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BEYOND UPJOHN: ACHIEVING CERTAINTY BY EXPANDING THE SCOPE OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

INTRODUCTION

Courts have recognized the difficulty in delineating the boundaries of the attorney-client privilege in the corporate context.¹ In order to establish a claim of attorney-client privilege, it is necessary to determine whether a communication to counsel is made in confidence² and for the purpose of seeking legal advice.³ Because a corporation acts only through agents,⁴ however, it is also necessary to discern which of these agents may make privileged disclosures to corporate counsel.⁵ The courts have established a myriad of conflicting "tests" to determine whether a corporate employee is empowered to speak for the corporation. Most courts have adopted

1. *E.g.*, *Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977); *SEC v. Gulf & W. Indus.*, 518 F. Supp. 675, 680 (D.D.C. 1981); *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 88 (D. Del. 1962); *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 732-35, 388 P.2d 700, 706-08, 36 Cal. Rptr. 468, 474-76 (1964) (en banc).

2. *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 603-04 (N.D. Tex. 1981); 8 J. Wigmore, *Evidence* § 2292, at 554 (J. McNaughton rev. ed. 1961). It is the communication, not the information contained therein, that must be kept confidential to retain the privilege. *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 389 (D.D.C. 1978). The client's intent to keep the information confidential is sufficient to retain the privilege. *See Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977); *Baxter Travenol Laboratories, Inc. v. Lemay*, 89 F.R.D. 410, 414 (S.D. Ohio 1981); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 388-89 (D.D.C. 1978); *International Bus. Machs. Corp. v. Sperry Rand Corp.*, 44 F.R.D. 10, 12 (D. Del. 1968).

3. *Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963); *SEC v. Gulf & W. Indus.*, 518 F. Supp. 675, 681 (D.D.C. 1981). Business advice is not covered by the privilege. *See United States v. Rosenstein*, 474 F.2d 705, 714-15 (2d Cir. 1973) (attorney's correspondence directing client to become involved in business deals not privileged); *United States v. Vehicular Parking, Ltd.*, 52 F. Supp. 751, 753 (D. Del. 1943) (letters from an attorney who also acted as corporate director, promoter and business manager to his corporate client were not privileged).

4. *Diversified Indus. v. Meredith*, 572 F.2d 596, 608 (8th Cir. 1977) (en banc); *D.I. Chadbourne v. Superior Court*, 60 Cal. 2d 723, 732, 388 P.2d 700, 706, 36 Cal. Rptr. 468, 474 (1964) (en banc).

5. This Note makes no distinction, as far as privilege issues are concerned, between in-house and outside counsel retained by the corporation. For analyses of the additional problems posed by in-house counsel, see Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953, 970-73 (1956); Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 Nw. U. L. Rev. 235, 244-48 (1961) [hereinafter cited as *The Lawyer-Client Privilege*].

either the control group test,⁶ which focuses on the job title of the employee-communicator, or variations of the subject matter test,⁷ which focuses on the content of the information disclosed to counsel. Some courts have adopted criteria other than those of the various control group or subject matter tests.⁸

The lack of any uniform privilege standard has injected unnecessary uncertainty into both corporate attorney-client relations and judicial

6. *E.g.*, *United States v. Amerada Hess Corp.*, 619 F.2d 980, 986-87 (3d Cir. 1980); *United States v. Upjohn Co.*, 600 F.2d 1223, 1226-28 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981); *In re Grand Jury Investigation*, 599 F.2d 1224, 1237 (3d Cir. 1979); *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977) (dictum); *Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286, 291-92 (D. Colo. 1979); *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 400 (E.D. Va. 1975); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 35-36 (D. Md. 1974); *United States v. International Bus. Machs. Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117, 120 (M.D. Pa. 1970); *Congoleum Indus. v. GAF Corp.*, 49 F.R.D. 82, 84 (E.D. Pa. 1969), *aff'd mem.*, 478 F.2d 1398 (3d Cir. 1973); *Garrison v. General Motors Corp.*, 213 F. Supp. 515, 520 (S.D. Cal. 1963); *cf.* *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 459 (N.D. Cal. 1978) (adopted both control group and subject matter tests).

7. *E.g.*, *Diversified Indus. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 385 (D.D.C. 1978); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 456 (N.D. Ill. 1974), *aff'd mem.*, 534 F.2d 330 (7th Cir. 1976); *Hasso v. Retail Credit Co.*, 58 F.R.D. 425, 428 (E.D. Pa. 1973); *Rockwell Mfg. Co. v. Chicago Pneumatic Tool Co.*, 57 F.R.D. 111, 112-13 (N.D. Ill. 1972); *Panduit Corp. v. Burndy Corp.*, 172 U.S.P.Q. (BNA) 46, 47 (N.D. Ill. 1971); *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 736-38, 388 P.2d 700, 709-10, 36 Cal. Rptr. 468, 477-78 (1964) (en banc).

8. *See United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950). The *United Shoe* test provides that "[t]he privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on 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.* Several courts have adopted this test. *E.g.*, *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 520, 522 (D. Conn.), *appeal dismissed and mandamus denied per curiam*, 534 F.2d 1031 (2d Cir. 1976); *United States v. Aluminum Co. of Am.*, 193 F. Supp. 251, 252 (N.D.N.Y. 1960); *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792, 794 (D. Del. 1954). The District Court for the Southern District of New York, in *Wonneman v. Stratford Sec. Co.*, 23 F.R.D. 281 (S.D.N.Y. 1959), adopted another alternative test which provides that the privilege exists "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.

decisions. Indeed, in *Upjohn Co. v. United States*,⁹ the Supreme Court¹⁰ advocated a case-by-case approach to corporate attorney-client privilege law and declined to formulate any specific criteria,¹¹ despite the continuing uncertainty and confusion wrought by the lack of guidance by the Court.¹² *Upjohn* and its progeny¹³ have left corporate counsel unable to determine whether communications made to them will be afforded protection from disclosure.¹⁴

This Note argues that due to the complex nature of corporate litigation¹⁵ and the frequent need for corporate counsel to conduct

9. 449 U.S. 383 (1981).

10. *Id.* at 385. Unfortunately, the absence of dissenters from the *Upjohn* opinion does not signal a definitive resolution to the scope of the corporate attorney-client privilege problem. The *Upjohn* holding is restricted to its facts, *id.* at 386, 397, and by the Court's own admission, does not "lay down a broad rule or series of rules to govern all conceivable future questions" concerning the scope of the privilege. *Id.* at 386.

11. In answer to the requests of the many *amici* who asked the Court to set forth a definitive test, e.g., Memorandum of the American Bar Association as *Amicus Curiae* at 2; Brief *Amici Curiae* on Behalf of the American College of Trial Lawyers at 3; Memorandum of the Chicago Bar Association as *Amicus Curiae* at 2, Justice Rehnquist, writing for the majority, stated that "[w]hile such a 'case-by-case' basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of [the federal rule governing privileges]." *Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981).

12. Scholars have suggested the need for a "bright line" test to determine the boundaries of the attorney-client privilege. Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 Harv. L. Rev. 424, 426 (1970) [hereinafter cited as *The Control Group Test*]; Note, *The Corporate Attorney-Client Privilege: Alternatives to the Control Group Test*, 12 Tex. Tech L. Rev. 459, 478 (1981) [hereinafter cited as *Alternatives to the Control Group Test*]; see 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 503(b)[04], at 503-47 to -49 (2d ed. 1980) (rejecting a case-by-case analysis and formulating an alternative test); Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 Mich. L. Rev. 360, 379 (1970) (proposing an alternate test) [hereinafter cited as *A Suggested Approach*]; *The Lawyer-Client Privilege*, *supra* note 5, at 259-60 (proposing a statute to govern privilege questions). Chief Justice Burger, chastising his brethren for the ambiguities in *Upjohn*, noted that "[i]ndeed, because Federal Rule of Evidence 501 provides 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 the light of reason and experience,' this Court has a special duty to clarify aspects of the law of privileges properly before us." *Upjohn Co. v. United States*, 449 U.S. 383, 403-04 (1981) (Burger, C.J., concurring in part and concurring in the judgment).

13. See *Baxter Travenol Laboratories, Inc. v. Lemay*, 89 F.R.D. 410, 413-14 (S.D. Ohio 1981) (disclosures to a corporate employee serving as a litigation consultant are privileged); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 618-21 (N.D. Tex. 1981) (material garnered by a "Special Officer" hired to implement a Securities and Exchange Commission consent decree is privileged).

14. *Baxter Travenol Laboratories, Inc. v. Lemay*, 89 F.R.D. 410, 413 (S.D. Ohio 1981).

15. *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 1000-07 (1961) [hereinafter cited as *Developments—Discovery*]. Corporate litigation in the privilege

internal investigations,¹⁶ some definitive guidelines for the privilege must be established. Part I of this Note discusses the development of the corporate attorney-client privilege and its underlying policy rationales. Part II analyzes *Upjohn* and its progeny, and examines the consequences of the absence of guidelines on corporate litigation and internal investigations. Part III discusses the tension between the privilege and liberalized discovery and argues that an expansion of the scope of the attorney-client privilege would not substantially impede discovery. This Note proposes that, to better serve the theoretical underpinnings of the attorney-client privilege, the scope of the corporate attorney-client privilege should be expanded to encompass the communications of all of a corporation's employees.

I. THE HISTORICAL AND THEORETICAL BACKGROUND OF CORPORATE ATTORNEY-CLIENT PRIVILEGE

A. *The Development of the Attorney-Client Privilege*

Rooted in principles of ancient Roman law,¹⁷ the attorney-client privilege originated during the reign of Elizabeth I.¹⁸ The privilege,

area often involves hundreds of documents, e.g., *Permian Corp. v. United States*, 665 F.2d 1214, 1215-17 (D.C. Cir. 1981) ("millions" of documents); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 382 (D.D.C. 1978) (over 745 documents); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 32 (D. Md. 1974) ("approximately 720 documents"); *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792, 793 (D. Del. 1954) ("some 1600 documents"); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) ("nearly 800 exhibits"), and the consolidation of multiple actions. E.g., *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 489 (7th Cir. 1970) (per curiam) ("more than forty separate antitrust actions brought in eight judicial districts"), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1156 (D.S.C. 1974) ("22 parties involved").

16. See generally Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, 35 Bus. Law. 5 (1979) (discussing the corporate attorney-client privilege problems attendant to internal investigations with emphasis on securities-related investigations).

