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Corporate Attorney-Client Privilege - New Emphasis on the Lawyer's Need to Know: Upjohn Co. v. United States

Michael J. Viscount Jr.
University of Richmond

COMMENTS

CORPORATE ATTORNEY-CLIENT PRIVILEGE—NEW EMPHASIS ON THE LAWYER'S NEED TO KNOW: *UPJOHN CO. v. UNITED STATES*

I. INTRODUCTION

In seeking the advice of legal counsel, the corporation may, out of necessity, communicate through its representatives confidential secrets about its conduct in business.[1] As is the case with individuals, it is well settled that a corporation may avail itself of the evidentiary privilege which allows concealment of such confidential communications.[2] This so-

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1. *See* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 324-25 (7th Cir. 1963) (Kiley, J., concurring), *cert. denied*, 375 U.S. 928 (1963).

2. 320 F.2d at 323. *See* Upjohn Co. v. United States, 101 S. Ct. 677, 683 (1981); United States v. Louisville & Nashville R.R., 234 U.S. 318 (1915); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971); City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950).

The attorney-client privilege protects confidential communications between an attorney and his client. Based primarily upon a policy of promoting freedom of consultation between the client and his legal advisor, it prohibits disclosure without the client's consent. Recognized as an obstacle to the investigation of truth, the privilege should be strictly construed. In United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950), Judge Wyzanski set out the following criteria for applying the privilege:

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

Id. at 358-59.

Judge Wyzanski's statement in *United Shoe* is frequently cited as the formulation of the attorney-client privilege. *See In re* Grand Jury Investigation, 599 F.2d 1224, 1233 (3d Cir. 1979); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 383 (D.D.C. 1978); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 601-02 (8th Cir. 1977).

In his treatise on evidence John H. Wigmore phrased the general principle of attorney-client privilege as follows:

called attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.[3] However, its application in the corporate context has been quite unpredictable for the past twenty years.[4]

The identity of the class of representatives who can speak for the corporation and whose communications with corporate counsel should be protected by the shield of the corporation's privilege is a major issue in the law of attorney-client privilege which is unique to the corporate client. In ordinary dealings between natural persons, the identification of the parties as attorney and client presents little difficulty.[5] The individual who receives the information and provides the advice is the attorney, while the one who makes the disclosure and decides on a future course of conduct based on the attorney's advice is the client.[6] In contrast, a corporation is an abstract legal entity that exists in law as a fictitious person; a corporation can act and communicate only through its various agents.[7] The possibility of a multiplicity of corporate agents, ranging from directors and officers to employees, all of whom communicate or receive communications on behalf of the corporation, gives rise to the problem of delimiting the scope of the corporation's privilege. The difficulty of deter-

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(1) Where legal advice of any kind is sought (2) from a professional legal advisor 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 advisor, (8) except the protection be waived.

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

A shorter definition was adopted in Wonneman v. Stratford Sec. Co., 23 F.R.D. 281 (S.D.N.Y. 1959), where the court noted:

> Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.

Id. at 285.

For a general discussion of the law of attorney-client privilege as it applies to corporations, see 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1979); Annot., 9 A.L.R. FED. 685 (1971); Koback, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972).

3. Upjohn Co. v. United States, 101 S. Ct. at 682. Reference to the existence of the privilege appears as early as the time of Queen Elizabeth I. 8 J. WIGMORE, *supra* note 2, § 2290 at 542.

4. *See generally* Koback, *supra* note 2; Brown, *Attorney-Client Privilege*, 28 DRAKE L. REV. 191 (1978-79); Gerk, *Corporate Attorney-Client Privilege—Diversified Industries, Inc. v. Meredith—The Modified Harper & Row Test*, 4 J. CORP. L. 226 (1978).

5. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1978).

6. *See* Burnham, *Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois*, 56 ILL. B.J. 542, 547 (1968).

7. *Id.* at 547; Koback, *supra* note 2, at 362.

mining when a particular agent is speaking to the attorney as a representative of the client-corporation is a longstanding problem which the Supreme Court recently addressed from a novel perspective in *Upjohn Co. v. United States.*[8]

II. Background to *Upjohn Co. v. United States*

A. *Search for a Uniform Approach*

Prior to the *Upjohn* decision, courts had recoginized the need for predictability and certainty in identifying the boundaries of the corporation's privilege,[9] but had been unable to agree on a uniform "bright-line" standard to assist counsel in predicting the existence of the privilege and its applicability to his client.[10] Over time three different "bright-line" tests were developed.

Before the controversial district court decision in *Radiant Burners, Inc. v. American Gas Association,*[11] courts assumed without question that the privilege applied to corporations.[12] A number of federal courts followed the "unlimited approach" set out in *United States v. United Shoe Machinery Corp.*[13] Although the communications in question in *United Shoe* were made by corporate employees in managerial and policy determining positions,[14] the court's statement that communications "by an officer or employee"[15] of the corporation could be privileged has been cited to support the proposition the communications by anyone affiliated with the corporation as an employee, officer or director could fall within the privi-

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8. 101 S. Ct. 677 (1981).

