The Corporation’s Attorney-Client Gamble: Privileged Communications or Discovery Prone Disclosures

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Abstract

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KEYWORDS: gamble, discovery, privileged
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Introduction

This article consists of a six-part study into the attorney-client privilege as it applies to the modern corporate client. Parts One and Two focus on the history, purpose, effect and traditional formulations of the attorney-client privilege. Sections Three and Four analyze precedent applying the privilege to the corporate client at the national level, with a separate look into Florida state courts and former Fifth Circuit Court of Appeals applications prior to the inception of the new Eleventh Circuit. The succeeding sections involve a critical analysis of the United States Supreme Court’s decision in *Upjohn v. United States*, focusing primarily on the rationale supporting the Court’s decision and the effect *Upjohn* will have on the corporate client.

The Attorney-Client Privilege

Throughout history, man’s insatiable quest for truth has been conceptualized in two distinct procedural forums: the adversarial process; and the inquisitorial process. Excepting Frederick the Great of Prussia and Lenin, few political leaders have adopted the inquisition, preferring instead the adversary system, pitting man against man. Government officials, in the adversary system, generally have been used only as referees, maintaining a separateness from the adversary’s participation in the process.

Anglo-American jurisprudence reflects this philosophy in the strictest sense, demanding injury-in-fact between adversaries and full disclosure of all pertinent facts. The concept of a privilege against
disclosure.
closure apparently conflicts with this philosophy. Since the sixteenth century, however, there has existed the oldest of testimonial privileges, the attorney-client privilege, which cloaks certain communications between client and attorney with immunity from disclosure.

For a privilege against disclosure to be recognized at law the following four conditions must exist:

1) The communications must originate in a confidence that they will not be disclosed.
2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3) The relation must be one which in the opinion of the community ought to be sedulously fostered. [and]
4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

The genesis of the original attorney-client privilege embodied the purpose of protecting the honor of the attorney and his oath of secrecy to his client by not forcing him to divulge his confidential communications. By the end of the eighteenth century this underlying justification started eroding from within, however, as professional jealousies developed from the hodge-podge labeling of privileges as exclusionary rules. Consequently, the courts were convinced to disregard application of the attorney-client privilege to all of the lawyer's relationships.

The attorney-client privilege is not an exclusionary rule and should

(1980); the goal secured by this philosophy is the "free and unobstructed search for the truth." This goal must be continually balanced with "the right and absolute necessity for confidential disclosure of information by the client to its attorney to gain the legal advice sought thereby," before the scope of the privilege can be ascertained. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 324 (7th Cir. 1963), cert. denied, 375 U.S. 929 (1963), rev'g 207 F. Supp. 771 (N.D. Ill. 1962).

5. Id. § 2285, at 527.
6. Id. § 2290, at 543.
8. Id.
not be considered as such. It may, "by chance of litigation become, [an] exclusionary rule; but this is incidental and secondary. Primarily ... [it is] a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping."

Recent critics of the attorney-client privilege, however, are still quick to label it as an exclusionary rule of evidence in an attempt to discredit its fundamental importance to the judicial system. Such spurious generalization, however, undermines the modern purpose of the attorney-client privilege. This purpose encourages a client's "full disclosure to his attorney by removing the ... fear of having such confidential communication divulged under judicial compulsion." Whereas the original privilege operated as the attorney's protectionist device to insure the honor of the profession, the new theory focuses on the client's fears. Thus the modern privilege belongs to the client, not the attorney. The client may invoke the privilege to protect his confidential disclosures regardless of his relationship to the particular cause or the attorney's desire to divulge the communications.