17. See Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 Calif. L. Rev. 487, 487-89 (1928). Under Roman law, a servant's duty of loyalty was prescribed. A slave was incompetent to testify against his master. Likewise, an advocate was prohibited from bearing witness against his client while the case was in progress, and, under later law, was made incompetent to testify at all. *Id.* at 488-89. The general moral duty not to violate the *fides* upon which such relationships were built was held paramount to the policy that sought the correct settlement of controversies. *Id.* at 490. Although the connection between this ancient precedent and the 16th century English concept of the privilege cannot be proven, Professor Radin posits that the early precedent may have had some influence on the English barrister's obligation to protect his client's disclosures. *Id.* at 488.

18. 9 W. Holdsworth, *A History of English Law* 201-02 (1926); 8 J. Wigmore, *supra* note 2, § 2290, at 542 & n.1. Wigmore contends that by the reign of Elizabeth

based on the barrister's code of honor, was premised on the notion that a gentleman could not be forced to reveal entrusted secrets.¹⁹ The early cases held that the barrister's privilege was absolute.²⁰ By the eighteenth century, however, courts began to regard the client's interest as more important than professional dignity.²¹ Underlying this shift of emphasis from the attorney to the client, was a general notion that "the law had reached such a state of complexity"²² that justice

I, the privilege was already unquestioned. *Id. Contra Hazard, An Historical Perspective on the Attorney-Client Privilege*, 66 Calif. L. Rev. 1061, 1070 (1978) ("the historical foundations of the privilege are not as firm as the tenor of Wigmore's language suggests"). Many early English cases upheld the privilege. *E.g.*, *Bulstrode v. Letchmere*, 22 Eng. Rep. 1019, 1019 (Ch. 1676) ("the defendant, being a counsellor at law, shall not be bound to answer . . . for any thing which he knoweth in the cause as counsellor"); *Waldron v. Ward*, 82 Eng. Rep. 853, 853 (K.B. 1654) (counsellor "not bound to make answer for things which may disclose the secrets of his clients cause"); *Berd v. Lovelace*, 21 Eng. Rep. 33, 33 (Ch. 1577) (solicitor "shall not be compelled to be deposed").

19. 8 J. Wigmore, *supra* note 2, § 2290, at 543; Gardner, *A Re-Evaluation of the Attorney-Client Privilege* (pt. I), 8 Vill. L. Rev. 279, 289 (1963) [hereinafter cited as Gardner I]. The original privilege only belonged to the barrister, not to the attorney or solicitor. Hazard, *supra* note 18, at 1071; see Gardner I, *supra*, at 289. While barristers were considered members of "an ancient and honorable class," *id.*, who were not merely officers of the court but members of it, Hazard, *supra* note 18, at 1071, attorneys and solicitors were not members of the court, *id.* at 1071 n.39, and were not as highly regarded. Gardner I, *supra*, at 289. The privilege itself was based on an oath of honor. 8 J. Wigmore, *supra* note 2, § 2290, at 543; see Gardner I, *supra*, at 292 ("Eighteenth century rationalism resulted in the notion that the silence of the attorney was necessary in order that the client might trust his legal advisor more fully."); Hazard, *supra* note 18, at 1071 ("A barrister . . . could no more properly be asked to reveal a client's confidences than a modern judge could be asked to disclose matters heard in camera.").

20. See, *e.g.*, *Sparke v. Middleton*, 83 Eng. Rep. 1079, 1079 (K.B. 1664); *Waldron v. Ward*, 82 Eng. Rep. 853, 853 (K.B. 1654); see Gardner I, *supra* note 19, at 289. *But cf.* Hazard, *supra* note 18, at 1071-73 (lawyer's testimony deemed admissible in a majority of early cases).

21. C. McCormick, McCormick's Handbook of the Law of Evidence § 87, at 175 (E. Cleary 2d rev. ed. 1972); 8 J. Wigmore, *supra* note 2, § 2290, at 543; see 9 W. Holdsworth, *supra* note 18, at 202. The reasons for the shift in policy rationale are unclear, and commentators posit varied explanations for the change: that the discovery rules expanded, Gardner I, *supra* note 19, at 293-95; that eighteenth century rationalists required sounder policy justifications, *id.* at 291-92, including the need to provide "subjectively for the client's freedom from apprehension," 8 J. Wigmore, *supra* note 2, § 2290, at 543; and that the privilege was extended to attorneys, who, unlike barristers, were not members of the court. Hazard, *supra* note 18, at 1071 n.39. The "honor of the barrister" rationale coexisted with the newer theoretical justifications until the mid-eighteenth century. 8 J. Wigmore, *supra* note 2, § 2290, at 543.

22. *The Lawyer-Client Privilege*, *supra* note 5, at 235; accord *Anderson v. Bank of B.C.*, 2 Ch. D. 644, 649 (Ch. 1876); *Greenough v. Gaskell*, 39 Eng. Rep. 618, 620 (Ch. 1833). Under the newer policy rationales, the privilege belonged to the client. 9 W. Holdsworth, *supra* note 18, at 202. It was not until 1873 that the client was fully

could be served only if the advocate was fully apprised of his client's case.²³

This policy rationale remains the underpinning of present-day attorney-client privilege theory. American commentators²⁴ and courts²⁵ likewise view the privilege as a means to foster client confidence and encourage full factual disclosure to an attorney. They argue that free communication facilitates justice²⁶ by promoting proper case preparation.²⁷ It is also suggested that frivolous litigation is discouraged when, based on full factual disclosure, an attorney finds that his client's case is not a strong one.²⁸

The attorney-client privilege prevents the disclosure of privileged communications²⁹ and promotes a full and free exchange of informa-

protected by the privilege both at law and in equity. Gardner I, *supra* note 19, at 298-99.

23. *Anderson v. Bank of B.C.*, 2 Ch. D. 644, 649 (Ch. 1876); *Annesley v. Anglesea*, 17 How. St. Tr. 1129, 1237 (Ex. 1743).

24. 2 D. Louisell & C. Mueller, *Federal Evidence* § 207, at 505-07 (1978); Gardner I, *supra* note 19, at 310-11; Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 Tul. L. Rev. 101, 111-13 (1956); see 8 J. Wigmore, *supra* note 2, § 2291.

25. E.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *SEC v. Gulf & W. Indus.*, 518 F. Supp. 675, 680 (D.D.C. 1981).

26. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971); *Natta v. Hogan*, 392 F.2d 686, 691 (10th Cir. 1968); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 321-22 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 383 (D.D.C. 1978); *The Lawyer-Client Privilege*, *supra* note 5, at 241; cf. Radin, *supra* note 17, at 492 (the attorney-client privilege ultimately serves to make men equal before the law).

27. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Trammel v. United States*, 445 U.S. 40, 51 (1980); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950); C. McCormick, *supra* note 21, § 87, at 176; Gardner I, *supra* note 19, at 310-11.

28. See Gardner I, *supra* note 19, at 292 n.43; Radin, *supra* note 17, at 491.

29. E.g., *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *United States v. Amerada Hess Corp.*, 619 F.2d 980, 986 (3d Cir. 1980); *Diversified Indus. v. Meredith*, 572 F.2d 596, 601 (8th Cir. 1977); *Schwimmer v. United States*, 232 F.2d 855, 856 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956); C. McCormick, *supra* note 21, § 87, at 177; 8 J. Wigmore, *supra* note 2, § 2291, at 545; cf. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970) ("appeal after disclosure of the privileged communication is an inadequate remedy"), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971). As the Supreme Court noted in *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457 (1877), "[i]f a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic." *Id.* at 458. The protection extends to both communications from the client to the attorney, and to those from the attorney to the client. *United States v. Margolis*, 557 F.2d 209, 211 (9th Cir. 1977); *Natta v. Hogan*, 392 F.2d 686, 692-93 (10th Cir. 1968); *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352

tion between an attorney and his client,³⁰ thereby facilitating effective legal representation.³¹ Given that the privilege prevents disclosure of communications during discovery and at trial,³² however, many courts³³ and commentators³⁴ have argued that an expansive privilege runs counter to the modern trend of liberalized discovery.³⁵ Too restrictive a privilege, however, will defeat the very purposes of the doctrine; without the privilege's protection, the incentive to communicate with counsel disappears.

U.S. 833 (1956); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 602-03 (N.D. Tex. 1981); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 388 n.20 (D.D.C. 1978); 2 J. Weinstein & M. Berger, *supra* note 12, ¶ 503(b)[03], at 503-39; 8 J. Wigmore, *supra* note 2, § 2320, at 628-29.

30. *E.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979); *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); C. McCormick, *supra* note 21, § 87, at 175; 8 J. Wigmore, *supra* note 2, § 2291, at 545; *Gardner I*, *supra* note 19, at 305; *Ladd, Uniform Evidence Rules in the Federal Courts*, 49 Va. L. Rev. 692, 714 (1963); *Radin, supra* note 17, at 490.

31. *E.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *United States v. Louisville & N.R.R.*, 236 U.S. 318, 336 (1915); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *Chirac v. Reinicker*, 24 U.S. 124, 130, 11 Wheat. 280, 294 (1826); *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); C. McCormick, *supra* note 21, § 87, at 175-76; *Gardner I*, *supra* note 19, at 292, 308-10; *Hazard, supra* note 18, at 1078-79 (quoting *Annesley v. Anglesea*, 17 How. St. Tr. 1139, 1237 (1743)).

32. The attorney-client privilege applies during discovery, *see, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 387-88 (1981); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 318 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 599-600 (N.D. Tex. 1981), and is available at trial. *See City of Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831, *adhered to*, 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). The privilege also applies in grand jury proceedings, *General Counsel v. United States*, 599 F.2d 504, 509 (2d Cir. 1979); *Duffy v. United States*, 473 F.2d 840, 841-42 (8th Cir. 1973), and in administrative proceedings. *United States v. Summe*, 208 F. Supp. 925, 927 (E.D. Ky. 1962); *CAB v. Air Transp. Ass'n*, 201 F. Supp. 318, 318 (D.D.C. 1961).

33. *E.g.*, *United States v. Upjohn Co.*, 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd on other grounds*, 449 U.S. 383 (1981); *Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977); *Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286, 292 (D. Colo. 1979).

34. *See, e.g.*, C. McCormick, *supra* note 21, § 96, at 202-03; 8 J. Wigmore, *supra* note 2, § 2292, at 554; *The Control Group Test, supra* note 12, at 425-26.

