APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE TO CORPORATIONS: NEW DIRECTIONS AND A PROPOSED SOLUTION

Communications between an attorney and his client are protected from disclosure by the attorney-client privilege.[1] Since a client is more likely to communicate candidly with his lawyer if he knows that information given will be kept secret,[2] the law encourages a client to seek professional legal advice by ensuring the confidentiality of his communications.[3] By protecting the confidentiality of a client's information, however, the privilege often operates as a bar to discovery of the truth.[4] In interpreting the scope of the privilege, courts have attempted to balance the competing interests of encouraging the resort to legal advice and discovery of the truth by construing the privilege strictly.[5] In its most common definitional form, the privilege attaches:

> 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) some legal services or (iii) assistance in some legal proceedings, and not (d) for the

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[1] 8 WIGMORE EVIDENCE § 2292 at 554 (McNaught rev. ed. 1961) [hereinafter cited as WIGMORE]. As to the existence of the privilege and its historical development, *see* WIGMORE §§ 2290, 2291. The privilege now applies in federal courts pursuant to Rule 501 of the Federal Rules of Evidence, which adopts the common law of privilege.

[2] *See* J. WEINSTEIN & M. BERGER, 2 WEINSTEIN'S EVIDENCE ¶ 503 [02] (1975) [hereinafter cited as WEINSTEIN]. WEINSTEIN in turn relies on C. MCCORMICK, EVIDENCE § 87 [hereinafter cited as MCCORMICK] (*2d ed. 1972*). Professor McCormick observes:

> Our adversary system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosures regarding professional business. Loyalty and sentiment are silken threads, but they are hard to break.

MCCORMICK at 175-76.

[3] United States v. Fisher, 425 U.S. 391 (1976). The Supreme Court pointed out that:

> As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney . . . than for himself . . . , the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only when necessary to achieve its purpose. Accordingly, it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.

Id. at 403.

[4] WIGMORE, *supra* note 1, § 2291 at 554.

[5] *Id.* Dean Wigmore notes, "[i]ts benefits are all indirect and speculative; its obstruction plain and concrete . . . . It ought to be strictly construed within the narrowest possible limits consistent with the logic of its principle." *Id.*

> purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[6]

As set forth in this definition, the attorney-client privilege focuses on the substance of an individual's communication to his lawyer,[7] protecting only those communications involved in seeking advice on an actual legal problem.

A recurring problem arises, however, where the client seeking protection under the attorney-client privilege is a corporation.[8] Because corporations speak only through their agents and employees, communications which a corporation seeks to keep confidential do not fit into the precise definition applicable to individual clients.[9] Rather, courts must adapt the privilege to the peculiarities of the corporate form and to its methods of communication. For the privilege to apply to the corporation *qua* corporation, the courts must determine to whom the privilege logically may extend. When, for example, a corporation requests its attorney to investigate allegations of wrongdoing and then to advise the corporation regarding liability, communications between low-level personnel and the attorney are necessary.[10] If discovery devices subsequently seek to reveal these conversations between lawyer and employee, a standard for determining the applicability of the attorney-client privilege must be established.[11]

In struggling with the issue of the corporate attorney-client privilege, federal courts have devised two widely used standards. A majority[12] have

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[6] United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

[7] *See* WIGMORE, *supra* note 1, §§ 2306-10 at 588-99.

[8] The availability of the attorney-client privilege to corporations was definitively established in Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 324 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963).

[9] *See* WEINSTEIN, *supra* note 2, at ¶¶ 503(a)(1)[01], 503(b)[04].

[10] *See, e.g.*, Diversified Industries, Inc. v. Meredith, 572 F.2d 606, 607 (8th Cir. 1978) and cases cited in notes 12 & 15, *infra*.

[11] *See* FED. R. CIV. P. 26, which permits discovery of all matters "not privileged."

[12] *See, e.g.*, United States v. Upjohn, 600 F.2d 1223, 1225 (6th Cir. 1979); In re Grand Jury Investigation, 599 F.2d 1224, 1237 (3rd Cir. 1979); Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968); Herbert v. Lando, 73 F.R.D. 387, 400 (S.D.N.Y. 1977), *remanded on other grounds*, 568 F.2d 974, 984 (2d Cir. 1977); Virginia Electric & Power Co. v. Sun Ship Building & Dry Dock Co., 68 F.R.D. 397, 401 (E.D. Va. 1975); Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 35-36 (D. Md. 1974); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117, 119 (M.D. Pa. 1970); Congoleum Industries, Inc. v. GAF Corp., 49 F.R.D. 82, 84 (E.D. Pa. 1969); Garrison v. General Motors, 213 F. Supp. 515, 520 (S.D. Cal. 1963); American Cyanamid Co. v. Hercules Power Co., 211 F. Supp. 85, 89 (D. Del. 1962); City of Philadelphia v. Westinghouse Electric Corporation, 210 F. Supp. 483, 485 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Electric Co. v. Kirkpatrick, 312 F.2d 743 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

The control group test also was recommended by the Judicial Conference of the United States as the appropriate means of applying the attorney-client privilege to corporations in *Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 249-51 (1969). *See Advisory Committee Note to Proposed Rule 5-03(a)(3)*, 46 F.R.D. at 252-53. These proposed rules were submitted to Congress by

adopted the "control group" test developed in *City of Philadelphia v. Westinghouse Electric Corporation.*[13] This standard protects communications between a corporate attorney and individual officers and employees of the firm with authority to act upon the lawyer's advice.[14] A significant minority of the jurisdictions,[15] however, have adopted the "subject matter" test first enunciated by the Seventh Circuit in *Harper & Roe Publishers Inc. v. Decker.*[16] The *Harper* test protects communications made by an employee at the direction of his or her superior concerning duties or acts within the scope of his or her employment.[17]

Neither test has withstood criticism well.[18] As a result, federal courts now are experimenting with new standards to remedy the perceived defects in the two major tests. Dissatisfaction with both the "control group" and the "subject matter" tests has spawned at least three recent variations on the same theme.[19] Under these experimental tests, courts are struggling to extend the privilege to encourage greater reliance on professional legal advice while preventing an interpretation of the privilege which would threaten to keep all corporate affairs permanently secret.[20] This struggle for revision is occurring, moreover, while the very existence of the attorney-client privilege in the corporate sector is under assault. Recent proposals to amend the Code of Professional Responsibility[21] and regulations of the Securities Exchange

the Supreme Court. Congress, however, amended the rules before granting its approval. *See* Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (adopting FED. R. EVID. 501, which embraces the common law of privilege). For a discussion of the rule as adopted, and the reason for the congressional changes, *see* H.R. REP. No's. 93-650 and 93-1597, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7082, 7098, 7100; S. REP. No. 93-1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7058.

[13] City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Electric Co. v. Kirkpatrick, 312 F.2d 743 (3rd Cir. 1962), *cert. denied,* 372 U.S. 943 (1963) [hereinafter cited as *City of Philadelphia*].

[14] *City of Philadelphia, supra* note 13, at 485.

[15] *See, e.g.,* Harper & Roe Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd per curiam,* 400 U.S. 348 (1971); Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp. 62 F.R.D. 454, 456-57 (N.D. Ill. 1974), *aff'd,* 534 F.2d 330 (7th Cir. 1976); Hasso v. Retail Credit Company, 58 F.R.D. 425, 428 (E.D. Pa. 1973).

[16] 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd per curiam,* 400 U.S. 348 (1971).

[17] 423 F.2d at 491-92.

[18] *See, e.g.,* Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts,* 6 GA. L. REV. 339, 362-71 (1972); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test,* 84 HARV. L. REV. 424, 432-34 (1970); Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 MICH. L. REV. 360, 369-74 (1970).

[19] *See* Diversified Industries, Inc. v. Meredith, 572 F.2d 606, 609 (8th Cir. 1977) (modified subject matter test preventing dissemination of information beyond those with "need to know"); In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 385 (D.D.C. 1978) (relating communication to decision-making process on legal advice).

[20] *See* United States v. Upjohn, 600 F.2d 1223, 1227 (6th Cir. 1979) (concern that attorneys for corporations not become the "exclusive repository of unpleasant facts.").

[21] *See* ABA COMM. ON PROFESSIONAL STANDARDS AND EVALUATION, *Draft Code of Professional Responsibility, reprinted in* Legal Times of Washington, August 27, 1979, *passim.*

Commission[22] question the very values which the attorney-client privilege seeks to protect.[23] The tensions on the privilege in terms of its scope, its nature, and its future effectiveness, thus have aroused the interest of both the corporate and legal communities.[24]

This note will examine the policy conflicts manifested in alternative approaches to the corporate attorney-client privilege. First, the note will analyze in detail the established "control group" and "subject matter" tests. This analysis will focus both on the principles underlying each standard and the effects which each test produces. Next, the note will scrutinize three recent decisions, *Duplan Corp. v. Deering Milliken, Inc.*,[25] *Diversified Industries Inc. v. Meredith*,[26] and *In re Ampicillin Antitrust Litigation*,[27] which present modifications to the traditional approaches of the federal courts. They will be examined for their compliance with the purpose underlying the attorney-client privilege and for the opportunity for reform which each represents. Finally, a new approach combining aspects of two recent tests will be suggested. It will be submitted that an unambiguous standard which closely relates application of the privilege to the reason for a corporate employee's communication with an attorney permits extension of the privilege to the corporation *qua* corporation. Thus, the proposed test presents the most predictable and practical method of serving the purposes of the corporate attorney-client privilege.

I. The Established Standards

A. *The Control Group Test*

In applying the attorney-client privilege to corporations, federal courts historically relied upon the definition and application of the privilege set forth by Judge Wyzanski in *United States v. United Shoe Machinery Corporation*.[28] In *United Shoe*, the district court held that where "letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged as contain, or have opinions based on, in-

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[22] The Institute for Public Representation at Georgetown University Law Center proposed an amendment to the Rules of Practice of the Securities and Exchange Commission which would require attorneys to disclose their knowledge of wrongdoing under the federal securities laws. SEC Release No. 34-16045, July 31, 1979.

[23] As noted, the attorney-client privilege encourages clients to seek the assistance of counsel. To the extent that the proposals would require attorneys to disclose information obtained in confidence, the values served by the privilege are undermined.

[24] *See* 66 A.B.A. J. 23 (January, 1980). The Supreme Court recently granted certiorari on United States v. Upjohn, 600 F.2d 1223 (6th Cir. 1979). United States v. Upjohn, No. 79-886 (March 17, 1980). For the reasons expressed in the text accompanying notes 73-89 *infra*, this note argues that the Court should reverse the Sixth Circuit's decision in *Upjohn*.

[25] 397 F. Supp. 1146 (D.S.C. 1975).

[26] 572 F.2d 606 (8th Cir. 1978).

[27] 81 F.R.D. 377 (D.D.C. 1978).

[28] 89 F. Supp. 357, 358-59 (D. Mass. 1950).

formation furnished by an *officer or employee* of the . . . [corporation] in confidence and without the presence of third persons."[29] Thus, courts following *United Shoe* permitted extension of the privilege to any corporate employee provided his or her confidential communication involved the rendering of legal advice.[30]

This broad extension of the attorney-client privilege to corporations created two problems. First, broad extension of the privilege did not relate application of the privilege to the underlying purpose of encouraging the solicitation of legal advice.[31] All corporate communications arguably fell within the *United Shoe* ambit, whether intended for a particular legal purpose or not. Second, the *United Shoe* approach ignored dictum from *Hickman v. Taylor*,[32] in which the Supreme Court of the United States observed that communications of corporate employee witnesses to corporate activity were not protected by the attorney-client privilege.[33] By extending a client-attorney privilege to all corporate employees, the *United Shoe* court clearly contradicted the Supreme Court's statement in *Hickman*. Thus, the formulation of the corporate attorney-client privilege announced by Judge Wyzanski was insufficient; the standard's overbreadth shielded too many corporate employee communications.

The problems of *United Shoe* led federal courts to adopt new means of construing the attorney-client privilege as it applies to corporations. In *City of Philadelphia v. Westinghouse Electric Corp.*,[34] Judge Kirkpatrick of the Eastern District of Pennsylvania fashioned a rule that restricted the traditional application of the privilege when asserted by a corporation. In that case, the city of Philadelphia sued Westinghouse, General Electric (GE), Allis-Chalmers and other corporations, alleging overpricing of certain products.[35] During pre-trial discovery, the city sought memoranda of conversations between defendant General Electric's counsel and several GE employees accused of wrongdoing. Memoranda of conversations between defendant Allis-Chalmers'

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[29] *Id.* at 359 (emphasis supplied).

[30] *See, e.g.*, United States v. Aluminum Co. of America, 193 F. Supp. 251, 252 (N.D.N.Y. 1960); Zenith Radio Corp. of America, 121 F. Supp. 792, 794 (D.Del. 1954); Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 367, 369-71 (1970).

[31] *See* WEINSTEIN, *supra* note 2, at ¶ 503(b)[04].

[32] 329 U.S. 495, 508 (1947). In *Hickman*, employees of a tugboat company were interviewed by the firm's attorney about an accident; the employees had survived the sinking of their tug. The court held that the attorney's memoranda of their conversations were protected as "work product" of the attorney, and discoverable only upon a showing of good cause. *Id.* at 511. The holding has now been codified in FED. R. CIV. P. 26(b)(3).

[33] The court stated, "the memoranda . . . fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. . . . For present purposes, it suffices to note that the protective cloak of the privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation." 329 U.S. at 508.

[34] *City of Philadelphia, supra* note 13, at 485.

[35] *See* City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 486, 487 (E.D. Pa. 1962) [hereinafter cited as *City of Philadelphia II*].

attorney and that company's employees also were sought.[36] Both GE and Allis-Chalmers attempted to prevent discovery of the documents, arguing that the memoranda were protected from disclosure by the attorney-client privilege.[37]

In reaching its decision that the memoranda were not entitled to the protection of the attorney-client privilege,[38] the *City of Philadelphia* court focused on the single question which it felt must be answered in applying the privilege to corporations, and which analogized the corporate client's privilege to that held by individual clients. The court asked, "[i]s it the *corporation* seeking the lawyer's advice when the asserted privileged communication is made?"[39] To answer this fundamental question, the court considered the *United Shoe* formulation of the privilege,[40] and the dictum from *Hickman v. Taylor* which the *United Shoe* court had ignored.[41] According to the *City of Philadelphia* court, the approach adopted in *United Shoe* was overly broad.[42] The court apparently feared that application of the attorney-client privilege to an "extremely broad class"[43] of employees would permanently insulate corporate affairs from the discovery process of litigation. