor completed in preparation for litigation which is unique to that lawyer, e.g. her mental impressions of the case contained in notes or memoranda or her litigation strategy. The privilege attaches when the client expresses confidential matters to his attorney, regardless of whether this leads to an actual "work product."<sup>22</sup> The focus differs; in one it is on the lawyer, in the other on the client. A second distinction is that the court may order that a party reveal work product upon a showing of "good cause"<sup>23</sup> but may never force the disclosure of privileged material.

### III. THE CORPORATION AS CLIENT

In theory, only those problems inherent in the individual's claim of privilege should attend a similar invocation by the corporation. A corporation is a statutorily created legal entity with most of the rights enjoyed by a natural person. However, in the modern corporate structure lies the dilemma, for the corporation as an entity, can act only through its employees. The courts' concern is the scope of the privilege. In a corporation, precisely who speaks as the corporate client? Whose communications merit protection vertically, every employee, all management personnel, or only top management? How far does immunity extend horizontally; to all information given an attorney acting in that capacity? One must remember that the right to exercise the privilege belongs to the corporation and not the individual employee.<sup>24</sup> If the privilege fulfills its purpose, it encourages full disclosure

<sup>21</sup> This article is restricted to discussion of federal decisions. For state rules of privilege, see MOORE, *supra* note 19, ¶ 26.60 [1] at 26-225, 227 and WIGMORE, *supra* note 5, § 2292, at 554.

<sup>22</sup> The premier case on the work product doctrine is *Hickman v. Taylor*, 329 U.S. 495 (1947) in which the Court found no privilege protection but discussed the limitation on discovery designed to protect the attorney work product. The *Hickman* Court found that employees questioned by the corporate attorney as to events leading to litigation answered the lawyer as mere witnesses to the event and not as "clients" for whom the privilege was warranted.

<sup>23</sup> FED. R. CIV. P. 26(b)(3). "Good cause" translates into a showing of substantial need and undue hardship in obtaining the information. The holding in *Upjohn* points out that this may be a very high standard when dealing with attorney notes of oral interviews.

<sup>24</sup> *In re Grand Jury Proceedings*, 570 F.2d 562 (6th Cir., 1978).

to corporate counsel and to no other. Given the corporate framework of many individuals working together as one "client," there may be a problem in creating a large "zone of silence" which ultimately protects matters properly discoverable by an adversary.<sup>25</sup>

Since 1915 and *United States v. Louisville & Nashville Railroad Co.*,<sup>26</sup> the Court has assumed that a corporation has the right to protect its confidential statements with use of the attorney-client privilege<sup>27</sup> through its employees. One writer had this to say about its application and the rationale therefor: "It is the office of these men to fear for the well-being of the corporation just as an individual fears for his own well-being and absent the privilege, corporate agents would doubtless be reluctant to disclose facts which might work against the corporation if disclosed."<sup>28</sup> The reasoning should be the same. "Certainly the public policy behind the attorney-client privilege requires that an artificial person be given equal opportunity with a natural person to communicate with its attorney."<sup>29</sup> Evidently, the Court concurred in this thinking, for while the Court did not expressly extend the right to the railroad, it did discuss the importance of the privilege without distinguishing between a corporation and a natural person.<sup>30</sup>

*United States v. United Shoe Machinery Corp.*<sup>31</sup> was the first judicial decision to attempt to establish the "main qualifications" for the privilege in a setting involving a corporation. Judge Wyzanski adopted a broad view not unlike that enunciated by Wigmore,<sup>32</sup> and found that the privilege was

<sup>25</sup> See Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 955-56 (1956).

<sup>26</sup> 236 U.S. 318 (1915).