While the privilege is "designed to secure the client's confidence in the secrecy of his communications," the purpose behind such a privilege is not thwarted by allowing for its voluntary relinquishment. Therefore the client may waive the legal protections afforded by the privilege at any juncture of the lawyer-client relationship. It is signifi-

9. Id. at 428.
10. Id.
11. Id.
12. Milstein, supra note 3, at A-1. "The lawyer-client privilege rests on the need for the advocate and the counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." Trammel v. United States, 445 U.S. 40, 51 (1980). The Supreme Court has recognized the purpose of the privilege "to encourage clients to make full disclosure to their attorneys." Fisher v. United States, 425 U.S. 391, 403 (1976).
14. J. WIGMORE, supra note 4, § 2321, at 629. This rule is not absolute, however. See the FLORIDA EVIDENCE CODE, § 90.502(2)(e) (1979) of the Florida Statutes, which states in part that an attorney may invoke the privilege on behalf of his client.
15. J. WIGMORE, supra note 4, § 2327, at 634.
16. Id.
cant to note that this right to waive "belongs solely to the client and not to the attorney."''17

The conscientious advocate must keep in mind that the attorney-client privilege is not a rule excluding evidence from admission into a court record; rather it is a substantive right granting the client immunity from divulging particular confidences communicated to his attorney. This fundamental difference emphasizes that the nucleus of the privilege is the client's substantive state rights: a concept that must be understood before a logical prediction can be made concerning the application and scope of the privilege. While making decisions concerning the availability of the attorney-client privilege it is mandatory for the advocate to balance the client's right to protect his confidential communications with the procedural requirement of full disclosure.18 The adjudicative forum must be considered in this decision-making process. For example, rule 501 of the Federal Rules of Evidence requires that a federal court decide most privilege questions in accordance with "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."19 Conversely, in a civil action where state law controls the rule of decision concerning an element of a claim or defense, questions regarding privilege, "shall be determined in accordance with state law."20

General Application of the Attorney-Client Privilege

Dean Wigmore's formulation of the attorney-client privilege has gained widespread recognition.21 According to Wigmore, the following elements are prerequisites for application of the attorney-client privilege:

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17. Id. See Hunt v. Blackburn, 128 U.S. 464 (1888), for an extensive discussion on the process of voluntary waiver of the attorney-client privilege by the client.
18. Radiant Burners, 320 F.2d at 324.
19. FED. R. EVID. 501. Although the federal courts will apply federal common law, they cannot agree upon the proper common-law privilege to apply. See Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960).
20. FED. R. EVID. 501. See also Milstein, supra note 3, at A-2. Courts will apply federal privilege law "in civil actions involving application of federal law" (e.g. antitrust, securities, and patent suits). Id.
21. J. WIGMORE, supra note 4, § 2292, at 554.
Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection may be waived.

Another general formulation of the privilege receiving frequent citation appeared in Judge Wyzanski's opinion from United States v. United Shoe Machinery Corp. In a civil anti-trust action where the defendant corporation objected to the introduction of nearly 800 exhibits on the grounds that they fell within the attorney-client privilege, the court held a matter privileged when:

(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 of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

"The beginning point [in understanding the applicability of the attorney-client privilege] is the fundamental principle that the public has the right to every man's evidence, and exemptions from the general duty to give testimony that one is capable of giving are distinctly exceptional." An exemption will become justified "if — and only if — policy requires it be recognized when measured against the fundamental responsibility of every person to give testimony."

22. Id.
The Privilege Applied to the Corporate Client

Although the Supreme Court recognized the attorney-client privilege in the 1880's,\textsuperscript{27} it was not judged applicable (arguably) to the corporate client until 1915.\textsuperscript{28} A landmark case from the Seventh Circuit Court of Appeals, \textit{Radiant Burners, Inc. v. American Gas Association},\textsuperscript{29} reflects the modern view toward the availability of the privilege for the corporate client. \textit{Radiant Burners} was a private civil action alleging violations of the Sherman Act by American Gas Association. The court held that "based on history, principle, precedent and public policy the attorney-client privilege in its broad sense is available to corporations. . . ."\textsuperscript{30}

As a keystone to predicting future application of the attorney-client privilege to the corporate client, it is important to understand the court's rationale for its holding in \textit{Radiant Burners}. In the court's view, the ultimate objective of the privilege is to "facilitate the administration of justice by encouraging full disclosure by the client to its attorney."\textsuperscript{31} Although \textit{Radiant Burners} reflects the typical balance of federal and state interests, as a federal nondiversity action the federal common law privilege was utilized instead of state law.\textsuperscript{32} The court in \textit{Radiant Burners} declined an invitation to decide a blanket privilege for corporations, holding that the applicable privilege must be decided on a case-by-case basis by "balancing the competing goals of the free and unobstructed search for the truth with the right and absolute necessity for confidential disclosure of information by the client to its attorney to gain the legal advice sought thereby. . . ."\textsuperscript{33}

Availability of the attorney-client privilege for the corporate client

\textsuperscript{27} See Hunt v. Blackburn, 128 U.S. 464 (1888).
\textsuperscript{28} United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915).
\textsuperscript{29} 320 F.2d 314 (7th Cir. 1963), cert. denied, 375 U.S. 929 (1963), rev'd 207 F. Supp. 771 (N.D. Ill. 1962).
\textsuperscript{30} Id. at 323.
\textsuperscript{31} Id. at 322.
\textsuperscript{32} It should be noted here, however, that there was no state law, codified or judicial, addressing the problem of applying the attorney-client privilege to corporations. \textit{Id.} at 319. In other nondiversity federal actions the courts have used state law when it was available. Garner, 430 F.2d at 1100.
\textsuperscript{33} 320 F.2d at 324.
is made more complex due to choice of law problems. The former Fifth Circuit recognized this problem in *Garner v. Wolfinbarger*, where it held that "the privilege does not arise from the position of the corporation as a party but its status as a client." In *Garner*, a class action suit was brought by stockholders against the corporation for alleged violations of federal and state securities laws. The court held "that the choice of law cannot be settled by reference to any simple talisman, but can be arrived at only after a consideration of state and federal interests that are inseparable from the factors bearing on the availability of the privilege itself." Those factors bearing on the availability of the privilege have become the basis for discord among the federal and state judiciaries. As a result various combinations of interests have been advocated and many have been adopted. Although the Supreme Court of the United States recognizes a need, it refuses to standardize the attorney-corporate client privilege, emphasizing that those cases can only be decided on a "case-by-case basis."

While, as stated, availability of the attorney-client privilege for the corporate client has been judicially accepted, there is much disagreement concerning the proper scope of that privilege. Recognizing that a "corporation can communicate only through its human agents, the . . . question arises: which individuals may 'be' the corporation for purposes of the attorney-client privilege?" Other courts have phrased this dilemma as "how far down the corporate table of organization [does] the privilege extend[?]"

If a corporation is deemed to communicate only through its human agents, then only those agents "deemed to personify the corporation may invoke the corporate privilege." Who, then, personifies the corpo-

35. *See generally* 430 F.2d 1093 (5th Cir. 1970).
36. *Id* at 1097.
37. *Id*.
ration to the extent required to invoke the privilege? The courts are divided on this issue. Although two primary tests are used to determine the scope of the privilege, in practice they actually form only the boundaries within which the courts operate. The test used by the majority of jurisdictions, and the most restrictive of the two, is the *control-group test.*\(^{42}\) This test, originally authored by Judge Kirpatrick in *City of Philadelphia v. Westinghouse Electric Co.*,\(^{43}\) held that an employee sufficiently personified the corporation for purposes of the attorney-client privilege:

> if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority. . . .\(^{44}\)

In every other case “the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.”\(^{45}\)

Although the *control-group test* is the majority view, it is rapidly losing support, being forced to give way to less restrictive and more realistic views. One of the most striking criticisms of the *control-group test* is that it does not provide for privileged communications between middle-level or lower-level management and counsel.\(^{46}\) The Eighth Circuit noted this flaw in *Diversified Industries, Inc. v. Meredith,*\(^{47}\) holding that: “In a corporation, it may be necessary to glean information relevant to a legal problem from middle management and nonmanagement personnel as well as from top executives.”\(^{48}\) A strict reading of

\(^{42}\) *Id.*
\(^{44}\) *Id.* at 485.
\(^{45}\) *Id.*
\(^{47}\) 572 F.2d 596.
\(^{48}\) *Id.* at 608-09. The ability to “glean” this information from those who are in
the control-group test, would require that such communications not be privileged.

The Supreme Court in *Upjohn v. United States* recently decided not to use the control-group test, holding that it "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." The Court further explained that there may be instances when the attorney's advice will be more significant to "noncontrol group members than to those who officially sanction the advice, [indicating that] . . . the control-group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy." Keeping in mind that corporations, quite unlike individuals, "constantly go to lawyers to find out how to obey the law," the application of the control-group test seems to encompass an unrealistic view of the business community in general. Nevertheless, this test continues to enjoy widespread popularity in its application.

Possession of it poses a problem for the attorney as well as the client. The privilege exists not only to protect "the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 390. See also the Model Code of Professional Responsibility, EC 4-1 (1980), which states: "A lawyer should 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." The incentive to perform this investigation might be lost were the attorney to suspect that his inquiry had uncovered confidential communications that could become the subject of discovery.

49. 449 U.S. 383.
50. Id. at 392.
51. Id.
The subject-matter test is another approach receiving widespread jurisdictional support. This test, holding the content of the communication to be determinative of its status with regard to a privilege rather than the corporate rank of the communicator, found its origin in the Seventh Circuit in Harper & Row Publishers, Inc. v. Decker. In a complex civil anti-trust action alleging horizontal price fixing by twenty-three defendants, the court held certain defense memoranda privileged communications when:

an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.
Although the *subject-matter test* is considered to be more reflective of the realities of modern corporate life, its broader blanketing of communications has been limited by at least one federal circuit. The Eighth Circuit in *Diversified Industries, Inc.* held the *subject-matter test* appropriate only 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.\(^6\)

A common criticism of the *subject-matter test* is its apparent conflict with the limitations imposed on the work product doctrine by the United States Supreme Court in *Hickman v. Taylor*.\(^5\) The Seventh Circuit (in *Harper & Row*), ingeniously averted running afoul with the *Hickman* limitations, explaining that the privilege does not cover "the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses. . . ."\(^6\)

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\(^5\) 572 F.2d at 609.

\(^6\) 329 U.S. 495 (1947). The Court in *Hickman* recognizes that "*[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.*" *Id.* at 507. (Statements of witnesses to a tugboat accident, though the product of an attorney, prepared while acting for his client in anticipation of litigation, were subject to discovery under Federal Rule of Civil Procedure 34 only upon a showing that denial of such production would unduly prejudice the preparation of the adversary's case or cause him any hardship or injustice).

The Work Product Doctrine established in *Hickman*, now codified in Fed. R. Civ. P. 26(b)(3), must not be confused with the attorney-client privilege. While the privilege belongs to the client, protecting his confidential communications, the work product doctrine belongs to the attorney as a means of protecting the fruits of his labor. An attorney may be forced to disclose his work product only upon a showing of good cause by his adversary. *Id.* See Note, *The Attorney-Client Privilege, The Self-Evaluative Report Privilege, And Diversified Industries, Inc. v. Meredith*, 40 OHIO ST. L.J. 699, 701 (1979).

\(^5\) *Harper & Row*, 423 F.2d at 491. The *subject-matter test* was criticized by the Sixth Circuit in *Upjohn* as enabling "the corporation's management-via agents-to 'communicate' to counsel the details of transactions about which management is only
Many courts have adopted tests of their own, which are combinations of the *control-group* and *subject-matter tests*, with characteristics far less restrictive than the former. For example some federal district judges in the District of Columbia have adopted their own test, fashioned after the *control-group* and *subject-matter tests*. First authored by Judge Richey in *In re Ampicillin Antitrust Litigation*, the following requirements must be met before the employee communications can be claimed within the attorney-client privilege:

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

Another well known analysis, coined the *all-employees test*, was authored by Judge Wyzanski in *United States v. United Shoe Mach. Corp.* The court in *United Shoe* held: “the attorney-client privilege protects communications of any corporate employee to the corporation’s attorneys where those communications otherwise meet the prerequisites for application of the privilege.” This test is the least restrictive and to have these communications protected by the attorney-client privilege.” 600 F.2d at 1227. This encouraged “senior managers purposely to ignore important information they have good business reasons to know and use.” Id. This supposedly impedes the liberal exercise of discovery which the modern procedural rules seek to foster. This argument fails to recognize, however, the “full panoply of discovery devices made available by the Federal Rules of Civil Procedure” even in jurisdictions applying the *subject-matter test*. Brief Amici Curiae at 19 n.16. E.g., Interrogatories submitted to an adversary under rule 33 require a response containing the collective knowledge of agents and employees; rule 34 provides for production of corporate documents; and rule 30 enables an adversary to depose employees. Id.

60. Id. at 385.
strictive of all and has been criticized as being in direct conflict with Hickman. Despite these criticisms, however, the *all-employees test* has found favor in other jurisdictions as well.

Former Fifth Circuit and Florida State Court Applications of the Attorney-Corporate Client Privilege

The general common law rule that an attorney cannot be forced to disclose any confidential communications made to him by a client without his client's consent, has long been recognized in Florida. "The rule is founded on the necessity, in the interest and administration of justice, that persons seeking legal aid and counsel should be free to communicate with their confidential adviser about the subject matter of their problem without fear . . . of disclosure."

The attorney-client privilege has been codified in the Florida Evidence Code providing the client with a privilege of refusal to disclose those communications made to his attorney when such were intended to be confidential. The Fourth District Court of Appeal in Florida has also adopted the *Radiant Burners* application of the attorney-client privilege to the corporate client, but neither the Florida state courts, nor the federal judiciaries within the former Fifth and Eleventh Cir-

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63. See supra note 57.
64. See Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 795 (D. Del. 1954), wherein the court seems to have adopted the *all-employees test* from United Shoe. See also United States v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978); In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir. 1975).
66. 24 FLA. JUR. 2d Evidence And Witnesses § 532, at 156, 157 (1981) (citing 81 AM. JUR. 2d Witnesses § 172 (1976)).
67. FLA. STAT. § 90.502(1)(a)-(c), (2) (1979) Florida recognizes that the privilege is not absolute and may be outweighed "by public interest in the administration of justice in certain circumstances." Sepler v. State, 191 So. 2d 588, 590 (Fla. 3d Dist. Ct. App. 1966) (citations omitted).
68. Burnup & Sims, Inc. v. Pledger, 352 So. 2d 85, 88 (Fla. 4th Dist. Ct. App. 1977). Although this point was included in Judge Downey's dissenting opinion, it becomes clear from a careful reading that the object of the dissent was not related to the application of the attorney-client privilege to the corporation. Judge Downey was merely stating that which he knew to be the law in Florida with regard to this issue.
circuits have explicitly adopted any particular test with respect to the scope of this privilege. In fact the Fifth Circuit specifically declined to choose between the control-group and subject-matter tests. A careful analysis of the precedent on this subject, however, establishes that both the former Fifth Circuit and the Florida state courts have chosen to mirror the application set forth in *United States v. United Shoe Mach. Corp.* On more than one occasion the Fifth Circuit specifically adopted the formulation of the general attorney-client privilege from *United Shoe.* The Fifth Circuit also recognized the importance of considering state court decisions when deciding the availability and scope of the attorney-client privilege, especially in light of the vague guidance provided by Federal Rule of Evidence 501.

Although Florida state court decisions do not reveal much “blanket-privilege law” concerning this issue, they do show some interesting corollaries to a less restrictive trend than that evidenced through an application of the control-group test. For example, Florida courts have consistently recognized the *Hickman* work product limitations on witness’ testimony. While inevitable conflict with *Hickman* remains the most formidable criticism of the subject-matter and all-employees tests, Florida follows *Hickman* guidelines, sometimes forcing the discovery of an attorney’s work product.

Florida courts have also deemed the extent of the attorney-client privilege to be a matter of state law, indicating that they were not “bound to follow the [United States] Supreme Court’s holding in this

69. *See In re* Thompson, 624 F.2d 17, 19 (5th Cir. 1980). The Fifth Circuit’s decision to pass on this issue was due to their expectation that the Supreme Court would resolve this matter once and for all in the *Upjohn* decision that was then pending before that court. *Id.* The irony here is that the Supreme Court also refused to resolve this issue definitively. *See infra* text accompanying note 82.


72. *In re* Grand Jury Proceedings, 517 F.2d at 670.


75. *Dupree*, 86 So. 2d 426; *Nationwide Ins. Co., Pinellas County*, 276 So. 2d 547.
This adamant stance emphasizes the client’s substantive state rights when balanced with the federal philosophy of full disclosure. With the statutorily guaranteed right to privileged communication receiving increased emphasis in Florida courts, the federal philosophy toward complete disclosure receives less consideration. The genesis of the subject-matter and all-employees tests, and the decisions in Harper & Row and United Shoe respectively, indicate that a need to protect the client’s substantive rights was perceived as giving rise to the attorney-client privilege. Arguably this perception by Florida courts represents an intent to apply the less restrictive test when determining the scope of the attorney-client privilege.

The Upjohn Decision

In Upjohn v. United States, the Internal Revenue Service demanded production of questionnaires compiled by Upjohn counsel during an in-house investigation of questionable corporate payments to foreign government officials. The Sixth Circuit Court of Appeals applied the control-group test, ordering discovery of the documents, but the United States Supreme Court subsequently granted certiorari “to address important questions concerning the scope of the attorney-client privilege in the corporate context. . . .” The circuit court decision was reversed as the Supreme Court recognized their “task as one of choosing between two ‘tests’ which have gained adherents in the courts of appeals.” Attorneys and clients alike awaited a decision that would finally standardize the applicability of the oldest of testimonial privileges to the corporate client. Such a decision was not forthcoming, however, as the Court, in practically the same breath that it had recognized

77. See FLA. STAT. § 90.502(1)(b) (1976), “Providing that a ‘client’ is any person or organization consulting a lawyer to obtain legal services or receiving them from a lawyer.” 24 FLA. JUR. 2d Evidence And Witnesses § 533, at 158 (1981). This rather liberal definition of a client for purposes of the privilege seems to support this proposition.
79. Id.
80. Id. at 386.
81. Id.
its task, held not "to lay down a broad rule or series of rules to govern all conceivable future questions in this area. . . ."82

Although at a glance this decision seems to carry limited potential for future application,83 a careful reading will reveal that the court not only fashioned a standard set of guidelines, useful during application of the privilege, but also strengthened the weakening basis of the modern attorney-client privilege. They held privileged those communications concerning "matters within the scope of the employees' corporate duties, . . . [where] the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."84 The Supreme Court in Upjohn recognized that the communications were: [1] made by Upjohn employees, [2] to counsel for Upjohn acting as such, [3] at the direction of corporate superiors, [4] in order to secure legal advice from counsel [5] within their scope of employment with the intent to be confidential.85

The Court specifically rejected the use of the control-group test stating that to hold otherwise "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."86 The Supreme Court clearly recognized the realities of corporate operation and management, saying that "[a]fter the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it."87

The Upjohn decision also strengthens the attorney-client privilege by recognizing the underlying purpose behind its application. That purpose is "to encourage full and frank communication between attorneys and their clients. . . ."88 The Court’s understanding of the purpose of

82. Id.
83. The Supreme Court specifically limited its review to a case-by-case analysis of the scope of the privilege to be applied. Id. at 396.
84. Id. at 394.
85. 449 U.S. at 394. There is striking similarity between this language and that used by the Eighth Circuit in Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (en banc) (1978). See supra text accompanying note 56.
86. Upjohn, 449 U.S. at 392.
87. Id. (citations omitted).
88. Id. at 389.
the privilege focuses on the fears of the client, providing for a scope determination only after a balancing of the federal philosophy of complete discovery with the need to protect the client's rights. The Supreme Court specifically refused to decide a standard proposition of law on this matter,\footnote{Id. at 396.} emphasizing that "to draft a set of rules which should govern challenges to investigatory subpoenas . . . would violate the spirit of Federal Rule of Evidence 501."\footnote{Id.}

