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Evidence--Scope of the Corporate Attorney-Client Privilege

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EVIDENCE—SCOPE OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE. *United States v. Upjohn Co.*, 600 F.2d 1223 (6th Cir. 1979) *cert. granted*, 48 U.S.L.W. 3602 (U.S. Mar. 17, 1980) (No. 79-886); In re *Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979).

I. INTRODUCTION

The scope of the attorney-client privilege for corporations has been litigated in numerous courts.[1] A split in authority has developed among federal jurisdictions but appellate courts in both the Sixth and Third Circuits recently aligned themselves with the courts which adhere to the control group test.[2] Rejecting attempts by other circuit

1. The attention attracted by the 1963 decision, Radiant Burners, Inc. v. American Gas Ass'n 320 F.2d 314 (7th Cir.), (addressing the basic issue whether or not the privilege could apply to a corporation at all) *cert. denied*, 375 U.S. 929 (1963), forced many courts to attempt to define the scope of the privilege in the corporate area. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1979). One writer has aptly described the situation:

> The isssues [*sic*] raised in attempting to apply the attorney-client privilege to corporations have vexed litigants and courts. Admittedly, reasonable men may agree in principle and still differ on solutions in particular cases. Because the circumstances in which layman and attorney communicate are so varied, inflexible rules of general application should not long prove satisfying, even to their proponents. Unfortunately, . . . the history of the corporate attorney-client privilege in the federal courts has been punctuated by a series of just such pat and unsatisfying formulations. Although these facile dogmas may permit a certain ease of application, they manage to avoid both of the two questions that ought to be pivotal to the existence of the attorney-client privilege in every case: 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 non-existence of the privilege significantly affect the likelihood that the communication would be made?

Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 341 (1972).

2. A majority of courts have adopted a test based on the person communicating (control group test); while others have focused on the nature of the communication (subject matter test). Cases following the control group test include: Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974); Congoleum Indus., Inc. v. GAF Corp., 49 F.R.D. 82 (E.D. Pa. 1969); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963); American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D. Del. 1962); City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962). Cases following a subject matter test or a modification of such a test include: Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971) (Douglas, J., abstaining); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978); Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd without opinion*, 534 F.2d 330 (7th Cir. 1976); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974); Hasso v. Retail Credit Co., 58 F.R.D. 425 (E.D. Pa. 1973).

courts to broaden the scope of this privilege, the Sixth Circuit in *United States v. Upjohn Co.*[3] and the Third Circuit in *In re Grand Jury Investigation*[4] opted for a narrower standard. By adopting the most restrictive position in this controversial area, they have moved the federal courts one step closer to a uniform rule severely limiting the application of the attorney-client privilege in the corporate context. This article will review the previously established tests for the use of the privilege and assess the significance of the holdings in these two most recent federal court decisions.

II. Background

The privilege is generally recognized as an intrinsic and necessary part of the attorney-client relationship because it encourages clients to make full disclosures to their attorneys, thereby allowing attorneys to better aid the clients.[5] The privilege is invoked by clients to protect confidential information communicated by them to their attorney.[6] A problem arises, however, when the client is a corporation and the court must determine which individuals within the corporate structure are entitled to claim the privilege on behalf of the client.[7]

Both the United States Supreme Court and Congress previously

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3. 600 F.2d 1223 (6th Cir. 1979) *cert. granted*, 48 U.S.L.W. 3602 (U.S. Mar. 17, 1980) (No. 79-886).

4. 599 F.2d 1224 (3d Cir. 1979).

5. The policy of the privilege has been plainly grounded since the latter part of the 1700's on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory.

8 J. Wigmore, Evidence § 2291 (McNaughton rev. 1961).

6. For a general statement of the essentials underlying the privilege see *id.* § 2292:

(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.

7. The application of the privilege to corporate "clients" poses a somewhat different problem. Since corporations are inanimate, artificial entities, the attorney-client relationship is conceptually more difficult, and its underlying principles are less obvious. As clients, corporations can communicate to attorneys only through agents. Moreover, corporations, unlike individuals, are organized in such a way that responsibilities, and the information needed to fulfill the responsibilities, are delegated and compartmentalized. Thus, marketing officials have knowledge and duties related only to selling, while plant supervisors have knowledge and duties related only to production. 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.

Courts have generally recognized that the attorney-client privilege applies to corporations so long as the attorney-client relationship was initiated and pursued by the company's management. Any communication made by top management to the corporation's

failed to resolve this problem.[8] They instead adopted "a case-by-case approach which will merely postpone the question . . . ."[9] This resulting split in authority should eventually force the Supreme Court to address and resolve the conflict. The federal courts have been forced to adopt their own guidelines and have formulated various tests for determining which corporate employees can be classified as the client and can, therefore, safely communicate privileged information to corporate attorneys.[10] The District Court for Massachusetts outlined general criteria for using the attorney-client privilege in *United States v. United Shoe Machinery Corp.*[11] The court suggested that corporate use of the privilege could be extended to a broad group of "officers and employees,"[12] but confusion subsequently developed over the dimensions of the term "employees."[13] Further, the related limits imposed by the United States Supreme Court in *Hickman v. Taylor*[14] have diminished

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> attorney, which otherwise meets the requirements of the attorney-client privilege, is protected from disclosure.
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> The difficulty arises when, after the attorney-client relationship has been established by the top management, communications are made to counsel by subordinate corporate agents and employees.

