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Control Group Test Unacceptable as Standard for Assertion of Attorney-Client by Corporations.

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EVIDENCE—Privileges—Control Group Test Unacceptable as Standard for Assertion of Attorney-Client Privilege by Corporations.

Upjohn Co. v. United States,
___U.S.___, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

General counsel for the Upjohn Company (the Company) conducted an internal investigation to identify kickbacks and political contributions illicitly made to secure foreign governmental business.[1] Following general counsel's initial investigation, the Company voluntarily disclosed the payments in a preliminary report filed with the Securities and Exchange Commission (SEC).[2] The SEC report prompted an IRS investigation of the federal income tax consequences of any funds improperly reported.[3] The Company was issued an IRS summons demanding production of confidential files containing written questionnaires and notes of interviews compiled by Upjohn's counsel for the purpose of advising the Company with regard to the payments.[4] Upjohn refused to disclose the summoned material on the ground the attorney-client privilege shielded it from forced disclosure.[5] The district court enforced the IRS summons.[6] On ap-

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1. *See* United States v. Upjohn Co., 78-1 USTC ¶ 9277 at 83,598-99 (W.D. Mich. 1978), *aff'd in part, rev'd in part and remanded*, 600 F.2d 1223 (6th Cir. 1979), *rev'd and remanded*, ___U.S.___, 101 S. Ct. 677 (1981), 66 L. Ed. 2d 584. The Company's independent auditors discovered one of Upjohn's foreign subsidiaries had made payments to foreign government employees. General counsel's investigation uncovered illegal payments in excess of four million dollars which were distributed in some 22 of the 136 countries in which the Company operated. *See id.* at 83,598-99.

2. *See id.* at 83, 599. The Company disclosed the payments to the SEC on its Form 8-K. At the time of the first filing, general counsel for Upjohn was aware of the SEC's lenient treatment of companies which had voluntarily disclosed similar payments. *See id.* at 83,599.

3. *See id.* at 83, 599. Prior to the time of filing of the first SEC report, the IRS had almost concluded an audit of Upjohn's 1972 and 1973 consolidated federal income tax returns. The IRS continued the audit after receipt of the 8-K report, and commenced an investigation of Upjohn's records for the year of 1974. *See id.* at 83,599.

4. *See id.* at 83,597-99. The summons was filed pursuant to sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954. The material sought by the IRS, communications between Upjohn's attorneys and the Chairman of the Board, managers of the Company's foreign affiliates, and employees who had direct knowledge of the payments. In addition to the SEC reports, the Company had furnished the IRS separate schedules of the payments supported by source documentation. The IRS, however, claimed Upjohn had furnished insufficient data to complete the investigation. *See id.* at 83,598-600.

5. *See id.* at 83,598.

6. *See id.* at 83,603. The magistrate concluded the documents in question were not pro-

peal, the United States Court of Appeals for the Sixth Circuit remanded the cause for a determination as to the composition of the corporation's "control group."[7] The United States Supreme Court granted certiorari. Held—*Reversed and remanded.* The control group test is an unacceptable standard for assertion of the attorney-client privilege by corporations.[8]

The attorney-client privilege is one of many exceptions to the general rule requiring witnesses to disclose whatever testimony they are capable of giving.[9] While some courts have argued for expanded discovery provisions to limit the scope of the privilege,[10] most courts agree broad application of the privilege is essential to encourage clients to candidly discuss their legal affairs with attorneys.[11]

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tected by the corporate attorney-client privilege because some of the interviewed employees had no decision-making authority with respect to the attorney's advice. Furthermore, the magistrate found the privilege had been waived since some details of the questionable payments had been disclosed to the IRS and SEC. *See id.* at 83,600-03.

7. *See* United States v. Upjohn Co., 600 F.2d 1223, 1226, 1227-28 (6th Cir. 1979), *rev'd and remanded*, ___U.S.___, 101 S. Ct. 677 (1981), 66 L. Ed. 2d 584. The court of appeals adopted the "control group" test for the corporate attorney-client privilege, and defined the control group as "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given." *Id.* at 1226, 1227-28. The summons would be denied with respect to control group members because their communications were privileged under the control group standard. *See id.* at 1226, 1227-28.

8. *See* Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 686, 66 L. Ed. 2d 584, 596 (1981).

9. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 688 (1972) ("public . . . has right to know every man's evidence"); United States v. Bryan, 339 U.S. 323, 331 (1950) (public duty for citizens to give testimony when capable); Blackmer v. United States, 284 U.S. 421, 438 (1932) (Congress prescribes citizen's duty to give testimony when properly summoned). *See also* 8 J. WIGMORE, EVIDENCE §§ 2192 & 2292 (McNaughton rev. 1961).

10. *See, e.g.*, Harris v. Nelson, 394 U.S. 286, 289 (1969) (Federal Rule of Civil Procedure 26(b) broadly construed for discovery); Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964) (discovery rules should be given broad treatment so federal civil trials not held in darkness); Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("fishing expedition" objection no longer sustained to preclude discovery of underlying facts). *See generally* FED. R. CIV. P. 26(b)(3), Advisory Committee Comments. The privilege has been found to often exclude pertinent testimony from the judicial fact finding process. *See* Herbert v. Lando, 441 U.S. 153, 175 (1979) (evidentiary privileges are unfavored obstructions to truth); Elkins v. United States, 364 U.S. 206, 234 (1960) (privilege is exception to general rule that society has right to every person's evidence); *cf.* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (proper litigation requires mutual knowledge of relevant facts). *See also* 8 J. WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961) (attorney-client privilege obstacle to judicial fact finding).

11. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 51 (1980) (client must fully disclose to attorney); Fisher v. United States, 425 U.S. 391, 403 (1976) (fully informed legal advice difficult to obtain without privilege); United States v. Buckley, 586 F.2d 498, 503 (5th Cir. 1978) (incomplete disclosure precludes client from obtaining legitimate legal assistance), *cert. denied*, 440 U.S. 982 (1979). Some commentators argue that without such a privilege,

The attorney-client privilege has historically been extended to corporations.[12] The primary explanation for such widespread acceptance of the corporate privilege is the judicial consensus that corporations require the assistance of fully informed legal counsel as much as individuals.[13] The particular circumstances when a corporate employee's communications will be protected, however, are considered far less pronounced.[14] Corporations, unlike natural persons, speak only through their agents and employees.[15] Judicial disagreement concerning whether these employees or agents speak for the corporation has provoked much uncertainty as to the scope of the corporate attorney-client privilege.[16]

Lower federal courts have set forth two principal tests to define the identity of the corporate client: the "control group" test[17] and the "sub-

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meritorious claims may be overlooked, and wasteful litigation would be encouraged. *See* Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 366 (1972); Withrow, *How to Preserve the Privilege*, 15 PRAC. LAW. 30, 31 (Nov. 1969).

12. *See* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 319 n.7 (7th Cir.) (court cites extensive list of cases in support of corporate privilege), *cert. denied*, 375 U.S. 929 (1963). The Seventh Circuit, in *Radiant Burners*, was the leading court to expressly hold that the attorney-client privilege was available to corporations. *See* Jox, *Attorney-Client Privilege-It's Application to a Corporate Client*, 3 WASHBURN L. J. 33, 33-34 (1964).

13. *See, e.g.*, United States v. Louis. & Nash. R.R., 236 U.S. 318, 336 (1915) (professional advice would be denied corporations without protection of confidential communications); Garrison v. General Motors Corp., 213 F. Supp. 515, 521 (S.D. Cal. 1963) (privilege exists to facilitate justice, not out of deference to personal right); American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 88 n.12 (D. Del. 1962) (disclosure by corporations is as important as by individuals).

14. *See, e.g., In re* Grand Jury Investigation, 599 F.2d 1224, 1234 (3rd Cir. 1979) (difficult to determine which corporate employees merit privilege); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977) (question arises concerning corporations whether privilege extends to all classes of agents and employees or only limited classes); Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968) (confusion arises when determining which officers and employees communicate as client for corporation). *See also* Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 956 (1956) (basic dilemma over who speaks for corporate client not present with regard to natural persons).

15. *See* United States v. State Tax Comm'n, 505 F.2d 633, 637 (5th Cir. 1974) (corporation is abstract creature of law acting through agents and employees); Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968) (corporation communicates through its employees and agents). *See generally* H. HENN, LAW OF CORPORATIONS § 78 (2d ed. 1970).

