Attorney-Client Privilege - Corporations - Work Product Doctrine - Administrative Summons

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Recent Decisions

ATTORNEY-CLIENT PRIVILEGE—CORPORATIONS—WORK PRODUCT DOCTRINE—ADMINISTRATIVE SUMMONSES—The Supreme Court of the United States, in a unanimous decision, has held that the control group test for determining the applicability of the attorney-client privilege in the corporate context is overly restrictive and that any future application of the privilege must be on a case by case basis. The Court also held that the work product doctrine is applicable to administrative summonses.


In January, 1976, the Upjohn Company hired independent accountants to conduct an audit of one of its foreign subsidiaries. The audit disclosed that the subsidiary had made payments to or for the benefit of foreign government officials in order to secure government business. This finding was communicated to Mr. Gerard Thomas, Upjohn's General Counsel. Thomas then consulted with outside counsel and with Upjohn's Chairman of the Board. As a result, the company conducted an internal investigation of what it termed "questionable payments." As a part of this investigation, Upjohn's counsel prepared and sent a letter, signed by the Chairman of the Board, containing a questionnaire to all foreign general and area managers. The managers were instructed to treat the investigation as highly confidential and not to discuss it with anyone except Upjohn employees who might be helpful in providing the requested information. Thomas and outside counsel also interviewed the recipients of the questionnaire and other Upjohn officers and employees as part of the internal investigation.

2. *Id.* The letter began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments by Upjohn. The letter identified Thomas as Upjohn's general counsel and that he was to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government. *Id.* at 386-87.
investigation.³

In March, 1976, the company voluntarily submitted to the Securities and Exchange Commission (SEC) a preliminary report which disclosed certain questionable payments.⁴ A copy of the report was also submitted to the Internal Revenue Service (IRS) which initiated an investigation to determine the tax consequences of the payments. Upjohn furnished a list of all employees interviewed and those who responded to questionnaires to the IRS.⁵

In November, 1976, the IRS issued a summons pursuant to 26 U.S.C. § 7602⁶ demanding production of all of Upjohn's investigatory files, including the questionnaires and interview memoranda relative to the investigation conducted under the supervision of Gerard Thomas.⁷ Upjohn declined to produce the documents,⁸ claiming that they were protected by the attorney-

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3. Id. The responses to the questionnaire were to be sent directly to Thomas. Id. at 387.
4. Id. An updated amendment, disclosing further payments, was submitted by Upjohn on July 26, 1976. Id. at 387 n.1.
5. Id. at 387.
6. 26 U.S.C. § 7602 provides, in relevant part:
   For the purpose of ascertaining the correctness of any return . . . [or] determining the liability of any person for any internal revenue tax . . . the Secretary is authorized . . . (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry; (2) To summon the person liable for tax . . . or any officer or employee of such person, . . . or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . .
7. 449 U.S. at 388.
8. Id. Upjohn did provide the IRS with details of $700,000.00 worth of payments which it conceded might have affected its federal income tax liability. However, the company furnished the IRS considerably less detailed information regarding another $3,700,000.00 worth of questionable payments claiming that these payments did not affect its tax liability. Although the company made its employees available for questioning by the IRS, the company refused to permit questions about the $3,700,000.00 worth of payments. The IRS claimed that the company's limited disclosure was inadequate and did not permit an independent evaluation by the IRS of the possible tax implications of the payments. Accordingly, the IRS issued the summons which became the subject of this appeal. Upjohn v. United States, 600 F.2d 1223, 1225 (6th Cir. 1979), rev'd and remanded 449 U.S. 383 (1981).
client privilege⁹ and constituted the work product¹⁰ of an attorney prepared in anticipation of litigation.¹¹

The United States filed a petition seeking enforcement of the summons in August, 1977, in the United States District Court for the Western District of Michigan. The district court held that the summons should be enforced because Upjohn had waived the attorney-client privilege by submitting its reports to the SEC.¹² On appeal, the Court of Appeals for the Sixth Circuit adopted a "control group test,"¹³ holding that those communications made by officers and agents who were not responsible for directing the company’s actions in response to legal advice were not privileged.¹⁴ The appeals court also stated that the work product doctrine does not apply to administrative summonses.¹⁵

The United States Supreme Court granted certiorari¹⁶ and reversed.¹⁷ Without dissent, the Court rejected the use of any test for the application of the corporate attorney-client privilege.¹⁸ Instead, the Court held that, based on the facts of this particular case, the communications were protected by the attorney-client privilege because they were made by corporate employees to counsel for the corporation, at the direction of corporate superiors, to secure legal advice from counsel, and because the employees were aware that they were being ques-

⁹. 449 U.S. at 388. See 8 J. WIGMORE, EVIDENCE, § 2292 (McNaughton Rev. 1961). Wigmores states that the attorney-client privilege is applicable:
       (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

¹⁰. 449 U.S. at 388. Work product includes interview, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and other tangible and intangible materials prepared by the attorney on behalf of his client. Generally, the Work Product Doctrine protects the invasion of the attorney’s privacy in the preparation and representation of his client. See Hickman v. Taylor, 329 U.S. 495, 511-12 (1947).