United States v. Upjohn Co., 600 F.2d 1224, 1226 (6th Cir. 1979) (footnote omitted).

8. The Supreme Court had an opportunity to endorse or reject the control group test in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971) (Douglas, J., abstaining). Also, the first draft of Rule 503 of the Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 249 (1969) proposed to Congress adopted a control group approach. Congress, however, deleted control group language, in part because of the 4-4 split in the Supreme Court on the issue. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 606 n.2 (8th Cir. 1977); Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 363-64 (1972); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 434-35 (1970).

9. Blakey, *An Introduction to the Oklahoma Evidence Code: Relevancy, Competency, Privileges, Witnesses, Opinion, and Expert Witnesses*, 14 TULSA L.J. 227, 287 (1978). At least one state (Oklahoma) has adopted the control group test as part of its rules of evidence. OKLA. STAT. tit. 12, § 2502 (1978).

10. For a general overview of the corporate attorney-client problem see Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956). Some of the alternative tests are described in Comment, *The Privileged Few: The Attorney-Client Privilege as Applied to Corporations*, 20 U.C.L.A. L. REV. 288, 297-310 (1972).

11. 89 F. Supp. 357 (D. Mass. 1950), *aff'd per curiam*, 347 U.S. 521 (1954).

12. After identifying United Shoe and all its subsidiaries and affiliates as "the client," the court then refused to allow the privilege because "[n]one of these corporations *or their officers or employees* consulted counsel with the purpose of seeking assistance . . . ." 89 F. Supp. at 359 (emphasis added).

13. "The employees in question were concerned with managerial and policy determinations but Judge Wyzanski's opinion did not indicate that this was a factor in his decision." 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1979).

14. 329 U.S. 495 (1947). In dictum, the Supreme Court stated that, "the protective cloak of [the attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation." *Id.* at 508. For a discussion of the

the viability of *United Shoe*'s broad standard.[15]

A federal district court in Pennsylvania restricted the scope of the privilege in *City of Philadelphia v. Westinghouse Electric Corp.*[16] In formulating the control group test, this court allowed the privilege to be invoked only by employees who control corporate decision making and communicate to the corporate attorney information pertaining to a legal matter about which the corporation is seeking advice.[17] The privilege was expressly limited to those "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 . . . , [because] in effect, . . . he is (or personifies) the corporation . . . ."[18] The focus of this test is on the person who communicates with the attorney rather than on the substance of his communication. Courts adopting this approach generally have limited its protection to upper-level management personnel.[19]

One advantage of this test is that the number of employees who can communicate privileged information is easily determined.[20] The

possible conflict between *United Shoe* and *Hickman* see 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1979).

15. In formulating a test [the court in *United Shoe*] stated in part that the privilege was applicable to "information which was secured from an officer or employee of defendant and which was not disclosed in a public document or before a third person . . . ." These words taken alone would appear to extend the privilege of communication to everyone within the corporation. However, in another part of the opinion Judge Wyzanski refers to *Hickman v. Taylor* as authority for the proposition that "there is no privilege for so much of a lawyer's letter, report or opinion as relates to a fact gleaned from a witness . . . ." The result of this statement is to create uncertainty as to the scope of the *United Shoe* test. The *Hickman* case was not only concerned with the application of the work-product doctrine, but also with the possible application of the attorney-client privilege. There is some authority to the effect that the reference to *Hickman* in *United Shoe* limited the scope of the test. Others, however, either ignore this reference or think it of little significance and interpret *United Shoe* as setting down a broad standard.

Case Comment, *Evidence—Attorney-Client Privilege—Who Can Represent a Corporation in Communications to Counsel*, City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962), 44 BOSTON U.L. REV. 123, 125-27 (1964) (citation omitted).

16. 210 F. Supp. 483 (E.D. Pa. 1962).

17. *Id.* at 485. The plaintiff in this case sought an order directing the defendant corporation to answer certain interrogatories. The defendant's counsel had obtained the requested information from company employees and refused to answer, claiming an attorney-client privilege. The court refused to allow the privilege to be invoked for these particular communications. *Id.*

18. *Id.*

19. *See* United States v. Upjohn, 600 F.2d 1223 (6th Cir. 1979) (implying that only certain senior corporate officers are likely to be members of the control group); Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963). *See generally* Note, *Attorney-Client Privilege for Corporate Clients: The Control-Group Test*, 84 HARV. L. REV. 424 (1970); Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759 (1971).

20. The control group test is supported by its ease of application. While the truth of that statement cannot be doubted, one must still question whether such an advantage should

test is both expedient and easy to apply.[21] The test has been criticized, however, because it may result in undue harshness to corporations involved in complicated litigation.[22] It is based on the premise that a control group member is aware of the details of all facets of the corporate entity. The realities of corporate structure, however, cast doubts on the feasibility of a theory which assumes a control group member

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> be the primary goal of the attorney-client privilege, especially as the privilege applies to the corporation. Merely because a particular test gives the courts a bright-line rule for differentiating those who are and those who are not included within the attorney-client privilege is hardly a convincing reason to make it the universal doctrine. The purpose of the privilege is to encourage uninhibited discussion between attorney and client, and the corporate "person" undoubtedly needs such discussion as much as the natural person. Developing a rule suitable for the corporate arena may prove more challenging, but an equitable application of the policies behind the privilege should not be sidestepped on the grounds of expediency alone.