<sup>27</sup> Only one federal case has differed and it was subsequently overturned. Judge Campbell, in *Radiant Burners, Inc. v. American Gas Ass'n.*, 207 F. Supp. 771 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir. 1963) denied defendant corporation the right to limit discovery on the ground that a corporation is barred from asserting the attorney-client privilege. He found the right to be strictly personal and hence available only to natural persons. Further, he found the structure of corporations prevents full compliance with the requirement of confidentiality. In reversing, the court of appeals, sitting *en banc*, held that the privilege is not personal but a legal device used to advance the larger interests of justice. The court also specifically declined to suggest appropriate guidelines for the application of the privilege to corporate clients. 320 F.2d 314, 323 (7th Cir. 1963).

<sup>28</sup> Comment, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 NW. U.L. REV. 235, 241 (1961).

<sup>29</sup> *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal.2d 723, 736, 388 P.2d 700, 709, 36 Cal. Rptr. 468, 477 (1964).

<sup>30</sup> 236 U.S. 318, 336 (1915).

<sup>31</sup> 89 F. Supp. 357 (D. Mass. 1950).

<sup>32</sup> 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 is informed (a) by the client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law (ii) legal service 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:

available to protect many of the 800 exhibits sought in discovery, because they were products of the attorney-client relationship existing between the corporate counsel and a number of defendant's employees acting on behalf of the corporate client.<sup>33</sup>

The "control group" test, the first to limit application of the privilege on the basis that the client was a corporation, came out of *City of Philadelphia v. Westinghouse Electric Corp.*<sup>34</sup> Judge Kirkpatrick reduced the number of those who may claim the privilege with regard to their discourse with corporate counsel. He found that the *United Shoe* decision conflicted with the holding in *Hickman v. Taylor*<sup>35</sup> in that it protected not only truly privileged communications but also statements by employees who spoke, not as representatives of the company, but as "witnesses." The result was a situation wherein the employee gave information to counsel for use in the pursuit of a claim of another client—the corporation.<sup>36</sup> The control group test provides that:

if 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 . . . then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.<sup>37</sup>

Under this narrow test the judge granted protection only to those statements emanating from the highest management level. This test has been specifically overturned in *Upjohn* where it was criticized as follows: "In the corporate context, however, it will frequently be employees beyond the control group . . . who will possess the information needed by the corporation's lawyers . . . . The control group test . . . frustrates the very purpose of the privilege."<sup>38</sup>

*Harper & Row Publishers Inc., v. Decker*<sup>39</sup> also found the control group

<sup>33</sup> Judge Wyzanski refused the privilege to the documents held by the United Shoes patent law department because those in that department were either not attorneys or not acting as legal counsel.

<sup>34</sup> 210 F. Supp. 483 (E.D. Pa. 1962). This is the most widely accepted test. See *Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286 (D. Colo. 1979).

<sup>35</sup> 329 U.S. 495 (1947).

<sup>36</sup> 210 F. Supp. 483, 485 (E.D. Pa. 1962).

<sup>37</sup> *Id.*

<sup>38</sup> 101 S. Ct. 677, 683-84 (1981).

<sup>39</sup> 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam* by an equally divided court, 400 U.S. 348 (1971), rehearing denied, 401 U.S. 950 (1971).

test inadequate. As an alternative, the *Harper & Row* court applied a "subject matter" test substantially broader than its predecessor.

An employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors . . . 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.<sup>40</sup>

This test opens up the use of the privilege vertically within a corporation. Any employee may function as the "client" given a protected subject matter and a directive from a superior. Conceivably, all information concerning the performance of the employees duties could fall within a privileged area once a lawyer's advice is sought. It is for this reason that detractors find the test too broad<sup>41</sup> and antithetical to the policy of open discovery. They suggest that a corporation basing its claim of privilege on the subject matter test will be able to hide information and documentary evidence simply by transmitting these to an attorney.<sup>42</sup>