Although a "case-by-case" analysis results in divergent application of the attorney-corporate client privilege, it also guarantees its continued existence by enabling the courts to take into consideration the underlying purpose of the privilege; the protection of the client's substantive rights.\footnote{See supra text accompanying note 18.}

Conclusion

The \textit{Upjohn} decision, while narrowly drafted, exhibits far reaching guidelines. Although the Court restricted application of the \textit{subject-matter test} to the facts in \textit{Upjohn}, the basis of their decision, recognizing the principles underlying the attorney-corporate client privilege, strengthened the precedential value of that opinion. The Court neither expressly condemned the \textit{control-group test} nor sanctioned any other as a matter of law; rather their reasoning reflects particular emphasis on the need for any forum deciding privilege questions to pay particular consideration to balancing the federal philosophy of full disclosure with the substantive rights of the client. The product of this balance is then to be filtered upon application through the facts of the case.\footnote{Upjohn, 449 U.S. at 396.} This two-part analysis provides first for a determination of the availability of the privilege as a matter of law, and secondly an evaluation of its applicability to the facts at issue.

By creating this two-step process, the Court has undercut the strength of the \textit{control-group test} as a matter of law. While considering the availability of the attorney-corporate client privilege the Court seems to be advocating the advantages of the \textit{subject-matter test}, much as an adversary would, to the ultimate demise of the \textit{control-group test}.  

\footnote{Id. at 396.}
\footnote{Id.}
\footnote{See supra text accompanying note 18.}
\footnote{Upjohn, 449 U.S. at 396.}
Not only has the control-group test become less available as a matter of law, it has also become less applicable as a matter of fact. 93

While the Supreme Court refused to decide a blanket privilege applicable to all jurisdictions, 94 its adamant stance, and argumentative style seems to have sounded the death knell for the control-group test. 95

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93. See In re Coordinated Pre-Trial Proceedings, 658 F.2d 1355 (9th Cir. 1981). The Supreme Court’s holding in Upjohn was followed as precedent with respect to the availability and applicability of the attorney-corporate client privilege. Regarding the issue of the privileged nature of corporate employee’s orientation sessions, the Ninth Circuit reversed the district court’s decision ordering discovery, citing Upjohn for the authority that the subject-matter test privileged those communications. The Ninth Circuit even expanded the holding in Upjohn, holding that “although Upjohn was specifically limited to current employees . . ., the same rationale applies to the ex-employees [as well].” 658 F.2d at 1361, n.7. If the Upjohn decision were actually to be limited to the facts in that case alone, then the Ninth Circuit’s reliance upon that decision would have been unwarranted. This author is of the opinion that the realistic effect of the Upjohn decision will be to severely limit the application of the control-group test throughout the federal judiciaries. See also, Leer v. Chicago, Milwaukee St. Paul & Pacific Ry., 308 N.W.2d 305 (Minn. 1981). The dissent in Leer found the unanimity of the Court’s decision in Upjohn to be “highly persuasive,” with regard to the applicability of the attorney-client privilege to protect depositions taken from switching crew employees for a railroad company. Id. at 310.

94. Upjohn, 449 U.S. at 386.

95. In the interest of complete fairness; for an indication that the control-group test still thrives, see Consolidation Coal Co. v. Bucyrus-Erie Co., 50 Ill. L.W. 2469 (Ill. Feb. 16, 1982). The Supreme Court of Illinois applied the control-group test, clearly recognizing that although the United States Supreme Court in Upjohn found that test inadequate, the Upjohn decision was limited to its own facts. The Illinois court found that a broadening of the scope of the privilege beyond the control-group would be “incompatible with [their] . . . state’s broad discovery policies looking to the ultimate ascertainment of the truth. . . .” Id. at 2470.