9. For a commentary advocating predictability and certainty, see Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test,* 84 Harv. L. Rev. 424 (1970), where the author notes that "[i]f the privilege is to achieve its purposes of encouraging communications, the communicants must be able to discern at the stage of primary activity whether the communication will be privileged." *Id.* at 426. *But see* Koback, *supra* note 2, at 368, where the author states that "[t]he attempt to establish a litmus of automatic application must either fail or secure arbitrary results."

10. *See* Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117, 120 (M.D. Pa. 1970). Since the protection against forced disclosure of confidential statements is a privilege and not a right, the burden is on the party invoking it to show an entitlement to its benefits. *Id. Accord,* Virginia Elec. Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 410 (E.D. Va. 1975).

11. 207 F. Supp. 771 (N.D. Ill.), *rev'd,* 320 F.2d 314 (7th Cir. 1962), *cert. denied,* 375 U.S. 929 (1963).

12. 2 J. Weinstein & M. Berger, *supra* note 2, at 503-41.

13. 89 F. Supp. 357 (D. Mass. 1950). *See* note 2 *supra.*

14. 2 J. Weinstein & M. Berger, *supra* note 2, at 503-41. "Judge Wyzanski's opinion did not indicate that this was a factor in his decision." *Id.*

15. 89. F. Supp. at 359.

lege.[16] This broad range of protection was challenged by the district court in *Radiant Burners* which held that a corporation is not entitled to claim attorney-client privilege.[17] On appeal, the Seventh Circuit reversed the lower court aberration.[18]

The "unlimited approach" of *United Shoe* accords with the basic purpose of the privilege—encouraging full disclosure to corporate counsel. It is also quite predictable and easy to apply. The approach, however, is incompatible with dictum in *Hickman v. Taylor,*[19] where the Supreme Court termed certain employees "mere witnesses" whose statements were unprivileged.[20] Likewise, the "unlimited approach" can not be reconciled with the trend towards broad discovery of all information relevant to any litigation, as dictated by the federal discovery rules.[21] These factors, along with the lingering influence of the district court's pronouncement in *Radiant Burners,* led to the creation of the "control group" test[22] which was rejected in *Upjohn.*

The "control group" test was first articulated in *City of Philadelphia v. Westinghouse Electric Corp.*[23] In addressing the question of whether

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16. Zenith Radio Corp. of America, 121 F. Supp. 792, 795 (D. Del. 1954); 2 J. WEINSTEIN & M. BERGER, *supra* note 2, at 503-41 & n.17 *See* Simon, *The Attorney-Client Privilege as Applied to Corporations,* 65 YALE L.J. 953, 960 (1956).

17. 207 F. Supp. at 773.

18. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 322 (7th Cir. 1962), *cert. denied,* 375 U.S. 929 (1963).

19. 329 U.S. 495 (1947).

20. Hickman v. Taylor is best noted for its articulation of the qualified work product immunity now embodied in FED. R. CIV. P. 26(b)(3). Some commentators have noted the opinion's additional significance in limiting the scope of the corporation's attorney-client privilege. *See* 2 J. WEINSTEIN & M. BERGER, *supra* note 2, at 503-41; Simon, *supra* note 16, at 956; Greenby, *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, 312 n.40 (1979).

Although it did not endorse any particular test or rule to determine which employees personify the corporate client for the purpose of limiting the scope of the privilege, the *Hickman* Court held that statements of employees who are "mere witnesses" are not privileged. 329 U.S. at 508. This language is dictum but it nonetheless indicates that in the corporate context the privilege is not to be extended to all statements by all employees.

21. Brown, *supra* note 4, at 192 (citing 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & CIVIL PROCEDURE § 2206 at 607 (1970)); FED. R. CIV. P. 26(b). Another factor in conflict with the unlimited approach of *United Shoe* is the heresay exception allowing entry of business records into evidence. Brown, *supra* note 4, at 192. *See also* United States v. De Georgia, 420 F.2d 889, 893 (9th Cir. 1969).

22. *See* Koback, *supra* note 2, at 362; 2 J. WEINSTEIN & M. BERGER, *supra* note 2, at 503-42.

23. 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert denied,* 372 U.S. 943 (1963).

communications of the corporate employee were communications of the corporate client for the purpose of the corporation invoking its attorney-client privilege,[24] Judge Kirkpatrick emphasized that the corporation must be the party seeking the legal advice when the privileged communication is made.[25] Judge Kirkpatrick established the following test:

> [I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.[26]

The members of the corporate "control group" were to be distinguished from other employees whose communications "would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice."[27]

A third approach, the "subject matter" test was formulated in *Harper & Row Publishers, Inc. v. Decker*.[28] Finding that the "control group" test[29] was "not wholly adequate"[30] as a means of determining whether the

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24. An attorney for Westinghouse had taken the statement of a Westinghouse employee "in the course of his investigation of facts relating to the pending indictment of the company" on civil antitrust charges. 210 F. Supp. at 484. *See also* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 486, 487 (E.D. Pa. 1962).