Note, *The Privileged Few: The Attorney-Client Privilege as Applied to Corporations*, 20 U.C.L.A. L. REV. 288, 300 (1972). *See also* Note, *Evidence—Privileged Communications—The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 370 (1970).

21. Once a court identifies the members of the control group within a corporation, then communications by these persons may be privileged. Regardless of the nature of the communication between other employees and the corporate attorney, the privilege may not be invoked by the corporation because the other employees do not speak as "the client."

22. Cases in this area frequently involve antitrust issues with large amounts of money at stake. *See, e.g.*, Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971) (Douglas, J., abstaining). *See also In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978), where the court in rejecting the control test as an artificial limit stated,

> Because attorneys may have to communicate with a number of employees in a corporation in order to render proper advice, particularly when antitrust and patent issues are involved, if those communications are never privileged, then the well-established purpose of the privilege—to promote full and frank discussion—would be frustrated.

Id. at 387.

Citing Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974), which addressed the feasibility of using the control group test for corporate clients involved in antitrust and patent issues, the *Ampicillin* court agreed that:

> [A corporation] cannot deal solely through the chairman of the board of directors. There has to be a sufficient number of persons within a corporation who are authorized on behalf of the corporation to seek advice, to give information with respect to the rendition of advice, and to receive advice.
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> . . . This is an antitrust case. If the chairman of the board and the president of a corporation were to seek advice on antitrust law, the only way that a lawyer can really understand how a corporation operates, what it is doing, and what it can do within the confines of the antitrust laws, is to go out into the branch offices and into the field to make the rounds with the salesmen. . . . If an attorney cannot make enquiries of salesmen and if the attorney cannot give advice to the corporate personnel who will apply it, then a corporation would be reluctant to seek legal advice since its confidential communications would not be protected by the attorney-client privilege. . . . Unless corporate personnel on a fairly low level can speak to attorneys in confidence, the enforcement of the federal antitrust laws is likely to be adversely affected.

In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 386-87 (D.D.C. 1978) (citations omitted), quoting Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164-65 (D.S.C. 1974). The court then concluded that "the main consideration is whether the particular representative of the client, to whom or from whom the communication is made, is involved in rendering information necessary to the decision-making process concerning a problem on which legal advice is sought." *In re* Ampicillin Antitrust Litigation, 81 F.R.D. at 387.

has enough information to effectively aid the attorney in his duties. In a complex corporate structure it is unreasonable to assume that upper management can provide all the information the attorney requires. Decision making responsibilities are often delegated to numerous middle-level managers who should be able to provide the necessary information, but whose communications would not be protected by the corporation's attorney-client privilege under this test.[23]

An attraction of the narrowness of the control group doctrine is that it supports the current judicial trend of allowing broad discovery.[24] The test is consistent with the prevailing policy of removing nearly all obstacles in the path of an attorney involved in discovery. This broad discovery policy, however, must be balanced against the underlying principle of the attorney-client privilege, encouraging a client to confidentially disclose all pertinent information to his attorney.[25]

In its effort to balance the need for disclosure of relevant informa-

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23. The sole basis for application of the privilege is the status of the communicating person within the decision making structure of the corporation. But in an antitrust case, such as Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971) (Douglas, J., abstaining), where the business actions and decisions of numerous middle management were involved in the wrongdoing, it is essential that the nature of their potential testimony be available to the attorney. Although these individuals may have been the ones most responsible for corporate liability, and "though their information could be the foundation for sound legal decision-making," these communications to counsel would not be privileged under the control group test. Comment, *The Privileged Few: The Attorney-Client Privilege as Applied to Corporations*, 20 U.C.L.A. L. REV. 288, 302-03 (1972).

24. The Supreme Court espoused this trend in Hickman v. Taylor, 329 U.S. 495 (1942), stating:

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

Id. at 507 (footnote omitted). *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 81 (3d ed. 1976).

25. For a discussion of the purposes of the attorney-client privilege see Gardner, *A Re-evaluation of the Attorney-Client Privilege* (pts. 1-2), 8 VILL. L. REV. 279, 447 (1963). The problem of balancing these purposes against discovery policies is the central issue in determining the scope of the privilege. One court summarized the issue:

> While the privilege serves a very important purpose, the Court is aware of the fact that it may nevertheless be an obstacle to the investigation of the truth. Therefore, the privilege ought to be "strictly confined within the narrowest possible limits consistent with the logic of its principle." The Court, therefore, views its duty as that of achieving a balance between the need for disclosure of all relevant information and the need to encourage free and open discussion by clients in the course of legal representation.