Dissatisfaction with the subject matter test has engendered two hybrid tests which have narrowed the application of the *Harper & Row* standard. *Diversified Industries v. Meredith*<sup>43</sup> presents the first. The essential elements in the *Diversified* approach are: first, the communication must be made for the purpose of securing legal advice; second, the employee making the communication must do so at the direction of his corporate superior; third, the superior must have so directed the employee so the corporation could secure legal advice; fourth, the subject matter of the communication must be within the scope of the employee's corporate duties; and fifth, the communication must not be disseminated beyond those persons who, because of the corporate structure, need to know its contents. The court expressly places the burden of proving the existence of these criteria on the party asserting the privilege.<sup>44</sup> Of note is the explicit burden of proving confidentiality within the corporate framework and the emphasis placed on *corporate* need for legal advice. On behalf of its test, the court explains that routine reports fall outside the standards for exclusion because they will either be seen by those who do not need to know of their content or will

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<sup>40</sup> *Id.* at 491-92.

<sup>41</sup> See, e.g., *United States v. Lipshy*, 492 F. Supp. 35 (N.D. Tex. 1979).

<sup>42</sup> E.g., *United States v. Upjohn*, 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd and remanded*, 101 S. Ct. 677 (1981).

<sup>43</sup> 572 F.2d 596 (8th Cir. 1977). For an extended discussion of *Diversified*, see Note, *Corporate Attorney-Client Privilege*, 4 J. CORP. L. 226 (1978); 47 GEO. WASH. L. REV. 413 (1979); Note, *Alternative Test for Attachment of the Attorney-Client Privilege to the Corporate Client*, 179 WASH. U.L.Q. 265.

<sup>44</sup> 572 F.2d 596, 609 (8th Cir. 1977).

be for a purpose unrelated to legal advice,<sup>45</sup> thus remedying the major pitfall in the *Harper & Row* test.

One of the more sensitive issues in determining whether the privilege attaches revolves around the characterization of "legal advice." In *Diversified*, a strong dissent urged rejection of the privilege applied by the majority because the information in question may have been generated in the pursuit of business advice.<sup>46</sup> In an ongoing corporation the distinction may be difficult to pinpoint and forced disclosure of a business aspect of a communication can reveal pertinent facts related to strictly legal aspects. A succinct "yardstick" provides:

Legal advice should remain protected along with "nonlegal considerations" discussed between client and counsel that are relevant to that consultation, but when the ultimate decision then requires the exercise of business judgment and when what were relevant nonlegal considerations incidental to the formulation of legal advice emerge as the business reasons for and against a course of action, those business reasons considered among executives are not privileged.<sup>47</sup>

Regardless of the criticisms of the dissent, *Diversified's* modification of the test used in *Harper & Row* has emerged as distinctive.<sup>48</sup>

A second hybrid arose in *In re Ampicillin*<sup>49</sup> which clearly draws from both the control group and subject matter approaches and sets out four requirements:

- 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 [made with the intention that it would be kept confidential].<sup>50</sup>

Elements one and three reflect the compromise position of Judge Richey.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 614 (Henley, J. dissenting).

<sup>47</sup> *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 506, 517 (D. Conn. 1977).

<sup>48</sup> *Markey, Privileged Communications Between Counsel and the Client*, 28 CLEV. ST. L. REV. 565, 572 (1979).

<sup>49</sup> 81 F.R.D. 377 (D.D.C. 1978).

<sup>50</sup> *Id.* at 385 (emphasis in original).

He compares his test with that of *Diversified*, noting that his is the more narrow "in that it requires a close relationship between the communication and a decision on a legal problem (or at least a reasonable belief of such relationship) rather than a request by a superior to an employee that the communication be made."<sup>51</sup> This is a balancing test necessitating analysis of both the subject and the context. Control group members are free to draw upon lower level personnel when doing so is important for the proper decision, but it must be directly connected to the subject matter of the employee's job. This approach protects those matters used to procure legal advice upon which a course of conduct will be devised without protecting all information simply because it falls within the employee's job performance.