25. 210 F. Supp. at 485. When a corporate employee communicates a fact relative to pending litigation to an attorney retained by the corporation, the critical question is whether "[w]hen he does so, is the corporation seeking the advice of the attorney?" In other words, "was he at the time . . . the corporation seeking advice?" If not, then the corporate employee is a mere witness who "was giving the lawyer information in order that the latter could advise a client other than himself." *Id.*

26. *Id.*

27. *Id.* In essence, communications by agents in the corporate "control group" would be privileged while those of other employees would be reduced to the status of unprivileged third party statements. The district court also noted that the "control group" does not necessarily mean upper level management. There may be situations where other employees would be authorized to make certain decisions after consultations with attorneys, as for example, when damage claims are settled by the head of the claims department. *Id* at 486.

28. 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971). The plaintiffs in a civil antitrust action against various publishers and wholesalers of children's books sought discovery of memoranda prepared by defense counsel while debriefing certain persons shortly after each had given testimony before a federal grand jury investigating the publishing industry. Each person debriefed was an employee or former employee of one of the various corporate defendants. The district court judge granted the request for discovery, and the defendants requested mandamus to compel the district court to vacate its order.

29. "The district judge substantially followed the 'control group' test." 423 F.2d at 491.

30. *Id.* This suggests that the court did not completely rule out utilization of the "control

corporation's attorney-client privilege extended to counsel's debriefing interviews of corporate employees,[31] the Court of Appeals for the Seventh Circuit adopted a new test:

> [A]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his supervisors 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 of the duties of his employment.[32]

The "subject matter" test, with its emphasis on the subject matter of the communication, has been called the "more reasoned approach."[33] By focusing on the circumstances surrounding the disclosure rather than the type of corporate employee from whom such disclosure emanates, this approach "affords a much broader sphere of protection to the corporate litigant."[34] This test enables the corporate client to protect communications from all employees who are engaged in the activity which is the subject matter of counsel's inquiry.[35]

The "subject matter" test has been criticized for being overly broad and susceptible to abuse. While it encourages disclosure by a great many corporate employees, it also expands the "zone of silence" surrounding corporate affairs, thus increasing the likelihood that relevant information will be shielded from the discovery process.[36] A narrower construction of the scope of this absolute privilege would be more in keeping with the

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group" test.

31. The finding was applicable to Decker's communications. He was an employee of Harper & Row at the time of the debriefing, but not when the civil antitrust action was filed. The finding does not extend to communications between lawyers and individuals who at the time of the interview were former employees of the corporation or employees of other corporations. *Id.* at 490. The *Upjohn* court similarly avoided a decision on the applicability of the privilege to communications by former employees. *See* note 75 *infra* and accompanying text.

32. 423 F.2d at 491-92.

33. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978).

34. Note, *supra* note 9, at 765.

35. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (The "subject matter" test "encourages the free flow of information to the corporation's counsel in those situations where it is most needed.").

36. Note, *supra* note 9, at 766. *See* 572 F.2d at 609. This test may enable the corporation to protect from discovey certain factual witnesses' statements which might be otherwise discoverable on a showing of special need or special circumstances. 4 MOORE'S FEDERAL PRACTICE ¶ 26.60[2] at 26-238 n.17 (2d ed. 1979).

federal discovery provisions as amended,[37] especially since counsel's mental impressions and documentation of witnesses' statements would likely fall under the "work product" protection.[38] Critics also fear the potential for widespread abuse by corporations directing all employees to channel reports and communications through corporate attorneys in order to prevent subsequent disclosure.[39]

The *Harper & Row* decision marked a departure from the federal courts' consistent application of the "control group" test. It has not, however, been accepted as an adequate replacement for the "control group" test.[40]

B. *Federal Rule 501*

The next significant development affecting the law of privileges as applied to the corporate client was the adoption of the Federal Rules of Evidence in 1975.[41] Rule 501,[42] a general rule under which *Upjohn* was decided, is the only enactment of the privilege provision in the federal

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37. *See* FED. R. CIV. P. 26(b).

38. *See* 4 MOORE'S FEDERAL PRACTICE, *supra* note 36, at 26-238 n.17.

39. *See* 572 F.2d at 609. *See also* Note *supra* note 9, at 766. Since the privilege keeps certain relevant information undiscoverable, it must be strictly construed. *See* United States v. Nixon, 418 U.S. 683, 710 (1974). It is inconceivable that courts would allow its application to protect communications that have no legal significance other than that they were communicated to counsel or that counsel was in possession of the written documents.

40. Only one other case has extended the corporate attorney-client privilege to the same degree as *Harper & Row*. *See* Hasso v. Retail Credit Co., 58 F.R.D. 425 (E.D. Pa. 1973).