16. *Compare In re* Grand Jury Investigation, 599 F.2d 1224, 1236 (3rd Cir. 1979) (extension of privilege to lower-echelon employees not necessary) *and* Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968) (privilege extended to upper-echelon employees in control group) *with* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 607-08 (8th Cir. 1977) (necessary to extend privilege to middle management and some non-management personnel) *and* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164-65 (D.S.C. 1974) (privilege extended to some lower-echelon agents, employees, and representatives).

17. *See* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa.) (limiting privilege to senior management), *mandamus and prohibition denied sub*

ject matter" test.[18] The court, in *City of Philadelphia v. Westinghouse Electric Corp.*,[19] established the control group test, which extended protection of the privilege to those employees who had authority to make decisions in response to the corporate attorney's advice.[20] Courts adopting the control group standard shared the perception that further extension of the privilege's scope would needlessly overprotect information regarding corporate conduct.[21]

Dissatisfaction with the limited scope of protection under the control group test, however, caused some courts to view the subject matter test as a more acceptable standard.[22] In *Harper & Row Publishers, Inc. v. Decker*,[23] the court shifted the focus of judicial inquiry away from the status of

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nom., General Elec. Co. v. Kirkpatrick, 312 F.2d 742, 743 (3rd Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

18. *See* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (subject matter test extending privilege to some lower-echelon employees), *aff'd per curiam*, 400 U.S. 348 (1971).

19. 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.*, General Elec. Co. v. Kirkpatrick, 312 F.2d 742, 743 (3rd Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

20. *See id.* at 485. The court in *Westinghouse* found that corporate employees "personify" the corporation as a client only when holding a senior management position; otherwise, the court considered the employee as merely a witness, providing information to the attorney who might use it in counseling the client corporation. The court cited Hickman v. Taylor, 329 U.S. 495, 508 (1947) as authority for the proposition that witness information provided to the attorney who was anticipating litigation was not privileged. *See* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa.), *mandamus and prohibition denied sub nom.*, General Elec. Co. v. Kirkpatrick, 312 F.2d 742, 743 (3rd Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). After its formulation in *Westinghouse*, the control group test gained broad judicial support. *See, e.g.*, Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975) (control group test adopted as test most consonant with purpose of privilege); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 35-36 (D. Md. 1974) (corporate privilege extends only to decision-makers); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117, 120 (M.D. Pa. 1970) (corporation's control group is client for purposes of asserting privilege).

21. *See In re* Grand Jury Investigation, 599 F.2d 1224, 1236 (3rd Cir. 1979) (extension of privilege to lower-echelon employees would not enable attorney to obtain more information thereby needlessly precluding its discovery); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975) (control group test allows greatest discovery). *But see* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 608-09 (8th Cir. 1977) (necessary to extend privilege to lower-echelon personnel).

22. *See, e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 608-09 (8th Cir. 1977) (protecting communication of top executives alone fails to address realities of modern corporations' communication systems); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 387 (D.D.C. 1978) (control group test artificially limits availability of privilege and provides insufficient protection for communication of employees); Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 368 (1972) (best for society to encourage communication at all levels of corporate structure).

23. 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam*, 400 U.S. 348 (1971) (affirmed by equally divided court).

the person who the attorney consulted to the subject of the consultation.[24] The *Harper* subject matter test extended protection of the corporate privilege to any employee directed by senior management to communicate with the attorney concerning matters within the scope of that employee's duties.[25] The *Harper* court reasoned all employees embroiling the corporation in legal liability, regardless of whether they were members of the control group, required protection of the privilege since they frequently had the information upon which the attorney would base his opinion.[26] The *Harper* test was modified in *Diversified Industries, Inc. v. Meredith*,[27] when the Court of Appeals for the Eighth Circuit added the requirements that the communication be made in order to secure legal advice, and that the communication not be spread beyond those needing to know its contents.[28] These new requirements precluded the corporation from attaching the privilege to all documents funneled through corporate counsel.[29]

With the conflict between proponents of the control group and subject matter standards crystalized in the lower courts,[30] the United States Su-

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24. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977). *See also* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (subject matter test focused on why attorney consulted), *aff'd per curiam*, 400 U.S. 348 (1971); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D.S.C. 1975).

25. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd per curiam*, 400 U.S. 348 (1971).

26. *See id.* at 491-92; *cf.* Commonwealth v. Beneficial Finance Co., 275 N.E.2d 33, 83 (Mass. 1971) (lower-echelon corporate employees exercise more control than senior management over corporate affairs), *cert. denied*, 407 U.S. 914 (1972). *See generally* 10 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, §§ 4877-4966 (REV. PERM. ED. 1978).