35. Liberalized discovery serves to "make available to each party the widest possible sources of proof as early as may be so as to avoid surprise and facilitate preparation," C. McCormick, *supra* note 21, § 96, at 202, and to limit the scope of the controversy. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). For a discussion of liberalized discovery, *see* C. Wright, *Handbook of the Law of Federal Courts* § 81 (3d ed. 1976). This liberal trend is reflected in the discovery rules. *See* Fed. R. Civ. P. 26-37. Another aim of discovery, the "fair and open adjudication of controversies,"

B. *The Federal Rules of Evidence*

The Advisory Committee on Federal Evidence Rules, at the direction of the Supreme Court,³⁶ addressed the scope of the corporate attorney-client privilege in devising Proposed Rule of Evidence 503.³⁷ In the preliminary draft, rule 5-03(a)(3) incorporated the control group test,³⁸ limiting the scope of the privilege to representatives of the client "having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client."³⁹ The final revised draft, however, eliminated this definition⁴⁰ and expressly left clarification of the scope problem for case-law

Note, *Upjohn Co. v. United States: Death Knell for the Control Group Test and a Plea for a Policy-Oriented Standard to Corporate Discovery*, 31 Syracuse L. Rev. 1043, 1052 (1980) [hereinafter cited as *Death Knell*], is generally believed to serve the public interest. See Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 Harv. L. Rev. 464, 470 (1977) [hereinafter cited as *Fixed Rules*]; *Developments—Discovery*, *supra* note 15, at 1000. Liberal discovery, however, may impede rather than expedite litigation. *Id.* (In the " 'big case,' . . . [r]ather than alleviating such conditions, the federal discovery rules have often added to the complications, burying the parties in a welter of documents, depositions, and interrogatories."). See generally *Discovery Reform Pushed by ABA Committee*, 63 A.B.A. J. 1691 (1977) (American Bar Association Litigation Section sought changes in the Federal Rules of Civil Procedure to curb abusive discovery tactics).

36. See *Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary on Proposed Rules of Evidence*, 93d Cong., 1st Sess., ser. 2 at 13-15 (1973) (testimony of Judge Albert Maris) [hereinafter cited as *Subcommittee Hearings*].

37. The preliminary draft of Proposed Fed. R. Evid. 5-03, 46 F.R.D. 161, 249-51 (1969), was first revised to change the disjunctive "or" to the conjunctive "and" in the definition of "representative of the client" in proposed rule 503(a)(3). Proposed Fed. R. Evid. 503(a)(3) (revised draft), 51 F.R.D. 315, 361 (1971). All specific references to the privilege as it applies to corporations were removed in the final revised draft. Proposed Fed. R. Evid. 503 (final revised draft), 56 F.R.D. 183, 235-37 (1972).

38. For a discussion of the control group test, see *infra* notes 50-58, 74-81 and accompanying text.

39. Proposed Fed. R. Evid. 5-03(a)(3) (preliminary draft), 46 F.R.D. 161, 250 (1969). The Advisory Committee noted that "[t]he rule reflects the trend of recent decisions." *Id.* at 252; accord 2 J. Weinstein & M. Berger, *supra* note 12, ¶ 503(b)[04], at 503-47 ("the control group test seemed to be in clear ascendancy in the federal courts").

40. Proposed Fed. R. Evid. 503 (final revised draft), 56 F.R.D. 183, 235-37 (1972). The "representative of the client" definition was removed from proposed rule 503 after the Supreme Court affirmed, by a vote of four to four, the Seventh Circuit's subject matter test formulation in *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971). According to Professor Edward Cleary, "[t]he committee never receded" from the control group view, but rather decided that after *Harper & Row*, the issue "was a little hot to handle." *Subcommittee Hearings*, *supra* note 36, at 524 (statement of Prof. Edward Cleary). Charles Halpern and George Frampton, Jr., commenting on the revised draft in their memorandum submitted to the House Subcommittee, noted that "[i]ndeed, the Rules escape even greater controversy sim-

resolution.⁴¹ Congress, unable to settle on specific privilege criteria, ultimately rejected even this revised draft⁴² and enacted rule 501.⁴³ The rule provides that when state law does not supply the rule of decision in an element of a claim or defense,⁴⁴ federal privilege law "shall be governed by the principles of the common law as they may

ply by avoiding some of the hardest and most pressing issues in the forefront of evidence law: the scope of the attorney-client privilege for corporate employees." *Id.* at 190 (Memorandum—Additional Submissions, Requested by the Subcommittee—Feb. 20, 1973).

41. Proposed Fed. R. Evid. 503(a) advisory committee note (final revised draft), 56 F.R.D. 183, 237 (1972). While the committee eliminated the definition of "representative of the client" in subdivision (a) of the rule, the phrase remained, undefined, in subdivision (b) of rule 503. *Id.* 503(b)(4) (final revised draft), 56 F.R.D. 183, 236 (1972).

42. According to Representative Hungate, Chairman of the House Special Subcommittee on the Reform of Federal Criminal Laws, "50 percent of the complaints in our committee related to the section on privileges." *Rules of Evidence: Hearings Before the Senate Comm. on the Judiciary on Federal Rules of Evidence: H.R. 5463*, 93d Cong., 2d Sess. 6 (1974) (statement of Rep. Hungate). Opposition to any codification of specific privilege rules was based on a myriad of reasons: (1) that the power of the Court to promulgate rules of "substantive" law was questionable, *e.g.*, *Subcommittee Hearings*, *supra* note 36, at 66 (statement of Rep. Dennis); *id.* at 147-52 (statement of Justice Goldberg); *id.* at 156-57 (statement of Justice Goldberg); *id.* at 159 (statement of Charles Halpern on behalf of the Washington Council of Lawyers); *contra id.* at 549-54 (reply statement of Prof. Edward Cleary); (2) that establishing a federal privilege law would improperly abrogate state-created privilege law, *e.g.*, *id.* at 156-57 (statement of Justice Goldberg); *id.* at 171-73 (statement of Charles Halpern and George Frampton, Jr. on behalf of the Washington Council of Lawyers); *id.* at 204-05 (statement of George Leisure); *id.* at 249 (statement of Chief Judge Henry Friendly); and (3) that the privilege provisions were too complex to be workable. *Id.* at 218 (statement of a Committee of New York Trial Lawyers on the Proposed Federal Rules of Evidence). Although most of the controversy surrounded the omission of certain privilege provisions and the inclusion of the unprecedented new law of governmental secrecy, *id.* at 191 (Memorandum—Additional Submissions, Requested by the Subcommittee—Feb. 20, 1973), there was opposition to the application of proposed rule 503 to corporations. *Id.* at 415-18 (statement of Terry Lenzner and Joseph Gebhardt); *id.* at 496-97 (statement of Stuart Johnson, Jr.).

43. Fed. R. Evid. 501.

44. Since the adoption of rule 501, the courts apply federal privilege law in federal question cases. 2 D. Louisell & C. Mueller, *supra* note 24, § 201, at 415; *e.g.*, *United States v. Hankins*, 581 F.2d 431, 438 n.13 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *Heathman v. United States District Court*, 503 F.2d 1032, 1034 (9th Cir. 1974); *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 458 (N.D. Cal. 1978) (dictum). In determining the federal law, however, the federal courts may seek guidance from existing state law, *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975) (per curiam); *Heathman v. United States District Court*, 503 F.2d 1032, 1034 (9th Cir. 1974), and if the federal court adopts the state law, this incorporated principle becomes federal common law. *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975) (per curiam); H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 7-8, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7098, 7101. In diversity jurisdiction cases, courts apply state privilege law. *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 458 (N.D. Cal. 1978) (dictum); *see Union Planters Nat'l Bank v. ABC Records, Inc.*, 82 F.R.D. 472, 473 (W.D. Tenn. 1979); H.R. Conf. Rep. No. 1597,

be interpreted by the courts of the United States in the light of reason and experience."⁴⁵ Rule 501 thus represents a compromise between those who proposed the creation of a specific federal privilege law⁴⁶ and those who opposed codification of the venerable common-law doctrine,⁴⁷ in that it calls for the creation of a federal common law.⁴⁸

93d Cong., 2d Sess. 7-8, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7098, 7101. In pendent claim cases, the weight of authority states that federal privilege law governs both the federal and state questions. *See, e.g.,* Dorsten v. Lapeer County Gen. Hosp., 88 F.R.D. 583, 586 (E.D. Mich. 1980); Perrignon v. Bergen Brunswick Corp., 77 F.R.D. 455, 459 (N.D. Cal. 1978). *But see* 2 D. Louisell & C. Mueller, *supra* note 24, § 206, at 503 (suggesting that pendent state claim should be dismissed if state law conflicts with the federal common law). When the state privilege claim is ancillary to the federal claim, or federal and state claims and defenses are otherwise mixed, the privilege rule to be applied is unclear. 2 D. Louisell & C. Mueller, *supra* note 24, § 206, at 504 (suggesting that separate trials be ordered pursuant to Federal Rule of Civil Procedure 42(b)); *see* Garner v. Wolfenbarger, 430 F.2d 1093, 1097, 1100 (5th Cir. 1970) (pre-rule authority indicating that both sets of privilege rules should be examined), *cert. denied*, 401 U.S. 974 (1971).

45. Fed. R. Evid. 501. Although Congress intended that there be no specific privilege rules, *see* S. Rep. No. 1277, 93d Cong., 2d Sess. 6-7, 11-13, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7051, 7052-54, 7058-59; H.R. Rep. No. 650, 93d Cong., 1st Sess. 8-9 (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7075, 7082-83, it did examine the pre-rule common law as to specific privileges, including the attorney-client privilege. *See* Library of Congress, *Current Status of the Law of Testimonial Privileges in Federal Courts*, K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 202, 203-08 (1975). Despite the fact that Congress rejected the proposed attorney-client privilege rule, Proposed Fed. R. Evid. 503 (final revised draft), 56 F.R.D. 183, 235-36 (1972), it still has some persuasive value. *See* Marshall v. Fitzsimmons, 27 Fed. R. Serv. 2d (Callaghan) 1379, 1381 (E.D.N.Y. 1979); *In re Grand Jury Proceedings*, Detroit, Mich., Aug. 1977, 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977), *aff'd per curiam*, 570 F.2d 562 (6th Cir. 1978); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 522 (D. Conn.), *appeal dismissed and mandamus denied per curiam*, 534 F.2d 1031 (2d Cir. 1976); Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 38 n.1 (E.D.N.Y. 1973); 2 J. Weinstein & M. Berger, *supra* note 12, ¶ 503[02], at 503-17; Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Power*, 76 Mich. L. Rev. 1177, 1196-1201 (1978).