In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 384 (D.D.C. 1978) (citations omitted). If the balance is upset and the number of persons within a corporation who can represent it is too seriously limited, the corporation will be encouraged to remain silent. *See* Recent Case, *Corpora-*

tion against the need for open discussion between clients and their attorneys, the Court of Appeals for the Seventh Circuit expressly rejected the control group test in *Harper & Row Publishers, Inc. v. Decker*.[26] This court provided an alternative test for determining those employees who may speak under the protection of the privilege by focusing on the substance, or "subject matter," of the communication:

> [A]n employee of the corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.[27]

Those who prefer the *Harper & Row* test claim that this emphasis on the subject matter of the legal representation is a more reasoned approach to the problem than the artificial limitations provided in the control group test.[28] The major criticism of the *Harper & Row* standard has been that it encourages corporations to thwart otherwise legitimate discovery by channeling communications through the corporate attorney even if those communications are unrelated to the underlying purpose of the privilege.[29] By failing to relate the scope of the attorney-client privilege to its major function, encouraging uninhibited attorney-client communications, *Harper & Row* effectively exempts from discovery all information except that which an employee might obtain fortuitously.[30] The subject matter test has been criticized by proponents of

tions—Attorney-Client Privilege—Corporate Employee's Communication to Attorney at Direction of Corporation Held to be Privileged, 23 VAND. L. REV. 847, 852 n.30 (1970).

26. 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971) (Douglas, J., abstaining). *See generally*, Note, *Evidence—Privileged Communications—The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360 (1970); Recent Case, *Corporations—Attorney-Client Privilege—Corporate Employee's Communication to Attorney at Direction of Corporation Held to be Privileged*, 23 VAND. L. REV. 847 (1970).

27. 423 F.2d at 491-92.

28. For articles critical of the control group test *see generally* Burnham, *Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois*, 56 ILL. B.J. 542 (1968); Dye, *The Attorney-Corporate Client Privilege*, 15 PRAC. LAW. 15 (1969); Heininger, *The Attorney-Client Privilege as It Relates to Corporations*, 53 ILL. B.J. 376 (1965); Maurer, *Privileged Communications and the Corporate Counsel*, 28 ALA. LAW. 352 (1967).

29. *See* Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759, 766-67 (1971). *See also* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1979).

30. Critics argue justifiably that the *Harper & Row* test may be used to shield too much data from the discovery process. *See, e.g.*, Note, *Privileged Communications—Inroads on the "Control*

liberal discovery,[31] and is considered by many to be overbroad and susceptible to abuse.[32]

One recent attempt to construct a functional test for applying the privilege to the corporate context was the formation of a modified subject matter test in *Diversified Industries, Inc. v. Meredith*.[33] The Eighth Circuit added anti-abuse safeguards in its compromise version of the corporate attorney-client privilege test:

> [T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. We note, moreover, that the corporation has the burden of showing that the communication in issue meets all of the above requirements.[34]

In stressing the relevance of the communication to the securing of legal advice and to the superior's motives in requesting such advice, the *Diversified* test more nearly meshes with the scope of the underlying purpose of the privilege than does the *Harper & Row* test.[35] *Diversified* encourages full disclosure by an employee to the corporation's attorney

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Group" Test in the Corporate Area, 22 SYRACUSE L. REV. 759 (1971). *See also* Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

31. *See* 4 J. MOORE, FEDERAL PRACTICE ¶ 26.61[3] (2d ed. 1976).

32. *See, e.g.*, United States v. Upjohn Co., 600 F.2d 1223, 1226-27 (1979).

> It is our opinion that the "subject matter" approach goes too far . . . . The "subject matter" test encourages senior managers purposely to ignore important information they have good business reasons to know and use. Corporate counsel should not be the exclusive repository of unpleasant facts. The law should not encourage corporate managers to shield themselves from information about possibly illegal transactions.

Id. *See also* Recent Case, *Privileged Communications—Who Can Speak for a Corporate Client*, 44 Mo. L. REV. 350, 357-58 (1979).

33. 572 F.2d 596 (8th Cir. 1978). For discussions of this case see Note, *The Corporate Attorney-Client Privilege—A Compromise Solution*: Diversified Industries, Inc. v. Meredith, 11 CONN. L. REV. 94 (1978); Note, *Corporate Attorney-Client Privilege*—Diversified Industries, Inc. v. Meredith—*The Modified Harper & Row Test*, 4 J. CORP. L. 226 (1978); Note, *Attorney-Client Privilege*—Diversified Industries, Inc. v. Meredith: *New Rules for Applying the Privilege When the Client is a Corporation*, 57 N.C.L. REV. 306 (1979); Recent Case, *Privileged Communications—Who Can Speak for a Corporate Client*, 44 Mo. L. REV. 350, 357-58 (1979).

34. 572 F.2d at 609. In arriving at this compromise solution, the *Diversified* court followed the suggested *Harper & Row* modifications made by Judge Jack B. Weinstein in his treatise on evidence. *Id.* citing 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1979).