27. 572 F.2d 596 (8th Cir. 1977). The communication had to meet the following requirements in order to be privileged:

(1) the communication was made for the purpose of securing legal advice;

(2) the employee making the communication did so at the direction of his corporate superiors;

(3) the superior made the request so that the corporation could secure legal advice;

(4) the subject matter of the communication is within the scope of the employee's corporate duties; and

(5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know it contents.

Id. at 609.

28. *See id.* at 609. The *Diversified* court reasoned too much information not deserving the privilege would be shielded by the *Harper* test. *See id.* at 609. *See generally* Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 955-56 (1956).

29. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977). *See also In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 386 (D.D.C. 1978) (recognized potential for routine business documents to be channeled through attorney under *Harper*).

30. *See* Attorney General of District of Columbia v. Covington & Burlington, 430 F. Supp. 1117, 1121 (D.D.C. 1977) (recognizing division of authority between control group and subject matter tests); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 386 (D.D.C. 1978)

preme Court granted certiorari in *Upjohn Co. v. United States*[31] to resolve the controversy concerning the scope of the corporate attorney-client privilege.[32] The *Upjohn* Court denied that its task was one of selecting between the control group or subject matter tests adhered to by the federal courts of appeal.[33] Instead, the majority rejected the control group test[34] and refused to replace it with another expansive rule.[35] The Court explained that a rigid standard would infringe upon Rule 501 of the Federal Rules of Evidence, which called for case-by-case development.[36] Notwithstanding its deference to a common law interpretation of the privilege, the Court found extending protection only to a corporation's control group would frustrate the privilege's purpose by discouraging lower-echelon employees from communicating relevant information to the attorney.[37] The Court noted that middle and lower-echelon corporate employees often involve the corporation in serious legal dilemmas, and thus, would have the primary information needed by counsel to advise the control group with respect to potential corporate liability.[38] Moreover, the *Upjohn* Court reasoned that the control group test was unpredictable in its application,[39] and asserted that such uncertainty would undermine

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(noting division between courts).

31. ___U.S.___, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

32. *See id.* at ___, 101 S. Ct. at 681, 66 L. Ed. 2d at 589.

33. *See id.* at ___, 101 S. Ct. at 681, 66 L. Ed. 2d at 589.

34. *See id.* at ___, 101 S. Ct. at 686, 66 L. Ed. 2d at 596.

35. *See id.* at ___, 101 S. Ct. at 681, 66 L. Ed. 2d at 589.

36. *See id.* at ___, 101 S. Ct. at 686, 66 L. Ed. 2d at 595-96. The "narrow" control group standard was found to be inconsistent with Rule 501 of the Federal Rules of Evidence (F.R.E.) due to flaws inherent in the test. *See id.* at ___, 101 S. Ct. at 686, 66 L. Ed. 2d at 596. The court noted "Federal Rule of Evidence 501 provides that 'the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.' " *Id.* at ___, 101 S. Ct. at 682, 66 L. Ed. 2d at 591; FED. R. EVID. 501. *See* United States v. Gillock, 445 U.S. 360, 367 (1980); Trammel v. United States, 445 U.S. 40, 47 (1980); S. REP. No. 93-1277, 93d Cong. 2d Sess. 13.

37. *See* Upjohn Co. v. United States, ___U.S___, ___, 101 S. Ct. 677, 684, 66 L. Ed. 2d 584, 593 (1981). The Court further reasoned that guarded disclosure to corporate counsel rendered the attorney's task of formulating sound legal advice more difficult. In the Court's view, "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *See id.* at ___, 101 S. Ct at 683, 66 L. Ed. 2d at 592. Faced with a vast array of complicated regulatory legislation, corporations would be unable to confer frankly with their attorney to learn how to comply with the law. *See id.* at ___, 101 S. Ct. at 683-84, 66 L. Ed. 2d at 592-93.

38. *See id.* at ___, 101 S. Ct. at 683, 66 L. Ed. 2d at 592. In addition, the Court found that corporate counsel's advice will frequently be more relevant to lower-echelon employees, as they are responsible for implementing corporate policy. *See id.* at ___, 101 S. Ct. at 683, 66 L. Ed. 2d at 592.