46. *Subcommittee Hearings*, *supra* note 36, at 554 (reply statement of Prof. Edward Cleary) ("[The following] reasons demonstrate the validity of the propositions which underlie the basic approach of the proposed rules to the area of privilege: first, that the Congress does have power to legislate in respect to privilege in diversity as well as in other cases; second, that this power was delegated to the Court; and third, that the decision to formulate federal rules of privilege was a wise one."); Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 Colum. L. Rev. 353 (1969) (advocating adoption of privilege rules prior to the promulgation of the proposed rules). The original version of proposed Article V, as drafted by the Advisory Committee, would have created a distinct federal privilege law to be used in all cases decided under the Federal Rules of Evidence. *See* Proposed Fed. R. Evid. 501-13 & advisory notes (final revised draft), 56 F.R.D. 183, 230-61 (1972).

47. *See supra* note 18.

48. 2 D. Louisell & C. Mueller, *supra* note 24, § 200, at 399-400. The adoption of a federal common-law scheme leaves unresolved not only the question of the scope of the corporate attorney-client privilege, but also leaves undefined the basic require-

C. The Federal Common Law

Without any definitive congressional mandate as to specific federal privileges, the federal courts have fashioned a myriad of conflicting tests.⁴⁹ In *City of Philadelphia v. Westinghouse Electric Corp.*,⁵⁰ the District Court for the Eastern District of Pennsylvania created the narrow control group test.⁵¹ The court held that the privilege extends only to an attorney's communications with employees "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."⁵² The privilege is limited only to communications made by high-ranking management or to certain other employees who could "act upon the lawyer's advice."⁵³ The court's decision has been interpreted to mean that the employee's title must fall within the ambit of the control group for the communication to be privileged.⁵⁴ The

ments necessary to establish a claim of privilege, such as the level of confidentiality and the type of advice that will be deemed privileged.

49. See *supra* notes 6-8 and accompanying text.

50. 205 F. Supp. 830, *adhered to*, 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). In *Westinghouse*, 1,800 civil antitrust actions were brought against the corporate defendant. 210 F. Supp. at 487. Plaintiffs moved for an order directing defendants to answer interrogatories concerning marketing and pricing decisions made by corporate officers. 205 F. Supp. at 830. Claiming that discovery was barred by the attorney-client privilege because such information was communicated to corporate counsel, the defendant refused to answer. *Id.* at 830-31. The court denied the claim of privilege. 210 F. Supp. at 486, 491.

51. 210 F. Supp. at 485. Commentators have suggested that Judge Kirkpatrick, in creating the narrow control group test, was wary of the lower court decision in *Radiant Burners, Inc. v. American Gas Ass'n.*, 207 F. Supp. 771, *adhered to*, 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963), which held that the privilege does not apply to corporations. *Id.* at 773; 2 D. Louisell & C. Mueller, *supra* note 24, § 212, at 560-61; Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 Ga. L. Rev. 339, 362 (1972); Stern, *Attorney-Client Privilege: Supreme Court Repudiates the Control Group Test*, 67 A.B.A. J. 1142, 1143 (1981).

52. 210 F. Supp. at 485.

53. *Id.* at 486.

54. See, e.g., *Hogan v. Zletz*, 43 F.R.D. 308, 315 (N.D. Okla. 1967) (control group includes managers and assistant managers of the patent and research and development divisions), *aff'd in part sub nom.* Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); *Garrison v. General Motors Corp.*, 213 F. Supp. 515, 518 (S.D. Cal. 1963) (control group is comprised of directors, officers, department heads, division managers and division chief engineers); cf. *United States v. Upjohn Co.*, 600 F.2d 1223, 1227-28 (6th Cir. 1979) (case remanded in part to determine whether the chairman of the board, vice chairman, president and senior officers are members of the control group), *rev'd on other grounds*, 449 U.S. 383 (1981); *Congoleum Indus. v. GAF Corp.*, 49 F.R.D. 82, 83-85 (E.D. Pa. 1969) (control group includes, at the lowest level, only vice presidents, yet the court stated that "actual duties and responsibilities" are the criteria for choosing control group members, not "labels or titles"), *aff'd mem.*, 478 F.2d 1398 (3d Cir. 1973).

Westinghouse decision has been widely accepted by the courts.⁵⁵ It has been praised by commentators as promoting consultation with counsel,⁵⁶ preventing discovery abuses,⁵⁷ and being an easily applicable "bright-line" test that promotes certainty.⁵⁸

In *Harper & Row Publishers, Inc. v. Decker*,⁵⁹ however, the Seventh Circuit dismissed the control group test as "not wholly adequate,"⁶⁰ and proposed the subject matter test.⁶¹ In contrast to the control group test, the *Harper & Row* approach focuses "upon why an attorney was consulted, rather than with whom the attorney communicated."⁶² Under this test, communications to corporate counsel are privileged when made by an employee at the direction of his superiors regarding subject matter within the scope of the communicator's employment.⁶³

55. Although the *Westinghouse* control group theory "first was regarded as an intermediate or compromise position" between the lower court *Radiant Burner* decision and the concept of corporate privilege, Stern, *supra* note 51, at 1143, it soon became the leading test to determine the scope of the corporate attorney-client privilege. See cases cited *supra* note 6.

56. See, e.g., Kobak, *supra* note 51, at 365-66; *The Control Group Test*, *supra* note 12, at 427.

57. See *The Control Group Test*, *supra* note 12, at 429. Courts have also praised the control group test for preventing discovery abuses. See *United States v. Upjohn Co.*, 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981); *Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286, 291 (D. Colo. 1979).

58. *The Control Group Test*, *supra* note 12, at 426, 434-35; see *A Suggested Approach*, *supra* note 12, at 379 (proposing a modified control group test).

59. 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971). In *Harper & Row*, more than 40 civil antitrust actions were brought against 23 defendants for an alleged conspiracy to fix prices of children's library books. 423 F.2d at 489. Plaintiffs sought discovery of memoranda prepared by defendants' counsel while debriefing employees after their grand jury testimony. *Id.* at 490. Defendants refused to produce these memoranda, claiming that they were protected either by the attorney-client privilege or by the work product immunity doctrine. *Id.*

60. *Id.* at 491.

61. *Id.* at 491-92. The *Harper & Row* court did not call its test the "subject matter test." That label was coined by later courts. See *United States v. Upjohn Co.*, 600 F.2d 1223, 1226-27 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981). Another court has described the *Harper & Row* criterion as the "scope of employment rule." *General Counsel v. United States*, 599 F.2d 504, 509 (2d Cir. 1979).

62. *Diversified Indus. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc); see *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971).

63. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971). A more detailed eleven-point test was developed by the California Supreme Court in *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964) (en banc). The *Chadbourne* test applies only when the employee is "the natural person to be speaking for the corporation," the employee is more than a

Although the *Harper & Row* test was adopted in many cases⁶⁴ and was generally well received by commentators,⁶⁵ subsequent cases have modified its scope.⁶⁶ In *Diversified Industries v. Meredith*,⁶⁷ the Eighth Circuit, sitting en banc,⁶⁸ added the requirement that "the communication [must not be] disseminated beyond those persons who, because of the corporate structure, need to know its contents."⁶⁹ This additional requirement in essence shifts the test's emphasis to whether the communication is strictly confidential.⁷⁰ The District Court for the District of Columbia, in *In re Ampicillin Antitrust Litigation*,⁷¹ further modified the subject matter test. The *Ampi-*

mere independent witness, the employees' statement would be required in the ordinary course of corporate business, and the person intends the communication to be confidential. *Id.* at 736-37, 388 P.2d at 709-10, 36 Cal. Rptr. at 477-78.

64. *E.g.*, *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 456 (N.D. Ill. 1974), *aff'd mem.*, 534 F.2d 330 (7th Cir. 1976); *Hasso v. Retail Credit Co.*, 58 F.R.D. 425, 428 (E.D. Pa. 1973); *Rockwell Mfg. Co. v. Chicago Pneumatic Tool Co.*, 57 F.R.D. 111, 113 (N.D. Ill. 1972); *Panduit Corp. v. Burndy Corp.*, 172 U.S.P.Q. (BNA) 46, 47 (N.D. Ill. 1971).

65. *See, e.g.*, *Kobak*, *supra* note 51, at 367-68; *Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. Indus. & Comm. L. Rev. 873, 879 (1971); *Alternatives to the Control Group Test*, *supra* note 12, at 465.

66. *See Diversified Indus. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (adopting the modifications suggested in 2 J. Weinstein & M. Berger, *supra* note 12, ¶ 503(b)[04], at 503-47 to -49); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 385 (D.D.C. 1978) (calling for a stricter limitation of the privilege).

67. 572 F.2d 596 (8th Cir. 1978) (en banc). During a proxy fight, it was discovered that *Diversified* maintained a "slush fund" to bribe purchasing agents. *Id.* at 600. The Securities and Exchange Commission's interest in the fund resulted in an investigation by corporate counsel at the direction of *Diversified's* board of directors. *Id.* The law firm representing *Diversified* wrote memoranda on its findings. Defendant sought discovery of these memoranda in claims against *Diversified* for alleged conspiracy, tortious interference with contractual relationships and violation of § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). 572 F.2d at 600. For commentary on *Diversified*, see Note, *The Attorney-Client Privilege, the Self-Evaluative Report Privilege and Diversified Industries, Inc. v. Meredith*, 40 Ohio St. L.J. 699 (1979); 47 Geo. Wash. L. Rev. 413 (1979).

68. The original court of appeals panel held that the memoranda were discoverable. 572 F.2d at 603. On rehearing en banc, however, the court reversed the panel, finding the memoranda privileged under a modified *Harper & Row* test. *Id.* at 609-11.

69. *Id.* at 609.

70. The Eighth Circuit wholly adopted the criteria set forth in 2 J. Weinstein & M. Berger, *supra* note 12, ¶ 503(b)[04], at 503-47 to -49. Weinstein and Berger note that the additional confidentiality requirement is necessary to "ensure that routine business records are not being immunized from discovery by the simple device of forwarding a copy to counsel," *id.* at 503-49, and to ensure that the information is not being "circulated unnecessarily in the organization." *Id.* (quoting Simon, *supra* note 5, at 985).