### III. THE IMPACT OF *Upjohn Co. v. United States*

Against this background of differences<sup>52</sup> stands the *Upjohn* decision, eagerly awaited by corporate counsel across the country.<sup>53</sup> Unfortunately, the case represents one giant sidestep of the problems inherent in the application of the attorney-client privilege to corporations, even though the desire to resolve the conflicts in this area was the impetus for the Court's acceptance of the case. While paying tribute to the need for workable guidelines,<sup>54</sup> the Court declined to "lay down a broad rule or series of rules to govern all conceivable future questions in this area."<sup>55</sup>

*Upjohn* concerned the protection of an in-house investigation of possibly illegal payments discovered during an Internal Revenue Service (IRS) audit.<sup>56</sup> The Chairman of the Board requested that corporate counsel interview, personally and via questionnaire, those employees with access to relevant information so the attorneys could advise *Upjohn* concerning the payments. Those interviewed were instructed that the matter was "highly confidential" and a cover letter stated that the purpose of the investigation was to ensure that any future expenditures would be "proper and legal."<sup>57</sup>

The IRS became aware of the inquiry after *Upjohn* voluntarily sent them a summary report of the payments. They received more information from the Securities and Exchange Commission to whom *Upjohn* had also re-

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<sup>51</sup> *Id.* at 385 n. 8.

<sup>52</sup> The cases discussed here represent only those most important in the development of the privilege. For a compilation of other relevant decisions, see Annot., 98 A.L.R.2d 241 (1964) and Annot., 9 A.L.R. Fed. 685 (1971).

<sup>53</sup> See, e.g., Markey, *supra* note 48, at 590.

<sup>54</sup> The Court stated, "But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." 101 S. Ct. 677, 684 (1981).

<sup>55</sup> *Id.* at 681.

<sup>56</sup> See the lower court's opinion, 600 F.2d 1223, 1224 (6th Cir. 1978), *rev'd and remanded*, 101 S. Ct. 677 (1981).

ported. Upjohn then submitted details of \$700,000 worth of payments which, the company concluded, might have an impact on Upjohn's tax bill. When the IRS insisted upon examining the documents collected by counsel pertaining to the remaining \$3,700,000 in order to satisfy themselves that no further tax liability remained, the company claimed that the documents were privileged. This litigation ensued.

The district court adopted the magistrate's finding that the privilege had been waived and the work product doctrine was inapplicable and ordered compliance with the IRS summons.<sup>58</sup> Defendant appealed but found only limited relief. The court of appeals adopted the control group test, reasoning that "corporations, unlike individuals, are organized in such a way that responsibilities, and the information needed to fulfill the responsibilities, are delegated and compartmentalized. . . . It is only the senior management, guiding and integrating the several operations, which can be said to possess an identity analogous to the corporation as a whole."<sup>59</sup> The court excluded that matter communicated by members of the control group and affirmed the lower court order as to disclosure of the other information.

The Supreme Court emphatically rejected the control group test: "Such a view . . . overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."<sup>60</sup> Thus, lower level employees merit protection when they possess the facts necessary for full legal counsel and sound decision-making by the corporation. Because actions of the agent may be the basis for the litigation, a non-control group person could represent the sole source of corporate access to facts useful in pursuit of a claim or defense. Unless the lawyer can elicit information from lower level employees, "he may find it extremely difficult if not impossible to determine what happened."<sup>61</sup>

The Court undertook a factual analysis of the events in Upjohn's investigation and found that the answers to the questionnaires and the notes of personal interviews with employees were protected by the attorney-client privilege.<sup>62</sup>

Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only

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<sup>58</sup> 600 F.2d 1223, 1225 (6th Cir. 1978).

<sup>59</sup> *Id.* at 1228.

<sup>60</sup> 101 S. Ct. 677, 683 (1981) (citing *Trammel v. United States*, 445 U.S. 40, 51 (1980) and *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

<sup>61</sup> *Id.* at 684 (quoting *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978)).