39. *See id.* at ___, 101 S. Ct. at 684, 66 L. Ed. 2d at 593-94.

the vitality of the privilege by having a chilling effect on communications between attorney and client.[40] The majority ultimately concluded the communications at issue were privileged.[41]

Justice Burger concurred with the majority's holding and agreed the communications were privileged.[42] He departed, however, from the majority's adoption of an ad hoc approach for determining when the privilege could be invoked.[43] Reiterating the majority's assertion that an uncertain privilege was "little better than no privilege at all,"[44] Burger argued the Court must clarify the law concerning the attorney-client privilege by announcing an unequivocal standard.[45] The Chief Justice proposed a standard which would protect communication between employees speaking at the direction of management about conduct within the scope of their employment, and corporate counsel who are authorized by management to perform one of several legal functions.[46]

The Court, in *Upjohn*, recognized that the narrow control group test failed to aid the corporate attorney in fulfilling his professional responsi-

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40. *See id.* at ___, 101 S. Ct. at 684, 66 L. Ed. 2d at 593. The *Upjohn* Court asserted that at the time of the primary stage of communication the parties should be able to predict whether the privilege will attach. *See id.* at ___, 101 S. Ct. at 684, 66 L. Ed. 2d at 593.

41. *See id.* at ___, 101 S. Ct. at 681, 66 L. Ed. 2d at 589. The *Upjohn* Court enunciated a variety of factors which compelled its decision to extend protection of the privilege beyond that afforded by the control group test:

> (1) the communications by the employees were made at the direction of corporate superiors to authorized counsel in order to secure legal advice;
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> (2) the information was not available from upper-echelon employees;
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> (3) the information was necessary for the attorney to formulate sound advice concerning Upjohn's compliance with the law and potential corporate liability;
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> (4) the employees were aware the information was secured in order for the corporation to receive legal advice and the information regarded matters within the scope of their employment; and
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> (5) the nature of the communication was considered "highly confidential."

Id. at ___, 101 S. Ct. at 685, 66 L. Ed. 2d at 594-95.

42. *See id.* at ___, 101 S. Ct. at 689, 66 L. Ed. 2d at 599 (Burger, J., concurring).

43. *See id.* at ___, 101 S. Ct. at 689, 66 L. Ed. 2d at 599 (Burger, J., concurring).

44. *Id.* at ___, 101 S. Ct. at 684, 66 L. Ed. 2d at 593.

45. *See id.* at ___, 101 S. Ct. at 689, 66 L. Ed. 2d at 599-600 (Burger, J., concurring). Chief Justice Burger reasoned that F.R.E. 501 mandated the Court to articulate a predictable standard for the lower federal courts to follow. *See id.* at ___, 101 S. Ct. at 689, 66 L. Ed. 2d at 600 (Burger, J., concurring).

46. *See id.* at ___, 101 S. Ct. at 689, 66 L. Ed. 2d at 599-600 (Burger, J., concurring). Burger formulated his test by amalgamating criteria from the various courts adopting the subject matter test. *Compare* Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 689, 66 L. Ed. 2d 584, 599-600 (1981) (Burger, J., concurring) (employee directed by management to speak with corporate counsel regarding conduct within scope of employment) *with* Diversified Indus., Inc., 572 F.2d 596, 609 (8th Cir. 1977) (subject matter of employee communication within scope of employee's duties and not disseminated beyond those needing to know contents).

bilities.[47] Corporate counsel can render sound legal advice only if fully informed of relevant facts concerning the corporation's affairs.[48] The control group test focused unrealistically on upper-echelon employees,[49] and thereby prevented the free-flow of relevant information from lower-level employees.[50] Furthermore, because advocates of the test had failed to set forth any objective criteria for defining control group members,[51] apprehensive clients were discouraged from candidly communicating with their attorneys for fear of subsequent disclosure.[52]

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47. *See, e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977) (control group test defeats purpose of privilege by inhibiting communication); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970) (compelled to extend privilege beyond parameters of control group test because some non-control group employees require communication with counsel), *aff'd per curiam*, 400 U.S. 348 (1971); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D.S.C. 1975) (corporation needing legal advice cannot deal strictly through upper-echelon management). *See generally* Sonnenfeld & Lawrence, *Why do Companies Succumb to Price-Fixing?*, HARV. BUS. REV. 145, 151-52, 154, 156 (July-Aug. 1978).