71. 81 F.R.D. 377 (D.D.C. 1978). In *Ampicillin*, plaintiff sought disclosure of over 700 documents in a consolidated civil antitrust case. *Id.* at 380. Defendant refused to produce them on the ground that they were privileged, *id.* at 380, and the court upheld the claim of privilege as to some of the documents. *Id.* at 394.

cillin court required "a close relationship between the communication and a decision on the legal problem [that is the subject matter of the communication] . . . rather than a request by a superior to an employee that the communication be made"⁷² as is required under *Harper & Row* and *Diversified*. Further, the *Ampicillin* court rejected the *Diversified* strict confidentiality requirement, maintaining that the communicator's intention that the discussion be confidential is sufficient to retain the privilege.⁷³

None of the aforementioned tests are fully consonant with the theoretical underpinnings of the corporate attorney-client privilege. The control group test ignores modern corporate realities, and thus ultimately hinders, rather than promotes, consultation with counsel.⁷⁴ First, many modern corporations are decentralized, delegating de facto responsibility for corporate action to middle or lower management,⁷⁵ yet such parties are generally not held to be within the control group.⁷⁶ In addition, lower-echelon employees are often the

72. *Id.* at 385 n.8. It is the relevance of the legal problem to the communication that is central to this test; to be protected communications must be made in the reasonable belief that they contain information necessary to the resolution of a legal problem. *Id.* at 385 n.10. This test was used without discussion in *SEC v. Texas Int'l Airlines*, 29 Fed. R. Serv. 2d (Callaghan) 408 (D.D.C. 1979).

73. 81 F.R.D. at 388 (citing *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 37 (D. Md. 1974); *City of Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831, *adhered to*, 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. 843 (1963)). The *Ampicillin* court reasoned that communications "which were believed to be relevant to a particular legal problem," 81 F.R.D. at 387, and "made with the intention of confidentiality," are privileged. *Id.* at 388 (emphasis omitted). As the court noted, "[i]ntent and confidentiality will depend on the circumstances of the particular case and may require a document-by-document determination in which the substance of the document may be the only objective indicator of the client's intention." *Id.* at 390. Because the *Ampicillin* test is based on the client's intent, and intent is a question of fact, *id.*, under the *Ampicillin* rationale, all determinations of whether the attorney-client privilege attaches to corporate employee communications will depend on the facts of the case.

74. See Kobak, *supra* note 51, at 365-66; Pye, *Fundamentals of the Attorney-Client Privilege*, 15 Prac. Law., Nov. 1969, at 15, 19; Weinschel, *supra* note 65, at 875-76; *Death Knell*, *supra* note 35, 1068-69.

75. See *United States v. Upjohn Co.*, 600 F.2d 1223, 1226 (6th Cir. 1979), *rev'd on other grounds*, 449 U.S. 383 (1981); *In re Grand Jury Investigation*, 599 F.2d 1224, 1227 (3d Cir. 1979); Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 Va. L. Rev. 1099, 1140 (1977); Weinschel, *supra* note 65, at 876; *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1254 & n.61, 1259 & n.78 (1979); *A Suggested Approach*, *supra* note 12, at 373.

76. *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164 (D.S.C. 1974); 2 J. Weinstein & M. Berger, *supra* note 12, ¶ 503[01], at 503-12 n.1, 503-13.

ones in a position to know the facts in controversy,⁷⁷ yet the attorney cannot be sure that his communications with these natural spokesmen will be deemed privileged under the control group test. As the Supreme Court noted in *Upjohn*, the application of the control group test is unpredictable, in that cases applying the test have made "[d]isparate decisions" as to who is a member of the control group.⁷⁸ This uncertainty is especially problematic in internal investigations.⁷⁹ The policy behind the attorney-client privilege is to foster full and free communications,⁸⁰ yet under the control group test the uncertain protection afforded lower and middle-level employee communications may force attorneys to interview only less knowledgeable upper management. Counsel is thus faced with the "Hobson's choice" of garnering all the relevant facts without the benefit of the privilege or of proceeding without the necessary facts in order to maintain the privilege.⁸¹

Both the *Harper & Row* and *Diversified* formulations of the subject matter test suffer from similar problems. First, if to be privileged

77. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164-65 (D.S.C. 1974); see Memorandum of the Chicago Bar Association as *Amicus Curiae* at 6, *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The Chicago Bar Association argued that "[a]n antitrust case involving allegations of price fixing [cannot] be defended without the defendant's attorney interviewing the sales personnel, nor prosecuted without the plaintiff's attorney interviewing the purchasing agents. Similarly, a product design defect case [cannot] be defended without the attorney interviewing the design engineers, nor prosecuted without interviewing the corporate employees who either bought, serviced or operated the allegedly defective equipment. Rarely will such individuals be members of the control group." *Id.*

78. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981); see *supra* notes 53-54.

79. *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 387 (D.D.C. 1978); Pye, *supra* note 74, at 19. In *Upjohn*, for example, the Sixth Circuit held that the privilege was inapplicable to information gleaned from interviews with lower-level employees in the course of an internal investigation. *United States v. Upjohn Co.*, 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981). The dictates of the Foreign Corrupt Practices Act of 1977 (adding in part Securities Exchange Act of 1934, § 13(b)(2), 15 U.S.C. § 78m(b)(2) (1976)), and the voluntary disclosure program of the Securities and Exchange Commission, Securities Exchange Act of 1934, §§ 10(b), 13(a), 13(b)(2), 14(a), 15 U.S.C. §§ 78j(b), 78m(a), 78m(b)(2), 78n(a) (1976), require internal investigations for the protection of the corporation. Thus, it is general practice that counsel conduct internal investigations upon the discovery of corporate impropriety. Block & Barton, *supra* note 16, at 8-9. Counsel can only adequately conduct such investigations if they have sufficient information. Under the control group test, counsel is faced with the difficult choice of questioning lower-level employees without a privilege, or proceeding without the proper data and maintaining the privilege. Weinschel, *supra* note 65, at 876. See generally Note, *Limited Waiver of the Attorney-Client Privilege upon the Voluntary Disclosure to the SEC*, 50 Fordham L. Rev. 963 (1982) (discussion of waiver problems in the SEC investigation context).

80. See *supra* note 30 and accompanying text.

81. Weinschel, *supra* note 65, at 876; see *The Control Group Test*, *supra* note 12, at 427-28.

communications to counsel must be made at the behest of the employee's superior, the scope of the privilege is unnecessarily determined by the question of who is sufficiently superior to direct employees to communicate with counsel.⁸² In addition, the "scope of the employee's duties" requirement is susceptible of abuse if interpreted narrowly; an employee's duties should involve a responsibility to help assure the lawful operation of all elements of the corporation,⁸³ rather than be confined to the performance of duties attendant to his job title. Second, although the *Diversified* court addressed the circumstance that many persons "beyond those persons who . . . need to know its contents" are familiar with the matter communicated to corporate counsel,⁸⁴ it used this observation to limit, rather than extend, the types of communications that could be considered confidential. To hold that such communications would be deemed nonconfidential would virtually eliminate the privilege in many circumstances.⁸⁵

Although the *Ampicillin* court succeeded in resolving the confidentiality question by stating that the intention of confidentiality is sufficient to retain the privilege,⁸⁶ the court's approach unnecessarily restricts the nature of employee communications. Corporate counsel are often required to examine matters that are indirectly related to legal problems, such as auditing financial records, investigating corporate activities or recommending future courses of action.⁸⁷ Particularly in the context of internal investigations, the *Ampicillin* "legal problem" requirement creates a dilemma for corporate counsel: Because counsel can never predict with certainty whether their communications with corporate employees are sufficiently related to a legal problem, they may decide to forego such investigations.⁸⁸

82. 2 D. Louisell & C. Mueller, *supra* note 24, § 212, at 566-67; Stern, *supra* note 51, at 1146. Further, it has been noted that by requiring that the employee's communication to counsel be both at his superior's direction and relate to the duties of his employment, corporations could protect all communications by authorizing all employees to report all job-related information to counsel. *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 386 (D.D.C. 1978).

83. Stern, *supra* note 51, at 1146.

84. *Diversified Indus. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (adopting the approach of 2 J. Weinstein & M. Berger, *supra* note 12, ¶ 503(b)[04], at 503-49 to -50).

85. See *supra* note 79 and accompanying text.

86. See *supra* note 73.

87. *Diversified Indus. v. Meredith*, 572 F.2d 596, 610 (8th Cir. 1978) (en banc); see Simon, *supra* note 5, at 969; Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226, 1226 (1962) [hereinafter cited as *Functional Overlap*].

88. The unpredictability problem arising from the *Ampicillin* test may have the same results as the unpredictability problem arising from the control group test. See *supra* note 81 and accompanying text.

Despite these deficiencies, the various subject matter tests better comport with the conceptual underpinnings of the privilege than does the control group test, in that they better encourage communications and focus on the nature of the communication rather than on the artificial consideration of the title of the communicator.⁸⁹ Despite these advantages, however, all three versions unnecessarily restrain full and free disclosure. Thus, with many inadequate and conflicting tests, the scope of the corporate attorney-client privilege issue was ripe for Supreme Court review in *Upjohn Co. v. United States*.⁹⁰

II. *UPJOHN CO. V. UNITED STATES*: THE CONSEQUENCES OF UNCERTAINTY

In choosing among the various standards for measuring the scope of the attorney-client privilege in the corporate context, the Sixth Circuit, in *United States v. Upjohn Co.*,⁹¹ rejected the subject matter test,⁹² aligned itself with the proponents of the control group analysis,⁹³ and denied Upjohn's claim of privilege.⁹⁴ Although commentators believed that the Supreme Court granted certiorari to resolve the scope of the privilege issue,⁹⁵ the Court merely reversed the Sixth Circuit,⁹⁶ rejected the control group test as "difficult to apply in practice,"⁹⁷ and declined "to lay down a broad rule or series of rules to

89. See 2 J. Weinstein & M. Berger, *supra* note 12, ¶ 503(b)[04], at 503-46 to -47; Note, *The Corporate Attorney-Client Privilege: The Subject Matter Test v. The Control Group Test: Will Reasonableness Prevail?*—*United States v. Upjohn*, 5 Del. J. Corp. L. 480, 496-97 (1980) [hereinafter cited as *The Subject Matter Test v. The Control Group Test*]. One commentator noted that the subject matter test of *Harper & Row* disregards "the faulty nexus of the control group test." Kobak, *supra* note 51, at 367-68.

90. 449 U.S. 383 (1981).