41. FED. R. OF EVID., Pub. L. No. 93-595, 88 Stat. 1926 (codified at FED. RULE EVID. RULE 501, 28 U.S.C.A.).

42. FED. R. EVID. 501 reads as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

This is the only evidentiary rule dealing with the subject of privileges. The second sentence of the provision serves to distinguish certain cases where state law may govern. In general, when in federal court, the federal common law of privileges will apply to federal question cases while in diversity cases, where only state claims are raised, the state law of privileges is applicable. *See* Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 445, 458 (N.D. Cal. 1978). *See also* Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Where there is a federal question with *pendent* state claims, the federal common law of privileges governs all claims of privilege raised in the litigation. *See* 77 F.R.D. at 458.

rules. The general rule was enacted in place of the thirteen specific rules proposed by the Supreme Court's Advisory Committee.[43] After considerable debate over the Court's proposals, Congress rejected reference to specific privileges. Instead, it chose to leave the law of privileges in its present state to be developed under the principles of the common law, as interpreted by the courts, in light of reason and experience.[44]

Particular congressional criticism was directed at the Advisory Committee's failure to define the "representative of the client" as applicable to the attorney-client privilege.[45] The report of the Senate Judiciary Committee termed this to be a "critical" issue for corporations and organizations.[46] The Advisory Committee's preliminary drafts of proposed rules included a rule on the attorney-client privilege.[47] Within that rule, the Advisory Committee initially endorsed the "control group" test by defining the representative of the client as "one having the authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client."[48] However, the Supreme Court's four-to-four *per curiam* affirmation of the *Harper & Row* decision did not endorse the "subject matter" test and indicated that a Court consensus in favor of one definition of the "representative of the client" was unlikely.[49] The Advisory Committee then withdrew its proposed definition of the representative of the client, indicating that "the matter is better left to resolution by decision on a case-by-case basis."[50] Thus, the federal law of privileges was left without a generally accepted rule of judicial construction applicable for determining the scope of the attorney-client privilege in the corporate context. The result was the Congressional mandate, as set forth in Federal Rule of Evidence 501, which the *Upjohn* Court interpreted as requiring a case-by-case determination of the particular facts and circumstances in light of judicial reason and experience.[51]

C. *Post Rule 501 Analysis*

After the enactment of Rule 501, federal courts did no more than give "lip service" to the case-by-case analysis requirement when confronted with the task of defining the scope of a corporation's attorney-client priv-

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43. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 200 (2d ed. 1977).
44. *Id.* at 218-22.
45. *Id.* at 219.
46. *Id.*
47. *Id.* at 752.
48. 2 J. WEINSTEIN & M. BERGER, *supra* note 2, at 503-44.
49. *Id.*
50. A. SALTZBURG & K. REDDEN, *supra* note 43, at 753. *See* 101 S. Ct. at 686.
51. 101 S. Ct. at 686.

ilege. Whether out of a belief that predictability is essential[52] or a judicial preference for uniformity of result, the tendency of federal courts was to try to adhere to clearly delineated tests already existing[53] or to formulate new tests for broad application.[54] Of the newly created tests, two have been widely cited. Both appear to have had some influence on the Supreme Court's ultimate decision in *Upjohn*, although neither test was cited expressly by the Court.

The decision by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*[55] was the first attempt to devise a test that would address deficiencies of earlier tests while attempting to achieve favorable results when dealing with contemporary problems. In 1974 and 1975, Diversified had been involved in litigation surrounding a proxy fight. That litigation disclosed the possible existence of a corporate "slush fund" used to bribe purchasing agents of other business entities to whom Diversified sold scrap metal. The corporation's Board of Directors retained a law firm to make an investigation of the company's business practices in the context of these disclosures.[56]

The subject matter of the law suit was Diversified's refusal to provide third party access to the materials generated by counsel during this internal investigation and the corporation's reliance on the attorney-client privilege. After finding the "control group test inadequate,"[57] and the "subject matter" test susceptible to potential abuse,[58] the court adopted the following 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

52. *See generally* Note, *supra* note 9, at 762.

53. United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979) (control group test); *In re* Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979) (control group test); SEC v. Canadian Javelin, 451 F. Supp. 594 (D.D.C. 1978) (combination of control group and subject matter tests); Perrignon v. Bergen Brunsweg Corp., 77 F.R.D. 455 (N.D. Cal. 1978) (combination of control group and subject matter tests); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977) (modified control group); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1975) (modified control group); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975) (control group test).

54. *See* notes 55-67 *infra* and accompanying text.

55. 572 F.2d 596, 606 (8th Cir. 1978).

56. *Id.* at 600-01. For a review of the facts of this case and a thorough analysis of its significance see Bitner, *Circuits Grapple With Work Product Issues in Payment Probes*, Nat'l L.J., Aug. 20, 1979, at 27, col. 1. *See also* Brown, *supra* note 4; Gerk, *supra* note 4; Greenby, *supra* note 20.

57. 572 F.2d at 609.

58. *Id.*

> 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.[59]

In adopting this test, it is clear that the primary concerns of the court were to facilitate the free flow of information to legal advisors[60] in accordance with the purpose of the attorney-client privilege, and to encourage communications to lawyers made in a good faith effort to promote compliance with law governing corporate activity.[61]

A similar but even less restrictive test was formulated in the antitrust and patent case of *In re Ampicillin Antitrust Litigation.*[62] When the defendant-corporation objected to the use of the "control group" approach for determining which employee communications could be protected by the attorney-client privilege,[63] the District Court for the District of Columbia emphasized the importance of examining the relevance[64] of the communication to a particular legal problem.[65] The court held that the following requirements must be met before the attorney-client privilege may be claimed for employee communications:

> 1) The particular employee or representative of the corporation must have made a communication of information which was *reasonably believed to be necessary to the decision-making process* concerning a problem on which legal advice was sought;
>
> 2) The communication must have been made for the purpose of securing *legal* advice;
>
> 3) The subject matter of the communication to or from an employee must have been related to the performance by the employee of the duties of his employment; and

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59. *Id.* The test is basically a modification of the *Harper & Row* "subject matter" test. It was formulated by "Judge" Weinstein. *See* 2 J. WEINSTEIN & M. BERGER, *supra* note 2 at 503-47, 49.