¹¹. 449 U.S. at 388.

¹². Id.

¹³. See infra text accompanying notes 69 & 70.

¹⁴. 449 U.S. at 388-89.

¹⁵. Id. at 389.


¹⁷. 449 U.S. at 402.

¹⁸. Id. at 386, 396-97.
tioned so that the corporation could secure legal advice.\textsuperscript{19} Further, the Supreme Court held that the work product doctrine was applicable to administrative summonses.\textsuperscript{20}

Justice Rehnquist, delivering the opinion of the court, observed that under the Federal Rules of Evidence, the existence of a privilege is based on common law principles as interpreted by the courts.\textsuperscript{21} Recognizing that the attorney-client privilege is one of the oldest privileges for confidential communications known to the common law, the Court noted that it was developed to encourage full and frank communications between attorneys and their clients, thereby promoting broader public interest in the observance of law and the administration of justice.\textsuperscript{22} Noting that the government did not contest the general proposition that the attorney-client privilege was applicable to corporations, the Court observed that it had in the past assumed that the privilege applied to corporations.\textsuperscript{23}

The Court then addressed the court of appeals' determination that because in the corporate context the client is an inanimate entity, the privilege only protects disclosures made by senior

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  \item \textsuperscript{19} Id. at 386, 394.
  \item \textsuperscript{20} Id. at 386, 397.
  \item \textsuperscript{21} Id. at 389. Federal Rule of Evidence 501, which relates to privileges, has left the problem of applying the attorney-client privilege up to the courts by providing:

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

  \textsc{Fed. R. Evid. 501}.

  \item \textsuperscript{22} 449 U.S. at 389. (quoting Trammel v. United States, 445 U.S. 40 (1980) (privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation); Fisher v. United States, 425 U.S. 391 (1976) (purpose of the privilege was recognized as encouraging clients to make full disclosures to their attorneys); Hunt v. Blackburn, 128 U.S. 464 (1888) (privilege is founded upon necessity, to aid counsel in obtaining information for advising their clients on matters of law)). See \textsc{Wigmore, supra note 9, \textsection 2290}.

  \item \textsuperscript{23} 449 U.S. at 390 (citing United States v. Louisville & Nashville R.R. Co., 236 U.S. 318 (1915) (attorney-client privilege applies to the corporate client)).
\end{itemize}
management who possess an identity analogous to the corporation as a whole. The Court noted that similar reasoning was advanced in City of Philadelphia v. Westinghouse Electric Corp., the first case to articulate the control group test. Justice Rehnquist then criticized this reasoning as overlooking the fact that the privilege exists to protect the giving of information to lawyers to enable them to give sound and informed professional advice to those who can act on it.

The Court concluded that the control group test was unduly restrictive and that it frustrated the purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the corporate client to attorneys seeking to render it legal advice. Further, the Court noted that the control group test inhibited the efforts of counsel to insure their clients' compliance with the law and that it was difficult to

24. 449 U.S. at 390. See 600 F.2d at 1226.
25. 210 F. Supp. 483, 485 (E.D. Pa. 1962), 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) (for attorney-client privilege to be applicable, the employee making the communication, of whatever rank he may be, must be in a position to control or to take a substantial part in the decision about any action which the corporation may take upon the advice of the attorney).
26. 449 U.S. at 390-91 (citing Trammel v. United States, 445 U.S. at 51; Fisher v. United States, 425 U.S. at 391). The Court emphasized that "[t]he first step to resolution of any legal problem is ascertaining the factual background and sifting through the facts." Id.
27. Id. at 392. The Court noted that for the individual client the provider of information and the person acting on the lawyer's advice are one and the same. In corporations, however, the giver of needed relevant information frequently is not the person who can act on the legal advice given as a result of the information received. Further, the Court observed that it is frequently non-control group employees who involve the corporation in serious legal difficulties and that in such cases it becomes vital for the corporate counsel to consult with these non-control group employees to discover relevant facts upon which to base his advice to the corporation. Under the control group test such communications would not be protected. Id. at 391-92.
28. Id. at 392-93 The Court stated:
In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem is thus faced with a Hobson's choice [e.g. in reality, no choice at all]. If he interviews employees not having the very highest authority their communication to him will not be privileged. If, on the other hand, he interviews only those employees with the very highest authority, he may find it extremely difficult, if not impossible, to determine what hap-
apply in practice with any degree of predictability. The Court stated that in order to achieve the purposes of the attorney-client privilege, the attorney and client must be able to predict whether their discussions will be privileged and that, therefore, an uncertain privilege is little better than no privilege at all.\(^{29}\)

Justice Rehnquist found that the communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel, and that the information thus given was not available from upper-level management. Further, the Court observed that the communications concerned matters within the scope of the employees' corporate duties and that the employees were sufficiently aware that they were being questioned so that the corporation could obtain legal advice.\(^{30}\) Justice Rehnquist noted that the communications were considered confidential when made and that the company has maintained this confidentiality. The Court therefore concluded that the communications must be protected from compelled disclosure to effectuate the underlying purposes of the attorney-client privilege.

The Court then noted the lower court's fear that extending the privilege to these communications would create a "zone of silence" over corporate affairs and severely burden discovery.\(^{31}\) The Court reasoned, however, that because the protection of the privilege extends only to communications and not to facts within the client's knowledge, the adversary is in no worse a position

\(^{29}\) 449 U.S. at 391-92 (quoting Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 608-09 (8th Cir. 1978) (en banc)).

\(^{30}\) 449 U.S. at 393. The Court noted that such unpredictability has led to disparate decisions in the federal courts. \textit{Id.} citing Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968) (control group includes managers and assistant managers of patent division and research and development department); Congoleum Indus., Inc. v. GAF Corp., 49 F.R.D. 82, 83-85. (E.D. Pa. 1969), aff'd 478 F.2d 398 (3d Cir. 1973) (control group includes only division and corporate vice-presidents, and not the directors of research and vice-presidents of production and research)).

\(^{31}\) 449 U.S. at 394.

\(^{32}\) \textit{Id.} at 395.

\(^{32}\) \textit{Id.} The Sixth Circuit Court of Appeals believed that the subject matter test encouraged senior managers to ignore vital information regarding possibly illegal transactions in order to make corporate counsel an exclusive repository of unpleasant facts. It noted further that when corporate agents are scattered in several foreign countries that the burden on discovery is severe and thus creates a large "zone of silence." \textit{Id.}
than if the communications had never been made. The Court stated that while a party could not be compelled to reveal what he said to his attorney, the same party cannot conceal a fact merely by revealing it to his lawyer.

The Court concluded that although it may be more convenient for the government if discovery of the requested documents was allowed, such considerations of convenience do not overcome the policy served by the attorney-client privilege. However, the Court emphasized that its conclusion applied only to the case before it and that it did not purport to establish a set of rules governing challenges to investigatory subpoenas. Justice Rehnquist noted that such a case-by-case approach, while it may cause some uncertainty in the area of the attorney-client privilege, is consistent with the mandate of Rule 501 of the Federal Rules of Evidence. The Court did, however, conclude that the control group test, as adopted by the court below, cannot govern the development of the law in this area.

The Court next considered whether certain notes and memoranda made by Upjohn's General Counsel, Thomas, concerning communications between employees and himself were protected
under the work product doctrine. The Court examined its decision in *Hickman v. Taylor*, which announced the work product doctrine and explained its importance. Justice Rehnquist observed that the *Hickman* Court determined that the interests of a client and justice are better served if an attorney can work with a certain degree of privacy. He then noted that the Supreme Court had recently held that the obligation imposed by a tax summons remained subject to traditional legal privileges and limitations. The Court stated that neither the language of the IRS summons provisions nor their legislative history suggests that Congress intended to preclude the application of the work product doctrine to such summonses.

39. *Id.* The court of appeals held that the work product doctrine was not applicable to administrative summonses issued under 26 U.S.C. 7602. See 600 F.2d at 1228 n.1. The Government conceded that the court of appeals had erred on this point. 449 U.S. at 397.

40. 329 U.S. 495 (1947). In *Hickman*, the administrator of a deceased seaman brought a wrongful death action against a tug boat company and its owner and sought discovery of all written statements and memoranda of oral statements which defendant's counsel had taken of witness-employees. These employees were the only witnesses to the accident. The Court held that only a showing of substantial need and inability to obtain information by other means would justify disclosure of attorney's work product. *Id.* at 511 & 512.

41. 449 U.S. at 387 & 398.

42. *Id.* See 329 U.S. at 510. The *Hickman* Court held that any attempt without compelling necessity and justification to secure written statements, memoranda, and personal recollections prepared or formed by a party's counsel in the course of his legal duties must fail. The *Hickman* Court feared disclosure would result in inefficiency and unfairness to a client and that it would affect the giving of legal advice and the attorney's preparation of cases for trial. As such, the Court concluded that the interest of the clients and the cause of justice would suffer substantially if such documents were readily discoverable. *Id.* at 511. *See also* United States v. Nobles, 422 U.S. 225, 236-40 (1975) (work product doctrine shelters the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case).


44. 449 U.S. at 398-99. Rule 81(a)(3) of the Federal Rules of Civil Procedure, which makes the Federal Rules of Civil Procedure applicable to summons enforcement proceedings, provides in pertinent part:

> These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

FED. R. CIV. P. § 1(a)(3).

The Court quoted the pertinent part of Rule 26(b)(3) of the Federal Rules of
The government contended that despite the work product doctrine's applicability to the IRS summonses, a sufficient showing of necessity to overcome its protection had been made in this case. Justice Rehnquist noted that although *Hickman v. Taylor* contained language indicating that production might be justified upon a showing that the witnesses are no longer available or may be reached only with difficulty, this proviso has never been used to expose to discovery a witness' oral statements that are now in the form of the attorney's mental impressions or memoranda.\(^{45}\) The Court observed that Rule 26(b) (3) of the Federal Rules of Civil Procedure\(^{46}\) provides special protection to work product that reveals an attorney's mental processes and requires a showing of substantial need and inability to obtain information without undue hardship before documents constituting attorney work product can be disclosed.\(^{47}\)

Observing that some courts have held that no showing of necessity can overcome the protection of work product based on oral statements of witnesses, the Court explicitly stated that it is

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Civil Procedure, which, codifies the work product doctrine, as follows:

A party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon showing that the party seeking discovery has substantial need of the materials in the preparation of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

*Id.* at 398, n.7.

45. 449 U.S. at 399. (quoting *Hickman v. Taylor*, 329 U.S. at 512-13) (it would be a rare situation in which the production of an attorney's memoranda of written oral statements would be discoverable); (citing *United States v. Nobles*, 442 U.S. at 238-39) (work product doctrine shelters the mental processes of an attorney and materials prepared by the attorney's agents).

46. *See supra* note 44.

47. 449 U.S. at 400-01. The Court concluded that although Rule 26 does not specifically refer to memoranda based on oral statements, such material must be protected from compelled disclosure. *Id.* at 400. *See Hickman v. Taylor*, 329 U.S. at 512-13. (forcing an attorney to repeat or write out all that a witness has told him gives rise to grave inaccuracies because the statement contains what he remembered or saw fit to write down and would make the attorney more of a witness than an officer of the court and invade his mental processes).
not deciding such an issue in *Upjohn*.

The Court held only that the federal magistrate applied the wrong standard in concluding that the government had overcome the protections of the work product doctrine and that this case required a far stronger showing, by the government, of necessity and unavailability by other means.

Because the court of appeals thought that the work product doctrine was inapplicable in an administrative summonees enforcement proceeding, and because the district court erred in applying the wrong standard of protection, the Court reversed and remanded to the court of appeals for proceedings not inconsistent with its opinion.

In an opinion concurring in part and concurring in the judgment, Chief Justice Burger agreed with the Court’s rejection of the control group test but strongly criticized the Court for its failure to adopt some standards to afford guidance to corporate clients, their attorneys, and the federal courts in this area.

He then proceeded to set down guidelines which, as a general rule, would enable corporate clients, their attorneys, and the courts to predict, with some degree of certainty, whether or not specific communications would be protected.

Chief Justice Burger main-
tained that Rule 501 of the Federal Rules of Evidence imposed a special duty on the Court to clarify the application of the privilege and that the majority's case-by-case approach in this area of the law was inadequate in an area of the law which needed clarification.54

The attorney-client privilege is one of the oldest of the privileges for confidential communications known to the common law.55 Although the privilege remains an exception to the general rule of disclosure,56 it has been criticized as an obstruction to full disclosure of the truth.57 In view of this criticism, it has been held that the privilege must be strictly construed.58

While the privilege was developed to protect individuals, it was assumed to be applicable to corporations as well.59 Prior to

conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to their conduct.

Id. at 403. (Burger, C.J., concurring).

54. Id. at 403-04. (Burger, C.J., concurring). The Chief Justice noted that Rule 501 provides that the courts are to "interpret" the common law principles which govern the law of privileges. Id. at 403 (Burger, C.J., concurring) See supra note 21.

55. See 8 J. WIGMORE, supra note 9, at § 2290. The roots of the privilege are traced to Roman Law and date back at least to 1577 as part of the English Common-Law Doctrine. In its early stage, the privilege was thought to belong to the attorney, who, as a matter of honor would not disclose communications from the client to him. It was based on the premise that an attorney's silence was necessary to elicit the client's trust. Later, it became recognized as a privilege of the client who, it was thought, knowing that his communications were not subject to discovery, would be more truthful with his counsel. By making it a privilege of the client, able to be waived only by the client, it was thought that the interests of justice could be best served. Id.

56. See Fisher v. United States, 425 U.S. 391, 403 (1976) (confidential disclosures by a client to an attorney made in order to obtain legal advice are privileged).

57. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir. 1963) (the privilege is an obstruction to full and free discovery). See, e.g., 8 J. WIGMORE, supra note 9, at § 2291; Note, Control Group Test Adopted as Standard for Assertion of Attorney-Client Privilege by Corporate Client, 58 WASH. U.L.Q. 1041, 1043 (1980) (the privilege is an obstruction to full disclosure of the truth and is in contradiction of the expanded rules of discovery).

58. See Diversified Indus., Inc. v. Meredith, 572 F.2d at 602 (while the privilege is absolute, the adverse effect of its application on the disclosure of truth warrants that it be strictly construed).

59. See United States v. Louisville and Nashville R.R. Co., 236 U.S. at 336 (1915) (confidential communications between the railroad and its counsel are
1962, courts followed the general assumption that all communications by an officer or employee of the client corporation were protected by the privilege if made in confidence without third persons present.  

However, in 1962 the assumption that the attorney-client privilege was available to corporations was wholly rejected by a federal district court in Radiant Burners Inc. v. American Gas Association, which held that the privilege was totally unavailable to corporations. This decision, though reversed on appeal, caused the federal courts to reconsider the assumption that corporations could avail themselves of the attorney-client privilege. Thus, the courts sought, in light of Radiant Burners, to formulate theories to justify the availability of the privilege to corporate clients.

While the appeal in Radiant Burners was still pending, the district court for the Eastern District of Pennsylvania in City of Philadelphia v. Westinghouse Electric Corp. addressed the

privileged, to hold otherwise would be a practical prohibition upon professional advice and assistance; Radiant Burners, Inc. v. American Gas Ass'n 320 F.2d at 323 (based on history, principle, precedent, and public policy the attorney-client privilege in its broad sense is available to corporations).

60. See United States v. Louisville and Nashville R.R. Co., 236 U.S. at 336 (confidential communications from a railroad's employees to its counsel are privileged); A. B. Dick Co. v. Marr, 95 F. Supp. 83, 102 (S.D.N.Y.) appeal dismissed, 197 F.2d 498 (2d Cir. 1950), cert. denied, 344 U.S. 878 (1952) (in the absence of the privilege, the corporate attorney could not properly represent his client); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) (communications by an officer or employee of the client corporation to the client corporations' attorney to secure legal advice are protected by the attorney-client privilege if made in confidence).

61. 207 F. Supp. 771 (N.D. Ill. 1962), rev'd 320 F.2d 314 (7th Cir.) cert. denied, 375 U.S. 929 (1963). The district court ruled that the privilege was not applicable to corporations; i.e., that it was a personal individual privilege. 207 F. Supp. at 773.


63. Radiant Burners v. American Gas Ass'n., 320 F.2d 314 (7th Cir. 1963) The court of appeals reversed, holding that the lower court's finding was without precedent and that the privilege had been recognized as available to corporations for more than a century and has gone unchallenged for so long and has been so generally accepted that it must be recognized. Id. at 319-21 & n.7. The court refused to set guidelines for applying the attorney-client privilege to corporations. It noted that any such questions must be resolved on a case-by-case basis by the trial judge and that his decision/method would then and only then be subject to review by a court of appeals. Id. at 323-24.

issue. The court adopted a test for applying the attorney-client privilege which became known as the "control group test." Deciding that the only satisfactory solution to applying the privilege to corporations was to develop a means of determining whether the employee making the communication personified the corporation, the court emphasized the communicant-employees' ability to act on the legal advice so rendered. If the communicant-employees were not in a position to so act, or could not at least take a substantial part in making the decision to so act, they were considered ordinary witnesses who give information to an attorney to enable the attorney to advise his client and thus, their communications were not privileged.65

The control group test was quickly adopted by many federal courts as a suitable standard for applying the attorney-client privilege to corporations.66 The remarkable speed of its acceptance prompted the Judicial Advisory Committee to Congress' Federal Rules Committee to include it in its first draft as indicative of the trend of recent decisions.67 In addition, several states incorporated the test in their codification of their rules of evidence while others, although judicially adopting the test as part of their common law, did not codify it.68 Proponents of the test claimed it was predictable, easily applied, and curtailed the creation of a "zone of silence" around corporate communications.69

noted that the employee was advised by corporate counsel at the time of his interview that any infringement on company policy would have to be reported to management. The court therefore concluded that it was obvious that the employee was not the client. As such, the court directed the employee to provide full and complete answers to the interrogatories. 210 F. Supp. at 484.

65. 210 F. Supp. at 485. The court stated that the work product doctrine of Hickman v. Taylor, see supra note 10, was sufficient to protect statements taken of non-control group employees by corporate counsel. Id.


Other courts and commentators, however, soon rejected the control group test as a suitable solution to the dilemma of applying the attorney-client privilege to corporations. They criticized the control group test as an attempt to equate corporations with individual clients.\(^70\) Other criticisms, all of which were considered by the Supreme Court in *Upjohn*, were that the test was unpredictable and led to conflicting decisions, was difficult to apply, discouraged the free flow of communications to legal advisors, and hampered a corporation's efforts to comply with the law.\(^71\)

\(^70\) See *Diversified Indus., Inc. v. Meredith*, 572 F.2d at 609 (neither the control group test nor the subject matter test is sufficient to determine the application of the privilege to corporations. The *Diversified* court proposed Judge Weinstein's modified subject matter test). See infra text accompanying note 81; Harper and 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. 955 (1971) (control group test inadequate; better test is subject matter test wherein an employee's communication to counsel is privileged when the employee makes the communication at the direction of his superiors and when the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 384-86 (D.D.C. 1978) (confidential communications by corporate employee to corporate counsel to enable counsel to give the corporation legal advice are privileged even though the employee is not a part of the "control group"); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974) (control group test provides inadequate protection for employee communications in that it seeks to limit the availability of the attorney-client privilege in an artificial manner, and subject matter test may be abused and lead to a "zone of silence"); Hasso v. Retail Credit Co., 58 F.R.D. 425 (E.D. Pa. 1973) (rejected its holding in *City of Phila. v. Westinghouse Elec. Corp.* 210 F. Supp. 483 and adopted the broader formulation of the *Harper and Row* subject matter test as more consistent with the policy underlining the attorney-client privilege). See also Burnham, *Confidentiality and the Corporate Lawyer*, 56 ILL. B.J. 542 (1968); Note, *Privileged Communications - Inroads On The 'Control Group' Test in the Corporate Arena*, 22 SYRACUSE L. REV. 759 (1971) (control group test erroneously attempts to equate the corporate client with the individual client and thus inhibits the free flow of information to counsel); Comment, *Corporate Self-Investigations Under the Foreign Corrupt Practices Act*, 47 UNIV. CHI. L. REV. 803 (1980)(control group test is inadequate protection for corporations in internal investigations conducted for self-policing purposes under the SEC); Note, *Control Group Test Adopted, supra* note 57, at 1051-53 (control group test inhibits the free flow of information from a client to its attorney, it fails to consider the realities of corporate life by equating the corporation with the individual, and compels corporations to resist a broad policy of self-investigation for fear that the information would be discoverable).

\(^71\) 449 U.S. at 391-92. The *Upjohn* Court stated that the above shortcoming effectively defeated the purpose of the attorney-client privilege by inhibiting full and frank communications between a corporation and its legal advisor. *Id.* at 392 See supra note 75.
Then, in 1970, the United States Court of Appeals for the Seventh Circuit, in *Harper and Row Publishers, Inc. v. Decker*\(^{72}\) rejected the "control group" test claiming "it is not wholly adequate." Instead, the court adopted two criteria to determine when communications by corporate employees are protected: If an employee makes communications to an attorney at the direction of his superiors and if the subject matter sought concerns the performance of his duties as an employee, the communications are protected by the privilege.\(^{73}\) This test became known as the "subject matter" test.

The Supreme Court's summary affirmance of *Harper and Row* without opinion\(^{74}\) loosened the grip that the control group test previously had on federal and state courts even though its affirmation failed to provide needed precedent.\(^{75}\) Even the District Court for the Eastern District of Pennsylvania, which initially propounded the control group test, rejected it and accepted the broader standards of the *Harper and Row* subject matter test as more consistent with the policy underlying the attorney-client privilege.\(^{76}\) The subject matter test, however, also received strong criticism as being highly susceptible to abuse, creating a broad "zone of silence" around corporate affairs, and conflicting with the new, broader discovery rules.\(^{77}\)

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72. 423 F.2d 487 (7th Cir. 1970), aff'd mem. by equally divided court 400 U.S. 955 (1971). *See supra* note 70.
73. 423 F.2d at 491-92.
74. 400 U.S. 349 (1971).
75. *See Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981)* (summary actions do not have the same authority in this Court as do decisions rendered after plenary consideration and do not present the same justification for declining to reconsider a prior decision as to decisions rendered after argument and with full opinion); *Illinois State Board of Elections v. Socialist Workers, 440 U.S. 173, 180-87 (1979)* (the precedential effect of a summary affirmance can extend no farther than the precise issues presented and necessarily decided by those actions; a summary disposition affirms only the judgment of the court below and no more may be read into a summary opinion than was essential to sustain that judgment).
76. *Hasso v. Retail Credit Co., 58 F.R.D. at 428 n.4.* The *Hasso* court simply stated that it felt that the proper rule was announced in *Harper and Row,* *see supra* note 70, and adopted the subject matter test. Without comment, the court rejected its previous holding in *City of Phila. v. Westinghouse Elec. Corp.* by the mere reference to it in a footnote without explanation. *Hasso v. Retail Credit Co., 58 F.R.D. at 428 n.4.*
77. *See Diversified Indus., Inc. v. Meredith, 572 F.2d at 609* (subject matter test shields too much information from the discovery process); *United States v. Lipshy, 492 F. Supp. at 42 n.6* (the subject matter test embraces too broad an
In 1978, the Eighth Circuit in *Diversified Industries, Inc. v. Meredith* rejected the control group test as defeating the purpose of the privilege by failing to take into account the realities of corporate life and by inhibiting the free flow of information to corporate legal advisors. Although the court believed that the subject matter test provided a reasoned approach to applying the privilege to corporations, it noted that it also has a potential for abuse. The court, therefore, adopted the modified subject matter test initially proposed by Judge Weinstein in his treatise on evidence. Under the modified subject matter approach, the attorney-client privilege is applicable to an employee's communication if: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

See also *Note, Attorney-Client Privilege for Corporate Clients*, supra note 69, at 427 (subject matter test makes the attorney the repository of corporate information; duplication of information could not be achieved even upon interviewing all employees and former employees because memories may have faded and employees may have had time to bring their statements into conformity with the corporate line); *Note, Privileged Communications*, supra note 70, at 766 (subject matter test is susceptible to abuse and unrelated to the purposes of the attorney-client privilege); *Note, Control Group Test Adopted*, supra note 57, at 1050 (subject matter test expands protection to intracorporate communications which are not deserving of protection, encourages the channeling of important information through counsel thus making that information protected, and it creates a broad zone of silence which is prohibitive).

78. 572 F.2d 596 (8th Cir. 1978). See supra note 70.
79. Id. at 608-609.
80. Id. at 609. The *Diversified* court felt that the subject matter test shields too much from discovery and could result in corporations funneling all communications through their attorneys to prevent disclosure in discovery. *Id.*
81. *Id.* See also *Weinstein*, supra note 67, § 503(b)(04). The *Diversified* court concurred with Judge Weinstein's belief that the modified subject matter test better protects the underlying purpose of the attorney-client privilege and removes from the privilege's protection any communications in which the employee functions mainly as a fortuitous witness. 572 F.2d at 609.
The modified subject matter test has been criticized as lacking simplicity and objectivity, and that if narrowly construed the test could effectively limit the privilege as much as, if not more than, the control group test.\textsuperscript{82}

Although the facts before the \textit{Upjohn} Court almost fit perfectly into the modified subject matter test,\textsuperscript{83} the Court did not adopt the test, but urged a case-by-case approach to determine the applicability of the attorney-client privilege in the corporate context.\textsuperscript{84} Thus, corporations and their attorneys still have no accepted guidelines to follow, and federal courts may continue to apply any test they choose except the control group test.\textsuperscript{85}

The Court's refusal to adopt any particular test for application of the privilege to corporate clients may be an invitation to lower federal courts to broaden the scope of the privilege under appropriate circumstances.\textsuperscript{86} Indeed, Rule 501 of the Federal

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\item \textsuperscript{82} Comment, \textit{The Attorney-Client Privilege, the Self-Evaluative Report Privilege, and Diversified Industries, Inc. v. Meredith}, 40 OHIO ST. L.J. 699, 710-711 (1979) (modified control group test is susceptible to subjective application and constitutes a rebellion against the mainstream school of simplicity and objectivity. If strictly construed, the modified subject matter test could exclude more information from protection than a broad reading of the control group test).
\item \textsuperscript{83} 449 U.S. at 396-97. In \textit{Upjohn}, the Court noted that the communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, and at the direction of corporate superiors in order to secure legal advice from counsel. Information, not available from upper-echelon management was needed to supply a basis for legal advice. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The communications were considered highly confidential when made and had been kept confidential by the company. \textit{Id.} at 394-95.
\item \textsuperscript{84} \textit{Id.} at 396.
\item \textsuperscript{85} See supra note 75. \textit{See also} Stern, supra note 68, at 1144. In contrast to the majority's refusal to establish guidelines for the application of the corporate attorney-client privilege, Chief Justice Burger believed that the Court neglected its duty to provide guidance in a case that squarely presents the question in a traditional adversary context. See 449 U.S. at 403 (Burger, C.J., concurring).
\item \textsuperscript{86} See Feld, \textit{The Supreme Court in Upjohn Protects Attorney-Client Privilege: Upholds The Work Product Doctrine}, 54 J. Tax'n. 210, 213 (1981) (Supreme Court's refusal to narrow the scope of the attorney-client privilege as it applies to corporations was an implicit invitation to the lower courts to broaden the privilege per Chief Justice Burger's statement that other communications between employees and corporate counsel may indeed be privileged beyond those communications covered by the factual situation in \textit{Upjohn}). See 449 U.S. at 403 (Burger, C.J., concurring).
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Rules of Evidence was designed to provide needed flexibility. Congress chose not to lock the courts into a set of "all or nothing" privileges but declared that the courts should determine "in light of their reason and experience" whether or not a privilege should be recognized in any given case. The Supreme Court has concluded that the standard of Rule 501 provides the flexibility needed to formulate new privileges as well as to develop and expand existing privileges as justice requires.

Throughout Justice Rehnquist's opinion, he stressed that if the purpose behind the privilege is to be achieved, the attorney and client must, with some degree of certainty, be able to predict whether particular discussions will be protected. Despite this recognition, he refused to proffer guidelines for the future application of the privilege to corporate clients. By doing so, he apparently equated flexibility with lack of guidelines. All cases, however, whether in a federal or state court, and although decided on a case-by-case basis, are governed by guidelines such as rules of evidence, procedure, and the common law.

Chief Justice Burger suggested qualified guidelines. He openly admitted that communications other than those considered in Upjohn between employees and corporate counsel may be privileged. However, the Chief Justice did not believe that this realization compelled the Court to prescribe guidelines for every possible future application of the privilege. He did insist, however, that predictability does require some guidance and concurred with Justice Rehnquist's finding that the need for predictability is not only desirable but is essential if the purpose of the attorney-client privilege is to be fulfilled.

Before Upjohn, the courts were in total disarray in applying the attorney-client privilege to corporations. After Upjohn, the disparity continues except that the control group test can no

87. 449 U.S. at 396-97. See note 21 supra
88. Trammel v. United States, 445 U.S. 40 (1980). The Federal Rules of Evidence acknowledge the authority of the federal court to continue the evolutionary development of testimonial privileges. Congress manifested an affirmative intention not to freeze the law of privilege and to provide the courts with the flexibility to develop rules of privilege on a case by case basis. Id. at 47.
89. 449 U.S. at 393.
90. Id. at 402-03 (Burger, C.J., concurring).
91. Id. See id. at 393.
longer be used as a judicial trap against corporations and their counsel. Although Chief Justice Burger concluded that the majority's failure to delineate guidelines perpetuates that which it condemned, \textit{Upjohn}, by exorcising the control group test from the corporate judicial arena, has already been recognized as supplying considerable guidance to attorneys, corporate clients, and the federal courts for the proper application of the privilege to corporations.

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92. \textit{Id.} at 397. \textit{See Comment, The Attorney-Client Privilege As Applied To Corporate Clients,} 15 Akron L. Rev. 119, 130 (1981) (Supreme Court's holding in \textit{Upjohn} is a disappointment. However, the removal of the control group test is of some benefit and the Court's examination of the facts in Upjohn gives some hints as to the analysis expected in the future); Stern, \textit{supra} note 68, at 1146 (the Supreme Court has put federal courts back on the right track in the application of the attorney-client privilege to corporations).

93. 449 U.S. at 404 (Burger, C.J., concurring).

94. \textit{See Feld, supra} note 86, at 210.

95. \textit{See Stern, supra} note 68, at 1146.