91. 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

92. *Id.* at 1227. The Sixth Circuit reasoned that the subject matter approach "goes too far," in that it encourages senior managers to ignore information purposely, forces corporate counsel to be the "exclusive repository of unpleasant facts," and "acts as a bar to the discovery of the truth." *Id.*

93. *Id.* The Sixth Circuit reasoned that the control group test not only "guards against undue limitation of evidence," but also promotes consultation with counsel. *Id.*

94. *Id.* at 1227-28. The claim of privilege was denied in part, and part of the case was remanded to determine who were members of the control group, because the control group member communications to counsel would be deemed privileged. *Id.*

95. *The Subject Matter Test v. The Control Group Test*, *supra* note 89, at 481; *Alternatives to the Control Group Test*, *supra* note 12, at 478-79.

96. *Upjohn Co. v. United States*, 449 U.S. 383, 402 (1981).

97. *Id.* at 393. The Court noted that the very concept of a control group suggests unpredictability given that different courts have included different members in the group. *Id.* The Court also found the control group test too narrow to be consistent with common-law principles. *Id.* at 397.

govern all conceivable future questions,"⁹⁸ on the ground that to decide anything but the case before it would "violate the spirit of Federal Rule of Evidence 501."⁹⁹

The Court argued that the control group test contradicts the policy underlying the attorney-client privilege.¹⁰⁰ The Court noted that under the control group analysis, the attorney cannot secure privileged information from middle management and is thus unable to ascertain the full factual background of a legal problem.¹⁰¹ Further, Justice Rehnquist, writing for the Court, stated that the control group test "frustrates the very purpose of the privilege" in that it "makes it more difficult to convey full and frank legal advice to the [non-control group] employees who will put into effect the client corporation's policy."¹⁰²

The *Upjohn* Court based its holding on factual considerations alone¹⁰³ and narrowly confined its holding to those facts,¹⁰⁴ stating

98. *Id.* at 386.

99. *Id.* at 396.

100. *See id.* at 390. The Court stated that the control group test "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also to the giving of information to the lawyer to enable him to give sound and informed advice." *Id.*

101. *Id.* at 390-91. As the Court noted, the ABA Code of Professional Responsibility provides that "[a] lawyer . . . be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system." *Id.* at 391 (quoting Model Code of Professional Responsibility EC 4-1 (1979)). The Kutak Commission's Final Draft of the Model Rules of Professional Conduct left this provision essentially intact. Model Rules of Professional Conduct rule 1.1 & accompanying comment (Discussion Draft 1980), reprinted in 67 A.B.A. J. 1299 (1981). In *Upjohn*, the Court inferred that use of the control group test is contrary to the mandate of Ethical Consideration 4-1. 449 U.S. at 391.

102. 449 U.S. at 392; accord *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164 (D.S.C. 1974).

103. 449 U.S. at 386. In *Upjohn*, independent accountants, while conducting an audit of one of the corporation's foreign subsidiaries, discovered a "slush fund" used by the subsidiary to bribe foreign officials. *Id.* This information was reported to Upjohn's general counsel, *id.*, who, in consultation with outside counsel and the chairman of the board, decided to conduct an internal 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." *Id.* at 394 (quoting *United States v. Upjohn Co.*, 78-1 U.S. Tax Cas. (CCH) ¶ 9277, at 83,599 (W.D. Mich. Feb. 23, 1978)) (emphasis added by Supreme Court). Pursuant to these inquiries, a questionnaire and letter signed by the chairman was sent to all foreign managers. These managers were instructed to interview employees who might provide the requested information, and to treat the investigation as "highly confidential." *Id.* at 387. The Supreme Court noted that the confidentiality warning was "[c]onsistent with the underlying purposes of the attorney-client privilege." *Id.* at 395. Further, in upholding Upjohn's claim of privilege, the Court found that the policy statement accompanying the questionnaire expressed the intent to secure legal advice. Upjohn voluntarily submitted detailed information as to \$700,000 of "slush fund" expenditures, *United States v. Upjohn Co.*, 600 F.2d 1223, 1225 (6th Cir. 1979), *rev'd*, 449

that the Court sits "to decide concrete cases and not abstract propositions of law."¹⁰⁵ In addition to rejecting the control group test, the opinion may be read as implicitly rejecting the various subject matter tests,¹⁰⁶ in that the Court refused to adopt any "broad rule or series of rules"¹⁰⁷ even though the facts before it ideally fit the criteria of the various subject matter tests.¹⁰⁸ Indeed, the Court noted that "no

U.S. 383 (1981), to the Securities and Exchange Commission and the Internal Revenue Service. *Id.* at 1225. In a subsequent audit of the company's tax returns, the IRS learned that Upjohn had made illegal payments of approximately \$4,400,000 in many of the 136 foreign countries in which Upjohn does business, *id.*, and consequently issued a summons pursuant to 26 U.S.C. § 7602 (1976), demanding production of all notes and memoranda prepared in the investigation. 449 U.S. at 387-88. Upjohn refused discovery on the grounds that the communications were privileged and that the memoranda made pursuant to the investigation were protected by work product immunity. *Id.* at 388. For analysis of the relation between the attorney-client privilege and the work product immunity doctrine, see 2 D. Louisell & C. Mueller, *supra* note 24, § 211, at 549-56 (contrasting the two doctrines); *Death Knell*, *supra* note 35, at 1101-03 (concluding that a "record immunity" doctrine combining both the corporate attorney-client privilege and work product immunity is preferable to the use of two separate doctrines). Because the Court narrowly restricted its holding to the facts before it, the decision is of little utility to later courts seeking to discern corporate attorney-client privilege guidelines. *Death Knell*, *supra* note 35, at 1095; see *Baxter Travenol Laboratories, Inc. v. Lemay*, 89 F.R.D. 410, 413-14 (S.D. Ohio 1981). But see Stern, *supra* note 51, at 1146 ("Upjohn has put the application of the attorney-client privilege as to corporations back on the right track."); Note, *The Attorney-Client Privilege as Applied to Corporate Clients*, 15 Akron L. Rev. 119, 129 (1981) (arguing that the *Upjohn* analysis supports the *Diversified* modified subject matter test).

104. 449 U.S. at 386. The Court stressed that the chairman of the board, in conjunction with the general counsel/vice president, directed the investigation, that the content of the letter directing employee cooperation with the investigation indicated the intent to secure legal advice, and that the investigation was deemed "highly confidential" by the chairman. *Id.* at 394-95.

105. *Id.* at 386.

106. *Baxter Travenol Laboratories, Inc. v. Lemay*, 89 F.R.D. 410, 413 (S.D. Ohio 1981) (The *Upjohn* Court "did not establish the 'subject matter' test as the standard by which the scope of corporate attorney-client privileges would be measured.").

107. 449 U.S. at 386.

108. In *Upjohn*, the corporate employees' communications (a) concerned matters within the scope of their employment, and (b) such communications were made at the direction of the chairman of the board, *id.* at 394-95, thus meeting the criteria of the subject matter test as enunciated in *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971). The *Upjohn* facts also meet the criteria set forth in *Diversified Indus. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc), in that (a) the chairman of the board directed employees to communicate with counsel, (b) so that the corporation could seek legal advice, (c) the employees' communications were within the scope of their corporate duties, (d) were made in order to secure legal advice, and (e) there was no indication that these communications were disseminated beyond those who needed to know their contents given that the communications were deemed "highly confidential." See 449 U.S. at 394-95. Lastly, because

abstractly formulated and unvarying 'test' will necessarily enable courts to decide questions such as this with mathematical precision."¹⁰⁹

Ironically, the *Upjohn* Court 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."¹¹⁰ But as Chief Justice Burger noted in his concurrence, the majority did not "clarify aspects of the law of privileges properly before [it]."¹¹¹ Rather than minimizing the confusion, the Court created even more uncertainty.¹¹² The absence of any discernible guidelines is likely to make the task of determining whether communications are privileged extremely difficult for courts. Indeed, the two post-*Upjohn* decisions that deal squarely with the scope of the corporate attorney-client privilege reflect this confusion. In *Baxter Travenol Laboratories, Inc. v. Lemay*,¹¹³ the District Court for the Southern District of Ohio stated that "one searches the [*Upjohn*] Court's Opinion in vain for some substituted guideline which might enhance the predictability of the privilege."¹¹⁴ Rather than applying any analytical test to determine the existence of the privilege, the *Baxter* court compared the

(a) the communications to counsel were made to secure legal advice, (b) the employees "were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice," (c) the communications related to the scope of the employees' duties, and (d) were "highly confidential," *id.*, the *Upjohn* facts also meet the criteria in *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 385 (D.D.C. 1978).

109. 449 U.S. at 393.

110. *Id.*

111. *Id.* at 403-04 (Burger, C.J., concurring in part and concurring in the judgment). Chief Justice Burger criticized the majority's failure to establish guidelines, and set forth his own alternative test to discern the scope of the corporate attorney-client privilege. *Id.* at 402-03.

112. In his concurrence, Chief Justice Burger noted that the majority's statement that the failure to establish guidelines "may to some slight extent undermine desirable certainty" . . . neither minimizes the consequences of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented." *Id.* at 404 (Burger, C.J., concurring in part and concurring in the judgment).

113. 89 F.R.D. 410 (S.D. Ohio 1981). In *Baxter*, the defendants left the plaintiffs' employ and established a competing business. In response, the plaintiffs brought suit for the defendants' breach of their employment contracts, breach of their fiduciary duties and for wrongful appropriation of the plaintiffs' confidential information. One of these former employees, Warnick, was hired to act as a litigation consultant by the plaintiff corporation, and informed plaintiffs' counsel of the details of the defendants' misappropriation of plaintiff's business secrets. When the defendants sought discovery of Warnick's disclosures, the plaintiffs refused, claiming the protection of the attorney-client privilege. *Id.* at 412. The court upheld the claim of privilege. *Id.* at 414.

114. *Id.* at 413.

facts before it with those in *Upjohn*, finding that because the same "operative factors" existed, the privilege must be granted.¹¹⁵ In *In re LTV Securities Litigation*,¹¹⁶ the District Court for the Northern District of Texas also based its holding on the similarity of the facts before it to those in *Upjohn*.¹¹⁷ Although these two courts found the facts in the cases before them similar to those in *Upjohn*, the unique facts in *Upjohn* make the case easily distinguishable. If, in the future, courts are to base their decisions on comparisons to *Upjohn*, roughly similar facts may serve as a pretext for a court to compel disclosure when so inclined. *Upjohn*'s obfuscation of the scope of the corporate attorney-client privilege also hinders counsel's ability to advise corporate clients. Without any discernible judicial guidelines, the attorney's ability to predict whether communications will be privileged virtually disappears.¹¹⁸ The scope of the privilege determination may rest on whether the facts of a case are similar to those of *Upjohn* or on which test is employed by the forum eventually chosen.¹¹⁹ Accordingly, a more substantive set of guidelines must be established.