60. 572 F2d. at 609.

61. *Id.*

62. 81 F.R.D. 377 (D.D.C. 1978).

63. *Id.* at 381.

64. The court held that compliance with the relevancy requirement did not require that the communication in fact contain information necessary to the decision making process for a particular legal problem. The court required only a reasonable belief that the information be necessary. The court also implied that both the status of employment and the nature of the information may affect the determination of whether a reasonable belief exists. *Id.* at 385 n.10.

65. Id. at 385.

4) The communication must have been a confidential one . . . .[66]

The district court noted that this test looks at the subject matter of the communication and the context in which it was made rather than the status of the employee making the communication.[67]

III. *Upjohn Co. v. United States:* THE LATEST POSITION OF THE SUPREME COURT

The Supreme Court shed new light on the scope of the corporation's attorney-client privilege in federal courts in *Upjohn Co. v. United States*.[68] The case involved Upjohn's appeal from a ruling by the Sixth Circuit that the attorney-client privilege protected only communications made by the corporate control group, i.e., those officers and agents responsible for directing Upjohn's corporate counsel.[69] The Supreme Court firmly rejected the "control group" approach sanctioned by the Sixth Circuit and many other courts before it. Writing for eight members of the Court,[70] Mr. Justice Rehnquist concluded that "the narrow 'control group test' . . . cannot, consistent with 'the principles of the common law as interpreted in light of reason and experience,' . . . govern the development of the law in this area."[71] The majority did not, however, take the opportunity to adopt one of the other tests that have been utilized by courts of appeals,[72] nor did it choose to set down a new rule or set of rules to govern questions in this area.[73] Instead, the Court was content to limit its

66. *Id.* (emphasis in original).

67. *Id.* at 387.

68. 101 S. Ct. 677 (1981). For a short discussion of the treatment of this issue in state courts see Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area,* 22 SYRACUSE L. REV. 759, 762 n.24 (1971).

69. Upjohn Co. v. United States, 600 F.2d 1223 (6th Cir. 1979). For a short discussion of the "control group" test, see notes 22-30 *supra* and accompanying text.

70. The decision in *Upjohn* was unanimous. Mr. Chief Justice Burger did, however, write a concurring opinion to express his belief that the Court should establish a rule of general application as a means of achieving predictability and certainty in this area of the law. 101 S. Ct. at 689 (Burger, C.J., concurring).

71. 101 S. Ct. at 686 (quoting FED. R. EVID. 501).

72. 101 S. Ct. at 681. *See* Upjohn Co. v. United States, 600 F.2d 1223 (6th Cir. 1979); *In re* Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979); Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970).

73. 101 S. Ct. at 681. The Court used the "spirit of Fed. R. Evid. 501," the congressional directive to determine the applicability of the privilege on a case by case basis, and its own policy of deciding "concrete cases and not abstract propositions of law" to justify its refusal to draft a set of rules. 101 S. Ct. at 681, 686. *See* Trammel v. United States, 445 U.S. 40, 47 (1980); S. REP. No. 93-1277, 93d Cong., 2d Sess. 13 (1974).

The Court recognized that "if the purpose of the attorney-client privilege is to be served,

ruling to the concrete facts before it, holding that in this case the communications by all of the "corporate employees"[74] involved were protected from compelled disclosure by the corporation's attorney-client privilege.[75]

The attorney-client privilege issue arose when the Internal Revenue Service brought a proceeding in Tax Court to enforce its summons issued to Upjohn and the corporation's in-house counsel.[76] The summons, issued on November 23, 1976, directed the corporation and its in-house counsel, Gerald Thomas, to appear before an officer of the IRS and give testimony relating to the tax liability of Upjohn for the years 1972, 1973 and 1974. The summons also demanded production of all corporate files which were related to an investigation conducted under the suupervision of Mr.

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the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." 101 S. Ct. at 684. It further stated that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts is little better than no privilege at all." *Id.* Notwithstanding this dicta, the majority decision undermined the very attributes of a privilege it recognized as desirable. *Cf.* 101 S. Ct. at 689 (Burger, C. J., concurring) (the Chief Justice called for articulation of a standard to "govern similar cases and afford guidance to corporations, counsel advising them, and federal courts").

74. The Court limited the ruling to communications by corporate employees even though some of the communications involved were between corporate counsel and individuals who had formerly been employed by Upjohn Co. Upjohn argued that the privilege should apply to communications by former employees concerning activities during their period of employment. Since the lower courts had not addressed this argument the Supreme Court declined to consider its validity. 101 S. Ct. at 685 n.3. This argument may be considered on remand.