35. It has been said that the new test "curbs whatever potential for abuse the *Harper & Row* test presents while maintaining the purpose of the privilege to a greater degree than allowed under

in matters relating to the duties of his employment. Further, in providing limits to the subject matter of the disclosure, it is consistent with the current trend allowing broad discovery.[36] The test, however, has not yet been adopted by other courts and both the Sixth and Third Circuits rejected it in recent holdings.[37]

III. *United States v. Upjohn Co.*

In *Upjohn* the Court of Appeals for the Sixth Circuit examined the question, "whether this Circuit should adopt the 'control group' or the broader 'subject matter' test as the standard for measuring the scope of the attorney-client privilege in the corporate context."[38] The factual situation presented to this court involved a corporation which had authorized its counsel to conduct an investigation of possible improper activities. The corporation later sought to prevent disclosure of this information by claiming an attorney-client privilege.[39]

In a 1971 audit of Upjohn's federal income tax returns the IRS discovered that approximately $4,400,000 had been paid to officials in foreign countries where Upjohn conducted business. Concerned that these payments might not have been properly reported to the Securities and Exchange Commission, the top management of Upjohn ordered an internal investigation. Both in-house and outside counsel were involved in the inquiry, and company officers and employees were urged to respond to all questions candidly and confidentially.[40]

The IRS subsequently sought to obtain the documents and records generated in the course of this investigation and summoned all written questionnaires, counsel's notes, and memoranda claiming they were necessary for an adequate evaluation of the tax implications of the payments in question.[41] The district court decided to enforce the summons

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the control group test." Note, *Corporate Attorney-Client Privilege*—Diversified Industries, Inc. v. Meredith—*The Modified Harper & Row Test*, 4 J. Corp. L. 226, 237 (1978).

36. See notes 24-25 *supra* and accompanying text.

37. United States v. Upjohn Co., 600 F.2d 1223, 1227 (6th Cir. 1979); *In re* Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979).

38. 600 F.2d 1223, 1224 (6th Cir. 1979).

39. Upjohn claimed that communications made by all officers and agents were made on behalf of the company, and were, therefore, made by the "client." *Id.* at 1225.

40. *Id.*

41. *Id.* After the internal investigation, voluntary disclosures of some of the details of the payments were made to the SEC and the IRS. The IRS then commenced the investigation involved but thought the limited disclosure was inadequate for its purposes. *Id.*

and ordered Upjohn to turn the materials over to the IRS.[42] The Court of Appeals for the Sixth Circuit affirmed part of the decision, reversed part, and remanded the case to the district court for further consideration.[43] This circuit adopted the control group test for determining the scope of the attorney-client privilege, and held that in applying this test only communications by members of the control group could be privileged and exempt from enforcement of the IRS summons.[44]

Upjohn argued that the communications to counsel made by *all* employees during the course of the investigation were privileged as confidential communications between attorney and client.[45] In arguing for protection of all communications, Upjohn was asking the court to adopt a broader standard than the control group test. The court rejected the subject matter approach[46] deciding that a narrower approach should be the Sixth Circuit's stance on the question.[47] The court held that "[t]o the extent that the communications were made by, officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . the communications were not the 'client's.' "[48] The case was remanded for the purpose of determining which communications were made by members of the control group of the corporation and should, therefore, be privileged.[49]

The court rejected Upjohn's plea for a broad test, fearing such a test would create a "broad 'zone of silence' " by encouraging lower echelon employees to communicate all types of information to corporate counsel.[50] An abuse of the privilege in this manner could shield a cor-

42. The district court's order enforcing the summons for documents was based on the jurisdictional authority provided in 26 U.S.C. §§ 7402(b), 7604(a) (1976).

43. 600 F.2d at 1225.

44. After determining that the control group test would be used, the court noted:

> The record indicates that, in the course of their investigation, Upjohn's counsel interviewed a number of senior corporate officers, including the Chairman of the Board, the Vice Chairman, and the President. These senior officers, and possibly others, are in all likelihood members of the "control group" and their communications to counsel should be privileged. Therefore, we remand the case to the District Court to determine which communications sought by the IRS were made by members of the "control group" and to deny enforcement of the summons with respect to these "control group" communications.

Id. at 1227-28 (footnotes omitted).

45. *Id.* at 1225.

46. For a discussion of the subject matter approach, see notes 26-36 *supra* and accompanying text.

47. 600 F.2d at 1227.

48. *Id.* at 1225.

49. *Id.* at 1227-28. *See* note 44 *supra.*

50. 600 F.2d at 1227. The fear is that "communications—many of which may be trivial in themselves—[will be] entitled to protection against disclosure. . . ." J. WEINSTEIN & M. BERGER,

porate client from disclosing information which otherwise should not be privileged. This zone of silence criticism was, however, satisfactorily answered in the compromise *Diversified* test.[51] *Diversified* determined that the communication must be made for the purpose of securing legal advice and must be requested by a superior seeking legal advice,[52] thus preventing the routing of routine reports and memoranda to the attorney solely to claim a privilege. The Sixth Circuit, however, summarily dismissed the *Diversified* safeguards and classified that standard as merely a version of the *disfavored* subject matter test.[53] The court continued its criticism of the subject matter test by saying:

> This [test], in turn, fosters situations in which the *only* record of the full details of a particular transaction is in the hands of corporate counsel and, under the "subject matter" test, undiscoverable. Discovery, then, would have to be directed at the corporate agents who know the details of the transaction rather than at the corporation's management.[54]

A policy or doctrine which forces the adversary to aim his discovery procedures toward the most knowledgeable party, however, should not automatically be categorized as undesirable. If, for instance, discovery questions were designed to elicit information about certain accounting procedures, it would be sensible to interrogate the employee who has the specific knowledge requested rather than obtaining second-hand information from a corporate director, officer, or attorney.

WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1979). *See also* Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956), where the phrase "zone of silence" was apparently coined.

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

Id. at 955-56.

51. 572 F.2d 596 (8th Cir. 1977). The *Diversified* court, in its modification of the *Harper & Row* test, stated that

> 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 will continue to be made for independent business reasons.

Id. at 609.

52. *Id. See Attorney-Client Privilege*—Diversified Industries, Inc. v. Meredith: *New Rules for Applying the Privilege When the Client is a Corporation*, 57 N.C.L. REV. 306, 317 (1979).

53. 600 F.2d at 1226, nn.5 & 6.

54. *Id.* at 1227 (emphasis in original).

The *Upjohn* court ignored the benefits and safeguards of the *Diversified* solution. Its decision to adopt the control group test failed to address the major criticisms other courts have recognized as valid. For example, a control group generally does not include middle management whose decisions are often perfunctorily ratified by upper management and officers.[55] This reality of corporate life was ignored in *Upjohn*. To be protected by the attorney-client privilege in a control group jurisdiction each corporation must bear the burden of passing such information from lower-level employees through the control group members to the attorney. Otherwise, disclosures made by middle management will not be protected under this test.

Further, in attempting to evaluate the various tests, the *Upjohn* court failed to analyze adequately the factual situation confronting it.[56] The specific materials summoned in *Upjohn* were obtained by counsel after the informants were told that any communications would be confidential.[57] Had the employees and the attorneys been able to foresee the future exposure of these confidences, the employees probably would have been reluctant to disclose complete details of the transactions involving the questionable payments. The attorneys would have been deprived of information needed to aid the corporation in determining its legal status with the SEC.[58] The fundamental purpose of the attorney-client privilege would have been undermined.

Justice would have been better served in *Upjohn* if the court had examined more carefully the ramifications of adopting the control group test. Had the court closely inspected the effects of the control group test, it should have noticed the often criticized flaws in this doctrine,[59] and should have adopted a more reasonable test for determin-

55. *See* Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963) (identifying the control group as the corporation's officers, directors, and department heads). *See generally* Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972); Maurer, *Privileged Communications and the Corporate Counsel*, 28 ALA. LAW. 352, 375 (1967); Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

56. The court briefly mentioned the strengths of the control group test and the weaknesses of the subject matter test without applying either test to the *Upjohn* facts. The more recent *Diversified* test was dismissed without analysis.

57. 600 F.2d at 1225.

58. *See* notes 40-41 *supra* and accompanying text.

59. *See* Burnham, *Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois*, 56 ILL. B.J. 542 (1968); Heininger, *The Attorney Client Privilege as It Relates to Corporations*, 53 ILL. B.J. 376 (1965); Pye, *Fundamentals of the Attorney-Client Privilege*, 15 PRAC. LAW. 15 (1969); Note, *Attorney-Client Privilege for Corporate Clients: The Control*

ing the scope of the attorney-client privilege as it relates to corporations. It is apparent that the Sixth Circuit sacrificed an in-depth examination of the available tests in the interests of expediency. The court claimed that the control group test guards against undue limitation of evidence while still promoting free and confidential communication between decision makers and counsel.[60] It ignored the fact that the evidence sought by the IRS was elicited under the guise of an attorney-client relationship between the corporation and the lawyers involved.[61] The court effectively undermined this relationship, thus encouraging Upjohn and other Sixth Circuit corporations to abuse the attorney-client privilege.

IV. *In re Grand Jury Investigation*

The Court of Appeals for the Third Circuit also recently adopted the control group test stating that, "we find no persuasive reason to deviate from the approach taken by the majority of the federal courts. . . . [T]he control-group test is both broad enough and flexible enough to accommodate the needs of a corporate client."[62] As in *Upjohn*, the factual situation involved a corporation's (Sun Company, Inc.) internal investigation of questionable payments made to foreign officials.[63] The corporation was then subpoenaed to produce documents resulting from the investigation. These documents included interview memoranda and questionnaires. Sun asserted that the documents were protected under the attorney-client privilege[64] and

Group Test, 84 HARV. L. REV. 424 (1970); Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759 (1971).

60. 600 F.2d at 1227. There is no doubt that the test guards against possible restraints on discovery of evidence, but by limiting confidential communications to a few top level decision makers the control group standard does not promote much free or open discussion.

61. "The company had directed its in-house counsel, along with outside counsel, to conduct an internal investigation of these payments. At the request of Upjohn's top management, officers and employees of the company were urged to respond to counsel's questions candidly *and confidentially*." *Id.* at 1225 (emphasis added).

62. *In re* Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979).