III. THE TENSION BETWEEN PRIVILEGE AND DISCOVERY RULES

In attempting to fashion a corporate privilege rule, the judiciary has struggled to strike a balance between the policies underlying the privilege and those supporting liberalized discovery.¹²⁰ The attorney-client privilege is designed to facilitate a full and frank exchange of

115. *Id.* at 413-14. The *Baxter* court defined the "operative factors" as "those considerations upon which the Supreme Court expressly found warranted the conclusion that the attorney-client privilege extended to communications from *Upjohn*'s lower-echelon employees to *Upjohn*'s counsel." *Id.* at 413.

116. 89 F.R.D. 595 (N.D. Tex. 1981). In *LTV*, the buyers and sellers of various *LTV* securities brought a securities fraud class action suit against the corporation, following an internal investigation by the corporation in response to SEC subpoenas. The class sought disclosure of documents related to the SEC investigation. The corporate defendant refused on privilege grounds. *Id.* at 598. The claim of privilege was upheld. *Id.* at 621.

117. *Id.* at 602. The *LTV* court placed great emphasis on the intent to garner legal advice, stating that "the focal point [of the privilege] is the purpose of the lawyer in gathering the data." *Id.* at 603.

118. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981); Block & Barton, *supra* note 16, at 17; *Alternatives to the Control Group Test*, *supra* note 12, at 481.

119. See *supra* note 44 and accompanying text.

120. See, e.g., *United States v. Upjohn Co.*, 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd on other grounds*, 449 U.S. 383 (1981); *Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977); *United States v. Goldfarb*, 328 F.2d 280, 282 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 600 (N.D. Tex. 1981); see C. McCormick, *supra* note 21, § 96, at 202-03; 8 J. Wigmore, *supra* note 2, § 2291, at 554; Radin, *supra* note 17, at 491.

information between an attorney and his client¹²¹ and has been deemed "the most important testimonial privilege."¹²² The policy behind the privilege fully applies to corporate communications;¹²³ "the group of agents and directors who motivate a corporation need the incentive of the privilege fully as much as do private clients to encourage full disclosure to counsel."¹²⁴

Because "the privilege remains an exception to the general duty to disclose,"¹²⁵ many courts and commentators have contended that the attorney-client privilege is antithetical to the aims of liberalized discovery.¹²⁶ Courts have expressed the fear that a broad privilege rule would create a "zone of silence" over corporate affairs, immunizing all information disclosed by employees from discovery.¹²⁷ Further,

This Note argues, however, that the theoretical underpinnings of the privilege and discovery rules are not entirely inconsistent. See *infra* notes 129-36 and accompanying text.

121. See *supra* note 30 and accompanying text.

122. 2 D. Louisell & C. Mueller, *supra* note 24, § 207, at 504.

123. E.g., *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981); *United States v. Louisville & N.R.R.*, 236 U.S. 318, 336 (1915); *Weil Inv. Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 23 (9th Cir. 1981); *Diversified Indus. v. Meredith*, 572 F.2d 596, 608 (8th Cir. 1978) (en banc); *Garner v. Wolfenbarger*, 430 F.2d 1093, 1097 & n.10 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *United States v. Bartone*, 400 F.2d 459, 461 (6th Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969). The only case to renounce the corporate privilege, *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771, *adhered to*, 209 F. Supp. 321 (N.D. Ill. 1962), was emphatically reversed by the Seventh Circuit, on the grounds that "based on history, principle, precedent and public policy the attorney-client privilege in its broad sense is available to corporations." *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963). The attorney-client privilege also applies to other non-individual clients such as trade associations, *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978), governmental bodies, *Hearn v. Rhay*, 68 F.R.D. 574, 579 (E.D. Wash. 1975); *Connecticut Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448, 450 (S.D.N.Y. 1955), administrative agencies, *Cogdill v. TVA*, 7 F.R.D. 411, 414 (E.D. Tenn. 1947), and "a partnership . . . , [a] transitory joint venture . . . , a tenant's association, a property owners' association, a boy scout troop or a political club or inchoate labor union." 2 J. Weinstein & M. Berger, *supra* note 12, § 503(a)(1)[01], at 503-18.

124. *The Lawyer-Client Privilege*, *supra* note 5, at 241; *accord* *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 736, 388 P.2d 700, 709, 36 Cal. Rptr. 468, 477 (1964) (en banc) ("Certainly the public policy behind the attorney-client privilege requires that an artificial person be given equal opportunity with a natural person to communicate with its attorney.").

125. 8 J. Wigmore, *supra* note 2, § 2291, at 554.

126. See sources cited *supra* note 120.

127. *United States v. Upjohn Co.*, 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd on other grounds*, 449 U.S. 383 (1981); *Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286, 291-92 (D. Colo. 1979); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 387 (D.D.C. 1978); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1163 (D.S.C. 1974); see *Simon*, *supra* note 5, at 955-56; Note, *Privileged Communi-*

commentators have argued that if the scope of the privilege were expanded, it would be difficult for an adversary to ferret out information during discovery.¹²⁸

These arguments ignore the fact that privileged information is often discoverable elsewhere. The privilege protects only disclosure of communications, not disclosure of the underlying facts communicated to the attorney.¹²⁹ Under the discovery rules,¹³⁰ when a party seeks to depose a corporation, the corporation must designate a person to "testify as to matters known or reasonably available to the organization."¹³¹ A party faced with a claim of privilege is then free to depose this designated person as well as other employees to obtain discovery regarding any facts "relevant to the subject matter involved in the pending action."¹³² While opponents of the privilege maintain that it would be far easier to subpoena all attorney records,¹³³ the *Upjohn* Court correctly noted that "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."¹³⁴ Convenience cannot serve as a basis to override the privilege.

Moreover, opponents of liberalized privilege rules fail to recognize that the policy rationales behind the privilege and discovery rules are

cations—Inroads on the Control Group Test in the Corporate Area, 22 Syracuse L. Rev. 759, 766 (1971).

128. Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 40 U. Det. L.J. 299, 344 (1963) (Gardner II); *The Control Group Test*, *supra* note 12, at 427.

129. *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981); *Diversified Indus. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc); *Baxter Travenol Laboratories, Inc. v. Lemay*, 89 F.R.D. 410, 415 (S.D. Ohio 1981); *City of Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831, *adhered to*, 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); 2 J. Weinstein & M. Berger, *supra* note 12, ¶ 503(a)(4)[01]-(b)[03], at 503-29 to -41.

130. Fed. R. Civ. P. 26-37; *see supra* note 35.

131. Fed. R. Civ. P. 30(b)(6). Federal Rule of Civil Procedure 31(a) employs the same criteria for depositions upon written questions. *Id.* 31(a).

132. *Id.* 26(b)(1); *accord* *Diversified Indus. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 608 (N.D. Tex. 1981); 4A J. Moore, *Moore's Federal Practice* ¶ 33.07, at 33-41, ¶ 33.20, at 33-99 (3d ed. 1981). The privilege belongs to the corporation, and the employee-defendant cannot claim the privilege to protect his own disclosures to corporate counsel made in the furtherance of seeking legal advice for the corporation. *See* *Diversified Indus. v. Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1978) (en banc).

133. *See The Control Group Test*, *supra* note 12, at 427 & n.14.

134. 449 U.S. at 396 (quoting *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J. concurring)); *see* Sterk, *Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems*, 61 Minn. L. Rev. 461, 468 (1977) ("[I]t would be unjust in an adversary system to allow one party to force the opposing lawyer to disclose damaging admissions made by his client.").

not necessarily antithetical. The overriding aim of discovery, ensuring the "fair and open adjudication of controversies," largely depends on "the industry and efficiency of counsel."¹³⁵ A restrictive interpretation of the attorney-client privilege makes counsel wary of gathering all relevant information for fear that it may be used against his client.¹³⁶ Thus, such an interpretation may prevent counsel from adequately representing his client, and therefore impedes, rather than promotes, the "fair" adjudication of controversies.

IV. PROPOSED SOLUTION

Because the liberalization of privilege rules would not substantially impede discovery, the scope of the attorney-client privilege must be reassessed. Instead of choosing between the alternative tests currently employed by courts to determine whether the communications of particular employees are privileged, the privilege should apply to communications of all corporate employees.

Given that the attorney-client privilege may be used to frustrate discovery if used improperly, the proposed rule that the privilege apply to the communications of all corporate employees is susceptible of abuse if it is not circumscribed. It is proposed that the party asserting the privilege must sustain the burden of proof on certain narrow issues.¹³⁷ The claim of privilege should be granted only when

135. *Death Knell*, *supra* note 35, at 1052-53.

136. *See supra* note 81 and accompanying text.