75. 101 S. Ct. at 681.

76. United States v. Upjohn Co., 78-1 USTC 83,597 (W.D. Mich. 1978). The summons was issued pursuant to I.R.C. § 7602, which provides:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Following Upjohn's refusal to comply with the terms of the summons, the IRS filed an enforcement petition pursuant to I.R.C. §§ 7402(b) and 7604(a). 78-1 USTC at 83,598.

Thomas. The purpose of the investigation was to identify payments made to employees of foreign governments and any political contributions made by Upjohn or any of its affiliates since January 1, 1971.[77]

The files sought by the IRS contained the results of a "questionable payments probe"[78] conducted by Mr. Thomas as Upjohn's in-house counsel. This internal investigation was undertaken when the audit of one of Upjohn's foreign subsidiaries identified payments by the subsidiary to the employees of a foreign government, or to third parties believed to be acting as intermediaries for these government employees, for the purpose of securing government business.[79] Thomas was one of the corporate representatives initially privy to the auditor's report because of his position as Upjohn's general counsel. Thomas was also the corporate secretary, a vice president, a member of the board of directors and an officer of various subsidiaries. He was aware that such corporate payments to foreign governments could place an American corporation in violation of securities laws, and the rules and regulations of the Securities and Exchange Commission.[80] Thomas was equally aware that the SEC had indicated a policy of lenient treatment of corporations which voluntarily disclosed payments of the type revealed by the audit.[81] Accordingly, after consultations with the chairman of the board and outside counsel, Thomas conducted a factual investigation "to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the Company with respect to the payments."[82]

The investigation consisted of written questionnaires prepared by Thomas and outside counsel regarding the alleged illegal payments. These questionnaires were mailed by the chairman of the board to all foreign general and area managers of the corporation,[83] with directions

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77. 78-1 USTC at 83,598. The summons directed that the records produced "should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." *Id.*

78. The Federal magistrate coined the term "questionable payments." 78-1 USTC at 83,598.

79. *Id.* This type of investigation has been the source of frequent litigation of the attorney-client privilege issue. *See* Bitner, *supra* note 56.

80. 78-1 USTC at 83,599; 600 F.2d at 1225.

81. 78-1 USTC at 83,599.

82. *Id.*

83. *Id.* A total of 53 Upjohn managers received questionnaires. *Id.* Also sent under the Chairman's signature was a letter which noted, (1) the recent disclosure of possibly illegal payments, (2) that management was in need of full information concerning any such payments and (3) that the corporation's legal counsel was conducting the investigation to deter-

that all completed questionnaires be returned to Thomas.[84] In addition, Thomas personally interviewed all recipients of the questionnaire. Finally, Thomas and outside counsel interviewed some thirty-three other employees, including former employees who had not received questionnaires.[85]

On March 26, 1976, after the initial investigation was completed, Upjohn voluntarily made a disclosure report to the Securities and Exchange Commission on Form 8-K.[86] Contemporaneously with the SEC reporting, the corporation sent copies of Form 8-K to the IRS. The IRS began its investigation at that point into the tax consequences of the payments which subsequently led to the November 23, 1976 summons.[87]

The summons specifically sought the written questionnaires which had been returned to Mr. Thomas by the managers of Upjohn's foreign affiliates, as well as memoranda or notes of the interviews conducted with the managers and other officers and employees of the corporation.[88] Thomas and the corporation refused to produce these documents on the grounds that they were protected from disclosure by the attorney-client privilege as well as the limited immunity provided an attorney's work product prepared in anticipation of litigation.[89] The Supreme Court agreed that "the response to the questionnaires and any notes reflecting responses to interview . . . [were] communications by Upjohn employees[90] to counsel"[91]

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mine the nature and magnitude of any payments made. The addressees were also instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the necessary information. 101 S. Ct. at 681.

84. 101 S. Ct. at 681.

85. *Id.* As to the former employees who were interviewed about their activities while employed by Upjohn, *see* note 74 *supra* and accompanying text.

86. 78-1 USTC at 83,599. This report disclosed "questionable payments" since January 1, 1971 totaling $2,710,000 in 22 of the 136 countries served by Upjohn. *Id.* A subsequent amendment to Form 8-K revealed actual payments of approximately $4,400,000. 600 F.2d at 1225.

87. 78-1 USTC at 83,599.

88. *Id.* at 83,598. See note 77 *supra* and accompanying text. The company voluntarily furnished the IRS with two schedules regarding the payments. One listed only $700,000 in payments which Upjohn believed had an effect on its consolidated income tax returns. The other less detailed schedule contained a country-by-country summary of approximately $3,700,000 in additional payments which Upjohn claimed did not affect its tax liability. The IRS claimed that this data was not sufficient to enable it to determine whether there were in fact more questionable payments than those shown in the two schedules. 78-1 USTC at 83,599-600.

89. For a discussion of the "work product" issue in the *Upjohn* case, see 101 S. Ct. at 685-90.

90. *See* note 74 *supra* and accompanying text.

and thus protected from disclosure by the corporation's privilege. Mr. Justice Rehnquist stated for the majority:

> The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel . . . . Information, not available from upper-echelon management, was needed to supply a basis for legal advise concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice . . . . Pursuant to explicit instructions from the Chairman of the Board, the communications were considered 'highly confidential' when made . . . and have been kept confidential by the company.[92]

IV. The Significance of the *Upjohn* Decision

The significance of the decision in *Upjohn Co. v. United States* lies in the Supreme Court's emphasis on the attorney's need to know and its reduced concern for the burdens on the discovery process.[93] The Court recognized the traditional purpose of the privilege—"to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[94] As it had recently held in *Trammel v. United States*,[95] it went further, however, to point out that " '[t]he attorney-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.' "[96] Thus, with this emphasis, the court

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91. 101 S. Ct. at 686.

92. *Id.*

93. The Court balanced the interest in promoting freedom of consultation and full disclosure between attorney and client against the interest in encouraging discovery of all information relevant to particular litigation. 101 S. Ct. at 682-86. *See also* 2 J. Weinstein & M. Berger, *supra* note 2, at 503-44.

94. 101 S. Ct. at 682. The purpose of the privilege is clearly set forth in the following statement:

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

8 J. Wigmore, *supra* note 2, § 2291 at 545.

95. 445 U.S. 40 (1980) (privilege against adverse spousal testimony).

96. 101 S. Ct. at 682. (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)). The Court found support for this emphasis in Hunt v. Blackburn, 128 U.S. 464 (1888).

held that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[97]

Under this approach, which emphasizes the corporate attorney's "need to know," the "control group" test was inadequate because it was too narrow in scope and because it "threaten[ed] the valuable efforts of corporate counsel to ensure their client's compliance with the law."[98] The Court noted that assuring attorney access to all of the information necessary to responsible performance of his function[99] requires that the attorney-client privilege protect communications of any employee in possession of the information.[100] Since the modern corporate structure makes it impossible for the control level officers and agents to know everything that the lawyers need to know,[101] the scope of the privilege cannot be limited by the "control group" test, which "frustrates . . . [the privilege's] very purpose."[102]

The Supreme Court was also impressed with the apparent fact that Upjohn took the initiative in pursuing the "questionable payments probe" as a means of voluntarily assuring compliance with law.[103] Certainly, this type of corporate activity is desired, if not essential, if we are to achieve the social goals promoted by business and corporate regulation. It was also noted that the complicated array of regulatory legislation which confronts the modern corporation today requires the assistance of learned and fully informed legal counsel, "particularly since compliance with the law in this area is hardly an instinctive matter."[104] However, the Court felt that the "control group" test frustrated these socially desirable efforts of legal counsel because it had proven to be "difficult to apply in practice."[105] Moreover, disparate lower court decisions which had attempted to identify the corporate "control group" illustrated the unpredictability of that test.[106] By sanctioning a broader scope of protection

97. 101 S. Ct. at 683.

98. *Id.* at 684.

99. *Id.* (citing ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 4-1, which requires each lawyer to "hold inviolate the confidences and secrets of his client").

100. 101 S. Ct. at 683.

101. *Id.* (citing Diversified Indus., Inc. v. Meredith, 572 F.2d at 608-09).

102. 101 S. Ct. at 684.

103. *Id.* at 681. The Court noted that Upjohn had voluntarily reported the payments to the SEC and the IRS.

104. *Id.* at 684. *See* United States v. United States Gypsum Co., 438 U.S. 422, 440-41 (1978); Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901, 913 (1969).

105. 101 S. Ct. at 684.

106. *Id.*

against forced disclosure of corporate communications, the *Upjohn* Court facilitated the efforts of corporate counsel in ensuring client compliance with the law.

The Court considered but dismissed two of the government's arguments against expanding the scope of the corporation's privilege. First, it was argued that a broad privilege was not necessary to encourage voluntary compliance with law. To the contrary, the government suggested that "the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege."[107] Rejecting this argument, the Court suggested that, even if it were true, it ignored the fact that "the depth and quality of any investigations [undertaken] to ensure compliance with law would suffer" in the absence of a broad privilege.[108] In addition, the Court stated that the argument was an overstatement for "it applies to all communications covered by the privilege"[109] whether involving a corporation or an individual. "[Y]et the common law recognized the value of the privilege in futher facilitating communications"[110] between an individual and his attorney even though that individual was likewise subject to the risk of civil or criminal liability.

The second government argument rejected by the Court was that "to extend the attorney-client privilege beyond the limits of the control group test . . . would entail severe burdens on discovery and create a broad 'zone of silence' over corporate affairs."[111] In the past, these factors had been frequently cited to deny an extension of the privilege beyond the corporate "control group."[112] The courts that have expanded the scope of the corporate privilege have had little difficulty dismissing this argument,[113] however, and the *Upjohn* decision extinguished any flickering hope that the "control group" test remains a viable justification for limiting the scope of a corporation's privilege.