63. Sun initially requested its audit committee to conduct an investigation. The committee reported that no significant violations had occurred, but new information led the Board of Directors to retain outside counsel and reopen the investigation. The outside counsel apparently assisted and advised the audit committee in the second investigation, but the final report made to Sun's Board of Directors was prepared by the committee itself. *Id.*

64. Sun's alternative assertion was that the documents were also protected under the work-product doctrine. The court did not address the attorney-client privilege issue until it had decided that the work-product doctrine could not be applied to portions of the subpoenaed materials. *Id.* at 1233.

could not be reached by a grand jury subpoena.[65]

Before choosing the control group test, the court studied the alternatives adopted by other circuits.[66] A brief examination was made of the underlying policies of the privilege,[67] and the various tests were reviewed.[68] Beginning with the premise that the control group test, as adopted by a majority of jurisdictions, offers at least a bare minimum of protection for the corporate client[69] the court first examined this test carefully.

The court addressed criticisms of the control group test, but found no convincing arguments that this majority approach should not also be adopted by the Third Circuit.[70] The court observed[71] that one criti-

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65. Sun filed a report with the SEC which disclosed that questionable payments had been made and which, in turn, prompted an investigation by the United States Attorney for the Eastern District of Pennsylvania. The United States Attorney requested a large number of documents including "all interview memoranda, questionnaires, statements, or other recorded recollections of these events . . . ." *Id.* at 1227-28. When Sun refused to release a portion of these documents a grand jury subpoena was issued.

66. Confronted with such an array of possibilities, we feel compelled to examine certain basic principles. First, as all courts and commentators seem to agree, the attorney-client privilege exists to foster disclosure and communication between the attorney and the client. Nevertheless, because the privilege obstructs the search for the truth and because its benefits are, at best, "indirect and speculative," it must be "strictly confined within the narrowest possible limits consistent with the logic of its principle." Moreover, although the need for a rule of predictable application has been questioned, especially in the corporate context, we agree with the majority view that the incentive to confide is at least partially dependent upon the client's ability to predict that the communication will be held in confidence.

Id. at 1235 (citations omitted).

67. *Id.* at 1233-35.

68. *Id.*

69. The court stated 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. Whether the privilege should be enlarged beyond that point should depend upon whether a broader rule would serve the policy of full communication underlying the privilege itself.

Id. at 1235 (footnote omitted).

70. Beginning with the statement that the control group test "adopted by a majority of the federal courts, draws as bright a line as any of the proposed approaches," *id.* at 1235, the court reasoned through an analysis of the test and summarized, "[W]e find no persuasive reason to deviate from the approach taken by the majority of the federal courts." *Id.* at 1237.

71. *Id.* at 1236. This observation apparently stemmed from the *Diversified* court's statement:

The principal criticism is that the control group test attempts to equate corporate clients with individual clients. An individual client both communicates to a lawyer and, based on the lawyer's advice, decides on an appropriate course of action. Similarly, before an employee's communication will be deemed the corporate client's communication, the control group test demands that the employee communicate to the attorney and be in a position to control or play a substantial role in any decision based on the attorney's advice. In practice, this results in protecting only communications of top level executives which fails to take into account the realities of corporate life.

572 F.2d at 608.

cism centers around the principle that a corporate client differs from an individual client in that corporate employees who know relevant facts frequently are not the decision makers, whereas an individual client assumes both roles.[72] The court acknowledged that an attorney who wants to advise soundly the decision makers must seek information from other employees.[73] But the court would not concede that confidentiality would aid in securing such information.[74] The court noted that any confidentiality extended to employees outside the control group would be illusory because such employees would have no control over the privilege; their communications would remain confidential only so long as the control group were to assert the privilege. The corporation would have the power to release any such communications by merely waiving the privilege.[75] Reasoning from this basis, the court refused to accept the notion that extending the privilege beyond control group communications would further an attorney's information gathering from those outside the control group:

> Privilege or no privilege, lower-level employees would confide in corporate counsel at their own risk. Conversely, where no questionable activity is involved, non-control-group employees have little reason not to relate information to corporate counsel, especially where a superior has instructed them to do so. In short, we do not believe that extension of the corporation's privilege against disclosure would significantly add to an attorney's ability to obtain information from employees outside the control-group.[76]

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72. *See* Burnham, *Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois*, 56 ILL. B.J. 542, 546-47 (1968). *See also* Note *Corporate Attorney-Client Privilege*—Diversified Industries, Inc. v. Meredith—*The Modified Harper & Row Test*, 4 J. CORP. L. 226, 229 (1978).

73. 599 F.2d at 1236.

74. *Id.*

75. One author has answered this argument:

> Like the barrier of caste, which it closely resembles, the rigidity of the control group test is neither salutary nor necessary. It would better serve the interests of society to encourage a desire for legal advice at whatever level that desire exists within a corporation. An employee who lacks power may not be wanting in zeal. If such an earnest soul perceives a problem while acting within the scope of his employment and subsequently secures legal advice, the communication ought to be privileged, *even if the outcome is determined by those to whom he reports*. The potential for social benefit inherent in the communication does not vary drastically with the status of its narrator.

Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 368 (1972) (emphasis added).

76. 599 F.2d at 1236. The court's simplistic analysis here betrays its failure to examine fully the issue. Dean McCormick has recognized the errancy of this type analysis.