48. *See* Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 683, 66 L. Ed. 2d 584, 592 (1981) (attorneys must determine legally relevant facts as first step in resolving legal problems); Hickman v. Taylor, 329 U.S. 495, 511 (1947) (historical and necessary way for lawyers to protect client's interest and promote justice is by sifting facts to differentiate relevant from irrelevant facts in order to prepare case). *See generally* AMERICAN BAR ASSOCIATION MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980).

49. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 608-09 (8th Cir. 1977) (information needs to be gleened from middle and lower-level management); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D.S.C. 1975) (corporate system would break down if attorney could not seek privileged information from other employees than control group); *cf.* Commonwealth v. Beneficial Finance Co., 275 N.E.2d 33, 83 (Mass. 1971) (lower-echelon employees exercise more control over corporate affairs than senior management, in some cases), *cert. denied*, 407 U.S. 914 (1972). *See also* Sonnenfeld & Lawrence, *Why Do Companies Succumb to Price-Fixing?*, HARV. BUS. REV. 145, 151-52, 154, 156 (July-Aug. 1978) (accurate information of corporate activities and conduct needed by attorney can only come from lower-echelon employees due to complexity and decentralization of modern corporations).

50. *See* Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 683-84, 66 L. Ed. 2d 584, 592-93 (1981) (narrow scope of privilege under control group test makes rendering of sound legal advice difficult for corporate attorneys); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 608-09 (8th Cir. 1977) (attorneys hindered in obtaining information from lower-level employees under control group test). *But see In re* Grand Jury Investigation, 599 F.2d 1224, 1236 (3rd Cir. 1979) (extension of privilege to non-control group members would not add to lawyer's ability to obtain more information).

51. *See* Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 684, 66 L. Ed. 2d 584, 593-94 (1981) (Court found privilege unpredictable under control group standard); *cf.* Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117, 120 (M.D. Pa.) (privilege denied because control group could not be determined). *See also* 2 J. WEINSTEIN, EVIDENCE ¶ 503(b) [04] at 503-46 (1980); Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 368 (1972).

52. *See, e.g.*, Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 684, 66 L. Ed.

Although implicitly sanctioned by the majority and concurring opinions in *Upjohn*,[53] the *Diversified* standard should have been expressly adopted by the Court, as it is well calculated to achieve the purpose of the attorney-client privilege.[54] This modified subject matter test precludes documents routinely funneled through the lawyer's office from becoming privileged, thus making them subject to discovery.[55] Despite such a limitation, key employees are still protected so that corporate counsel is assured access to the information needed to fulfill his responsibilities.[56]

2d 584, 593 (1981) (uncertain privilege tantamount to no privilege whatsoever); Fisher v. United States, 425 U.S. 391, 403 (1976) (uncertain privilege causes client to become apprehensive and not make full disclosures); *In re* Grand Jury Investigation, 599 F.2d 1224, 1235 (3rd Cir. 1979) (client must be able to predict whether privilege will attach if he is to be encouraged to confide in attorney).

53. *See* Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 685, 66 L. Ed. 2d 584, 594-95 (1981) (critical factors enunciated by majority compelling decision to extend privilege); *cf. id.* at ___, 101 S. Ct. at 689, 66 L. Ed. 2d at 599-600 (Burger, J., concurring) (Burger's proposed test). *See also* Harper & Row Publishers, Inc. v. Decker, 400 U.S. 348 (1971) (Court's silent affirmance of subject matter test evidencing a decided preference for a broader standard).

54. *See, e.g.*, Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 689, 66 L. Ed. 2d 584, 599-600 (1981) (Burger, J., concurring)(approving of *Diversified* test); *In re* D. H. Overmyer Telecasting Co., Inc., 470 F. Supp. 1250, 1254 (S.D.N.Y. 1979) (applying *Diversified* test); Union Planters Nat'l Bank v. ABC Records, Inc., 82 F.R.D. 472, 474-75 (W.D. Tenn. 1979) (*Diversified* test best reasoned approach for corporate client communications).