The Court pointed out that "the [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . ."[114]

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107. *Id.* at 684 n.2.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 685.
112. *See, e.g.*, United States v. Upjohn Co., 600 F.2d at 1227; Diversified Indus., Inc. v. Meredith, 572 F.2d at 596. *See also* Note, *supra* note 9.
113. *See, e.g.*, 572 F.2d at 606; Harper & Row Publishers, Inc. v. Decker, 423 F.2d at 487.
114. 101 S. Ct. at 685. The Court distinguished communications from underlying facts:

> The protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different

Thus, the privilege does not make it possible for a party to conceal a fact merely by revealing it to his lawyer.[115] The Court agreed that the government's discovery burden would be less severe if it was able to secure the results of Upjohn's internal investigation by simply subpoenaing the questionnaires and notes taken by the corporation's attorneys.[116] This factor is particularly significant since the only other way for the government to obtain the information would be to independently interview each of the knowledgeable corporate agents who were located in several foreign countries.[117] However, as Mr. Justice Rehnquist noted for the majority, "considerations of convenience do not overcome the policies served by the attorney-client privilege."[118] Justice Rehnquist further noted that " '[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on the wits borrowed from the adversary.' "[119] These arguments were thus put to rest when the Court concluded that an expansion of the privilege for corporate communications "puts the adversary in no worse position than if the communications had never taken place."[120]

V. The Corporate Privilege in Federal Court After *Upjohn*

It is unfortunate for practitioners and jurists who must struggle with the delicate problem of defining the scope of a corporation's privilege that the majority of the Supreme Court felt no compulsion to provide explicit guidance for cases beyond the facts before it.[121] The position was reached notwithstanding the Court's recognition that predictability and certainty are essential to achievement of the goal of promoting corporate communications which facilitate corporate counsel's "need to know."[122] The Court's position in this regard differed from that of Chief Justice Burger. Unlike the majority, which held that the mandate of Federal Rule of Evi-

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> thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney"? but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Id. at 685-86 (quoting City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

115. 101 S. Ct. at 686 (citing State v. Circuit Court, 34 Wis. 2d 559, 580, 150 N.W.2d 387, 399 (1967)).

116. 101 S. Ct. at 686.

117. *Id.*

118. *Id.*

119. *Id.* (quoting Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring)).

120. 101 S. Ct. at 685.

121. *See* note 73 *supra* and accompanying text.

122. *Id.*

dence 501 required determination on a case by case basis, the Chief Justice opined that the Court had a special duty to clarify aspects of the law of privileges due to the provisions of Rule 501.[123]

Whether or not Chief Justice Burger's assessment of the Court's duty is accepted, it is clear that practical considerations require that the Court should articulate some guideline which federal courts could then utilize while defining the proper scope of a corporation's attorney-client privilege. Such a standard was suggested by Chief Justice Burger in his concurring opinion in *Upjohn:*

> A communication is privileged . . . when . . . an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.[124]

As recognized by the Chief Justice, this test would not cover the entire spectrum of privileged communications. It is designed to serve only as a starting point in the analysis.[125]

A test that might prove more useful in a general context can be gleaned from the majority's observations in *Upjohn.* Implicit in their analysis is the following standard: a communication is privileged when (1) it is made by corporate employees to corporate counsel; (2) at the direction of corporate superiors; (3) in order to secure legal advice from counsel; (4) the communication must concern matters within the scope of the employee's corporate duties; (5) the information sought must not be available from upper-echelon management; (6) the information is needed to supply a basis for legal advice concerning compliance with law; (7) the employees themselves must be sufficiently aware that they are being questioned so the corporation can obtain legal advice; (8) the communication must have been considered confidential when made; and (9) the information must

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123. The Chief Justice analyzed the provisions in Federal Rule of Evidence 501 and stated that the law of privileges "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." 101 S. Ct. at 689 (Burger, C.J., concurring).

124. *Id.*

125. *Id.*

have been held confidential by the corporation.[126] In *Upjohn*, the Court held that the communications made by the corporation's employees to counsel met the above criteria; the communications were therefore protected from compelled disclosure.[127] From this, it is safe to conclude that other communications which meet the same criteria should be likewise protected by the corporation's attorney-client privilege.

VI. Conclusion

In *Uphohn Co. v. United States*, the Supreme Court provided little overt assistance for corporate attorneys faced with the problem of obtaining information to assist in advising their corporate clients, and for federal judges who must decide whether the information is protected from forced disclosure. There is still no absolute test for determining when a corporate communication falls within the corporation's protection from compelled disclosure. The Court did refocus the primary consideration to the attorney's "need to know," while de-emphasizing the interests of discovery. The Court also put an end to any consideration of the "control group" test as a means of limiting the boundaries of the corporation's privilege. In practice, or until Congress deems otherwise, the scope of the corporation's privilege in federal court remains to be determined on a case-by-case basis in light of developments in the common law. Such is the mandate of Federal Rule of Evidence 501. This development of the common law in the lower federal courts will no doubt be influenced by the test implicity articulated by the Supreme Court in *Upjohn*.

*Michael J. Vicount, Jr.**

126. *Id.* at 685.
127. *Id.*
* Member 1980-1981 *Law Review* staff and member of 1981 graduating class.