> Perhaps we need not yield fully to the force of Bentham's slashing argument that the privilege is not needed by the innocent party with a righteous cause or defense, and that

What the court failed to recognize, however, was that by focusing on the person communicating with the attorney, the control group test forces corporations seeking the advice of counsel and wishing to retain the privilege to channel all confidences through members of the control group. This is an unreasonable, artificial limit to place on confidential communications. As stated earlier[77] this test ignores the realities of corporate life and unnecessarily burdens corporations.

The court next directed its attention to the possibility that under the control group test an attorney dealing with a complex legal problem would be faced with a "Hobson's choice":[78] interviews with control group members would not produce adequate information,[79] but interviews with employees outside the control group would not be privileged.[80] In answering this argument the appellate judges reasoned that the work product doctrine, as stated in *Hickman v. Taylor*,[81] would protect inquiries made in anticipation of litigation. The court further reasoned that where "there is no prospect of litigation, corporate counsel has little reason to be apprehensive about the unprivileged nature of the investigation."[82] *Hickman v. Taylor*, however, does not offer absolute protection as, under its doctrine, immunity from disclosure hinges on the need for discovery and the nature of the documents sought.[83] The dilemma remains for an in-house attorney seeking other types of

> the guilty should not be given its aid in concerting a false one. Wigmore in answer points out that in lawsuits all is not black and white but a client's case may be one where there is no real preponderance of morals and justice on either side, and he may mistakenly think a fact fatal to his cause, when it is not, and thus be impelled, if there were no privilege, to forego resort to counsel for advice in a fair claim.

McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 87 (2d ed. E. Cleary 1972), at 176 (citations omitted).

77. See notes 22-23 *supra* and accompanying text.

78. Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. IND. & COM. L. REV. 873, 876 (1971).

79. Especially in problems such as antitrust litigation, it is unlikely that persons "having the very highest authority" will have enough facts to convey what actually transpired to the attorney. *Id.*

80. No matter how essential this information might be to aid the attorney in his fact-finding process or legal advice, the communications will not be protected by the privilege.

81. 329 U.S. 495 (1947).

82. 599 F.2d 1224, 1237 (3d Cir. 1979).

83. "[D]ocuments subject to the work product rule are discoverable for good cause; if they are subject to the attorney-client privilege they are absolutely barred." 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1979). A discussion of the many problems involved in analyzing the work product doctrine is beyond the scope of this note. For a general discussion of the interrelationship between the work product and the attorney-client privilege, see Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 958-66 (1956); Case Comment, *Evidence—Attorney-Client Privilege—Who Can Represent a Corporation in Communication to Counsel*, City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962), 44 BOSTON U.L. REV. 123, 126-27 (1964).

information from corporate employees.[84]

The court also recognized that a control group test might discourage some corporations from conducting internal investigations.[85] The court dismissed this argument by stating simply that attorneys "have little choice"[86] other than to conduct introspective investigations when necessary. "In our opinion, the potential costs of undetected noncompliance [with complex laws] are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential."[87] While conceding that "[a] broader test undoubtedly would encourage the employment of outside counsel to conduct internal corporate investigations,"[88] the court concluded that a "narrower control-group test will [not] significantly reduce" such employment.[89] Again referring to protections offered by the work product doctrine in *Hickman v. Taylor*, the court assured itself that adequate safeguards already exist for attorneys seeking confidential information and that a broadening of any protective privilege is unnecessary.[90]

Satisfying itself that the criticisms of the control group standard were not sufficiently persuasive to cause the court to deviate from the majority viewpoint, this appellate court adopted that test. By aligning itself with proponents of the arbitrary control group test, the court failed to develop an alternate, perhaps more rational, interpretation of the privilege. Avoiding the risk of adopting a more imaginative method for protecting privileged communications from corporate clients to attorneys, this court superficially analyzed the issue, concluding that the majority test should not be challenged. As a result, corporate clients in the Third Circuit may now join corporations in other control group jurisdictions in channeling all communications of a confidential nature through members of the designated control group.

V. CONCLUSION

The debate in the federal courts over the ideal scope of the corporate attorney-client privilege is rapidly becoming one-sided. The

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84. 599 F.2d 1224, 1237 (3d Cir. 1979).
85. *Id.*
86. *Id.*
87. *Id.*, citing Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 431-32 (1970).
88. 599 F.2d 1224, 1237 (3d Cir. 1979).
89. *Id.*
90. *Id.*

Upjohn and *Grand Jury Investigation* decisions have tilted the weight of authority toward acceptance of a control group theory. This insistence by some courts on adopting artificial but convenient limits on the scope of the privilege may thwart recent attempts to provide a proper balance between the client's need for confidentiality and the law's need for discovery of relevant evidence. The search for a reasonable approach may have been weakened by these decisions. Perhaps when the issue again reaches the Supreme Court, as it surely will,[91] that body will realize the practical and philosophical defects in the control group test and adopt a rule which more nearly meets the needs of a corporate client seeking legal advice.

Nancy L. Woods

91. The Supreme Court has indeed granted certiorari in *Upjohn*. 48 U.S.L.W. 3602 (U.S. Mar. 17, 1980) (No. 79-886).