55. *Compare* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977) (privilege not extended to routine business reports because communication not made for purpose of securing legal advice or made available to those who do not need to know) *with* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (privilege extended to all communications funneled through corporate lawyer's office as long as within employee's job scope), *aff'd per curiam*, 400 U.S. 348 (1971). Furthermore, corporate adversaries are assured access to the facts underlying privileged communications through discovery proceedings. *See* Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 685-86, 66 L. Ed. 2d 584, 595 (1981) (disclosure of facts underlying communication not protected); City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962) (client must disclose facts even if incorporated into communication with attorney), *mandamus and prohibition denied sub nom.*, General Elec. Co. v. Kirkpatrick, 312 F.2d 742, 743 (3rd Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). *But cf.* Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 955-56 (1956) ("zone of silence" concept originated whereby corporations abuse broad privilege by funneling all documents through corporate lawyer's office to be rubber-stamped).

56. *See, e.g.*, Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 683, 66 L. Ed. 2d 584, 592 (1981) (attorney can give sound advice to corporation only if obtaining candid information from lower-echelon employees); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977) (protection of privilege extended to some lower-echelon employees of corporation); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D.S.C. 1975) (corporation would not have effective privilege if only few persons embodied corporate client seeking legal advice); *cf. In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 387 (D.D.C. 1978) (federal antitrust law enforcement would be detrimentally affected for lack of

The *Diversified* test, therefore, properly balances the corporation's need for confidential disclosure to counsel with the adversary's need for discovery.[57]

Case-by-case analysis of the privilege, as mandated by the *Upjohn* Court, will result in more confusion for courts, corporations, and corporate attorneys.[58] Such an ad hoc approach not only inhibits communication to corporate attorneys, but will induce corporations to conceal critical information from their attorney, rather than risk subsequent disclosure.[59] In addition, the adoption of the *Diversified* test would be consonant with the spirit of Rule 501 of the Federal Rules of Evidence, so long as the Court left room for reasoned application in the lower federal courts under relevant state law.[60]

Abolition of the control group test in *Upjohn* represents a constructive attempt by the Supreme Court to resolve the controversy attending the scope of the attorney-client privilege in the corporate context. The Court, however, failed to articulate an unequivocal standard to ascertain when the corporate privilege attaches. The ad hoc approach employed by the *Upjohn* Court lends itself to an unpredictable and uneven application of

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compliance unless privilege extended to lower-level employees).

57. *See, e.g.*, Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 689, 66 L. Ed. 2d 584, 600 (1981) (Burger, J., concurring) (approval of *Diversified* test); United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 620-21 (D.D.C. 1979) (*Diversified* test precludes privilege from attaching to routine reports so not to overly burden discovery); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 387 n.18 (D.D.C. 1978) (*Diversified* test balances need for disclosure with need for discovery).

58. *See* Upjohn Co. v. United States, ___U.S.___, ___, 101 S. Ct. 677, 689, 66 L. Ed. 2d 584, 599-600 (1981) (Burger, J., concurring) (an articulable standard must be set forth by Court if purpose of privilege to be availed). *See also* Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 368 (1972) ("'bright line' test is desirable because it increases certainty and eases judicial administration").

59. *See* Fisher v. United States, 425 U.S. 391, 403 (1976) (uncertain privilege discourages full disclosure by clients); *In re* Grand Jury Investigation, 599 F.2d 1224, 1235 (3rd Cir. 1979) (incentive to communicate dependent on predictability of privilege); 2 J. WEINSTEIN, EVIDENCE ¶ 503(b)[04], at 503-46 (1980) (unpredictable privilege causes corporate decision-makers to hesitate before availing themselves of legal advice). *See also* Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 426-27 (1970) (ad hoc approach to privilege creates long range harm of discouraging some communications which should have been disclosed to corporate lawyer).

60. *See* Brief for Appellant at 25, 26 n.30, Upjohn Co. v. United States, ___U.S.___, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981) (listing state court decisions affording corporations protection similar to that provided by subject matter test); *cf.* Trammel v. United States, 445 U.S. 40, 48-50, nn.9-10 (1980) (state court decisions considered in defining scope of marital privilege); United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976) (case-by-case analysis of privileges needs guidance of rules promulgated by Supreme Court). *See generally* FED. R. EVID. 501.

the privilege, which discourages corporate employees from making the candid disclosures necessary for informed legal counseling. The subject matter standard set forth in *Diversified*, and implicitly relied upon in *Upjohn*, is the preferable test. Such a standard not only allows discovery of documents routinely channeled through corporate counsel's office, but provides objective guidelines to aid in evaluating future questions of confidentiality.

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