137. The burden of proof is usually said to rest with the party asserting the privilege. *United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978); *Union Planters Nat'l Bank v. ABC Records, Inc.*, 82 F.R.D. 472, 475 (W.D. Tenn. 1979); *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 457 n.1 (N.D. Cal. 1978); *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 729, 388 P.2d 700, 704, 36 Cal. Rptr. 468, 472 (1964) (en banc). Therefore, a party asserting the privilege must establish that the counsel to whom the communication was made was an attorney hired to represent the corporation, present some description of the type of disclosure claimed to be privileged and show that the attorney was not consulted for purely economic or business reasons. Given that the ultimate purpose of the privilege is to encourage the professional relationship, purely non-legal communications should not be protected from disclosure. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); *see United States v. Davis*, 636 F.2d 1028, 1044 (5th Cir.) (business advice and the attorney's personal business transactions are not covered by the privilege), *cert. denied*, 102 S. Ct. 320 (1981); *Functional Overlap*, *supra* note 87, at 1250 (purely business advice is not protected by the attorney-client privilege). Therefore, if an attorney acted solely in the capacity of a business adviser, *see, e.g.*, *United States v. Rosenstein*, 474 F.2d 705, 714-15 (2d Cir. 1973) (letters from attorney directing client to enter into a business deal were not privileged); *Lowy v. Commissioner*, 262 F.2d 809, 812 (2d Cir. 1959) (attorney's actions as business associate not privileged); *United States v. Vehicular Parking, Ltd.*, 52 F. Supp. 751, 753 (D. Del. 1943) (letters of an attorney acting as a business manager not privileged), corporate director or officer, *see, e.g.*, *In re Grand Jury Proceedings of Browning Arms Co.*,

the corporation can show that (A) the employee communicating the information was not a "fortuitous witness," and (B) that the employee did not intend to waive the privilege.¹³⁸

A. The Fortuitous Witness Exception

Given the large numbers of employees in some modern corporations, it is possible that by pure chance an employee might witness events involving the corporation that have no relationship to his employment. For instance, in *Hickman v. Taylor*,¹³⁹ crew members who survived a tug boat accident and who happened to be employees of the tug's owner were interviewed by their employer's counsel as to the cause of the accident.¹⁴⁰ The Supreme Court noted that these interviews were with bystander "witnesses," and asserted that their communications with their employer's counsel were not privileged.¹⁴¹

528 F.2d 1301, 1303 (8th Cir. 1976) (communications to an attorney on board of directors not privileged); *SEC v. Gulf & W. Indus.*, 518 F. Supp. 675, 683 (D.D.C. 1981) (information received by an attorney in his role as corporate director not privileged); *but cf.* *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981) (information garnered from internal investigation by general counsel/vice president held privileged), or an accountant, *see, e.g.*, *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (accounting service sought from an attorney not privileged); *Olender v. United States*, 210 F.2d 795, 805-06 (9th Cir. 1954) (same); *In re Shapiro*, 381 F. Supp. 21, 22 (N.D. Ill. 1974) (same), the communications with corporate employees would not be privileged. The courts have denied the privilege in many other circumstances in which attorneys did not act as legal advisors. *See, e.g.*, *United States v. Bartone*, 400 F.2d 459, 461 (6th Cir. 1968) (attorney's fund-tracing services not privileged), *cert. denied*, 393 U.S. 1027 (1969); *Canaday v. United States*, 354 F.2d 849, 857 (8th Cir. 1966) (attorney acting "merely as a scrivener"); *Modern Woodmen of Am. v. Watkins*, 132 F.2d 352, 354 (5th Cir. 1942) (attorney acting as a friend); *Radio Corp. of Am. v. Rauland Corp.*, 18 F.R.D. 440, 444 (N.D. Ill. 1955) (attorney acting as a negotiator between corporations); *cf.* *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 146 (D. Del. 1977) (attorney-client privilege does not protect the results of research, tests, experiments and other technical information communicated to the attorney).

138. It is a basic principle of attorney-client privilege law that communications to counsel in furtherance of a future crime or fraud are not privileged. *Clark v. United States*, 289 U.S. 1, 15 (1933); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 802 (3d Cir. 1979); *SEC v. Gulf & W. Indus.*, 518 F. Supp. 675, 680 (D.D.C. 1981); C. McCormick, *supra* note 21, § 95. It is the client's intention that the communication be in furtherance of the crime or fraud which controls, regardless of whether the attorney was cognizant of his client's purpose. *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 802 (3d Cir. 1979); *United States v. Calvert*, 523 F.2d 895, 909 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *United States v. Aldridge*, 484 F.2d 655, 658 (7th Cir. 1973), *cert. denied*, 415 U.S. 922 (1974).

139. 329 U.S. 495 (1947).

140. *Id.* at 498.

141. *Id.* at 508 (dictum); *accord* *General Counsel v. United States*, 599 F.2d 504, 510 (2d Cir. 1979); *Baxter Travenol Laboratories, Inc. v. Lemay*, 89 F.R.D. 410,

To comply with the *Hickman v. Taylor* rule, therefore, it is necessary to carve out a fortuitous witness exception to the rule of privilege.¹⁴² It should be noted, however, that this exception is exceedingly narrow, applying only to bystander witnesses who, by mere happenstance, are also corporate employees. Further expansion of the *Hickman* rule to employees communicating information relevant to the direct scope of their employment¹⁴³ raises the spectre of a privilege defined by job title as in the control group test denounced in *Upjohn*.¹⁴⁴

B. The Waiver Exception

Although the concepts of confidentiality and waiver are generally treated as distinct,¹⁴⁵ they overlap in one very significant area: If the client breaches the confidentiality of the attorney-client relationship by revealing the communication to third parties, the privilege is waived.¹⁴⁶ Traditionally, courts and commentators seeking severe restriction of the privilege advocate a strict standard of waiver, providing that any disclosure of confidential information, even if inadvertent, would end the privilege.¹⁴⁷ In the corporate context, such a

414 (S.D. Ohio 1981); *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 737, 388 P.2d 700, 709, 36 Cal. Rptr. 468, 477 (1964) (en banc).

142. The distinction between a communication made by a corporate employee *qua* employee and a mere witness has been referred to as both the "fortuitous witness" problem, *The Subject Matter Test v. The Control Group Test*, *supra* note 89, at 483-84, and the "bystander witness" problem. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971).

143. The scope of the employee's employment requirement is one part of the subject matter test. *Diversified Indus. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971). For criticisms of this approach, see *supra* notes 82-85 and accompanying text.

144. 449 U.S. at 393.

145. See 8 J. Wigmore, *supra* note 2, § 2292, at 554, § 2327, at 634; Block & Barton, *supra* note 16, at 5; Proposed Fed. R. Evid. 503, 511 (final revised draft), 56 F.R.D. 183, 235-37, 258 (1972). But see Block & Barton, *supra* note 16, at 17-21 (concepts discussed together).

146. The attorney-client privilege belongs to the client, *In re Grand Jury Proceedings* (FMC Corp.), 604 F.2d 798, 801 (3d Cir. 1979); *Garner v. Wolfenbarger*, 430 F.2d 1093, 1096 & 1097 n.7 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967); *Tillotson v. Boughner*, 350 F.2d 663, 665 (7th Cir. 1965), and accordingly, only the client may waive it. *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967); *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 459-60 (N.D. Cal. 1978).

147. Under traditional waiver theories, the presence of disinterested third parties, 8 J. Wigmore, *supra* note 2, §§ 2311, 2327; *The Lawyer-Client Privilege*, *supra* note 5, at 238, or voluntary disclosure of the communication to a third party, Permian

strict standard would pose a significant problem: If information contained in the communication is widely known throughout the corporate structure, it would be held to lose its confidentiality, and the privilege would be waived.¹⁴⁸

This Note proposes the adoption of the confidentiality test as enunciated in *In re Ampicillin Antitrust Litigation*¹⁴⁹ to govern waiver problems. Under the *Ampicillin* rationale, to be privileged, only the employee's communication need be confidential, not the underlying facts disclosed to the attorney. Further, the communication need only be made with the intention of confidentiality, and therefore another employee's knowledge of the communication does not necessarily waive the privilege.¹⁵⁰

Because this Note proposes that the privilege apply to communications of all corporate employees, however, it is possible that any employee could waive the privilege for the corporation if he intentionally reveals the communication to a third party. Thus, corporate counsel should strongly caution all employees with whom he communicates not to disclose the communication, for any intentional disclosure of the communication to third parties will waive the privilege for the entire corporation.

Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981); *United States v. Aronoff*, 466 F. Supp. 855, 862 (S.D.N.Y. 1979), or dissemination of the communication beyond the corporate employees who need to know the contents of that communication, automatically waives the privilege. *Diversified Indus. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc); *SEC v. Gulf & W. Indus.*, 518 F. Supp. 675, 681 (D.D.C. 1981); cf. *Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286, 292 (D. Colo. 1979) (privilege not allowed when documents in question may be routinely reviewed by employees).

148. *Diversified Indus. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc). Although some modern courts have modified the traditional waiver approach, holding that the intent to disclose, rather than the disclosure itself, should be the linchpin of waiver, see *United States v. Bump*, 605 F.2d 548, 550-51 (10th Cir. 1979); *United States v. Bigos*, 459 F.2d 639, 643 (1st Cir.), cert. denied, 409 U.S. 847 (1972); *United States v. Woodall*, 438 F.2d 1317, 1324 (5th Cir. 1971) (en banc), it is likely that the use of an "intent to disclose" theory would not, by itself, obviate the waiver problem in the corporate context. A court inclined to deny the privilege could find that, because the underlying facts of the communication are widely known throughout the corporate structure, it may be inferred that the corporation does not intend that the information be confidential, and therefore indicates intent to waive the privilege.

149. 81 F.R.D. 377, 389-90 (D.D.C. 1978).

150. *Id.* at 388-89. The *Ampicillin* court stated that "the most appropriate [means] . . . of encouraging individuals to speak freely to their attorneys . . . is to require only that the communication be confidential." *Id.* at 390 (emphasis in original). The court reasoned that if by virtue of a third party's knowledge of the communication the privilege could be waived, "it would be the rare communication that would be protected and, in turn, it would be the rare client who would freely communicate to an attorney." *Id.*

The approach suggested in this Note—that the communications of all corporate employees be privileged—better comports with the theoretical underpinnings of the privilege than do any of the tests adopted by the courts. The courts' use of either the control group or the various subject matter tests restricts the scope of the privilege on the ground that it poses an "obstacle to the investigation of the truth."¹⁵¹ Such strict construction of the privilege, however, unnecessarily hinders the truth-finding process in internal investigations. Only a standard, such as the one proposed in this Note, which gives the widest berth to the privilege and establishes a standard of certainty will promote full and frank communication between attorneys and their clients.

CONCLUSION

The concept of attorney-client privilege recognizes that full and free communication between attorneys and their clients ultimately facilitates justice. In the corporate context, however, courts have restricted the scope of the privilege in an attempt to balance it with discovery practices. The result of this balancing process is a myriad of confusing tests that misapprehend the policies underlying both privilege and discovery rules, and which deprive corporate counsel of predictability in their attorney-client relationships. A rule that the communications of all of a corporation's employees be privileged, tempered by limited exceptions, will better promote confident and efficient attorney-client relations and benefit the adversary system as a whole.

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151. *Id.* at 384; see *United States v. Upjohn Co.*, 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd on other grounds*, 449 U.S. 383 (1981); *Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977). Accordingly, many courts have called for a strict construction of the privilege. *E.g.*, *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 802-03 (3d Cir. 1979); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 600 (N.D. Tex. 1981); *Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480, 483 (E.D. Pa. 1978); *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 547-48 (D.D.C. 1970). *But see* *Garner v. Wolfenbarger*, 430 F.2d 1093, 1100 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).