<sup>62</sup> *Id.* at 685.

protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.<sup>63</sup>

The Court refused to propose a test that would allow a uniform approach to the problem of the corporate privilege, stating that to do so would "violate the spirit of F.R.E. 501."<sup>64</sup> Instead the Court urged a case-by-case examination of the facts.<sup>65</sup> However, scrutiny of the Court's analysis in protecting the Upjohn documents lends support to the test of *Diversified*.<sup>66</sup> The elements proffered by the Court as evidence of communications deserving access to the privilege closely align with the elements of the *Diversified* test.

The Court found these facts to be relevant:

The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors [element 2] in order to secure legal advice from counsel. [elements 1 and 3] . . . The communications concerned matters within the scope of employee's corporate duties [element 4] . . . [T]he communications were considered "highly confidential" when made . . . and have been kept confidential by the company. [element 5]<sup>67</sup>

Thus, taken all together, the *Upjohn* opinion appears to accept the test used in *Diversified* as a means of approaching any given case.

Chief Justice Burger concurred, stating that "a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment."<sup>68</sup> This is broader in scope than the majority holding.

The concurring opinion differs further in that Burger felt that the Court has a duty to forge new ground in this area. The Burger rule of thumb is that a communication is privileged when the attorney is authorized by management to inquire into the subject and is seeking information to assist counsel in performing any of the following functions:

(a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.<sup>69</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> See FED. R. EVID. 501 and text accompanying notes 19-21 *supra*.

<sup>65</sup> 101 S. Ct. 677, 686 (1981). *Accord* American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D. Del. 1962).

<sup>66</sup> See text accompanying notes 43-44 *supra*.

<sup>67</sup> 101 S. Ct. 677, 685 (1981).

<sup>68</sup> *Id.* at 689 (Burger, C.J. concurring).

Different from all other proposals, the Burger opinion focuses not on the acts or intent of the employee or corporation but rather on the reasons that the attorney would require the information. This focus is nonetheless in accord with the rationale and holding of Burger's brethren provided that the requirements of confidentiality and scope of employment subject matter are implicit. If a lawyer needs information to fulfill the strictly legal duties on behalf of the corporation as specified in the concurrence, then that information is immune from discovery. One problem may be that in order to prove that the privilege covers the matters in the hands of the attorney, the legal adviser will have to explain why he required it, which opens the door to a form of discovery.

Left undiscussed by the Court is the issue of waiver. When has the corporation given up the right to assert the privilege, and who has the power to do so? Even given a case-by-case framework, the Court could have established a guide to this aspect of the privilege. The magistrate's decision relied upon by the district court found a waiver. Considering the fact that corporations are beset with a variety of governmental entities demanding information, the question of what constitutes a waiver, and how much may be revealed before one must tell all, becomes significant.

Another question that arises, though not directly on point in *Upjohn*, concerns stockholders' derivative suits. General guidance as to the extent of the privilege may clarify how far into the protection of the privilege go the rights of the shareholders in their suits on behalf of the corporation itself. One court had held that the protection is subject to evidence offered by the shareholders as to why the privilege should not be invoked.<sup>70</sup>

All in all *Upjohn* is a disappointment. The courts and counsel are left to struggle with unknown parameters as they have in the past. Certainly the removal of the control group option is of some benefit, and the Court's examination of the facts gives some hints as to the analysis expected in the future. Nonetheless, the attorney-client privilege remains in a legal limbo with regard to its application to the corporate client.

ELINORE MARSH

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<sup>70</sup> *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), cert. denied, sub. nom., *Garner v. First Am. Life Ins. Co.*, 401 U.S. 974 (1971). For additional discussion of this topic see Annot., 34 A.L.R.3d 1106 (1970); Brereton, *Abrogation of the Corporate Privilege in Stockholder Suits*, 15 PRAC. LAW. NO. 7, 24 (1969); Comment, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 S. CAL. L. REV. 303 (1977).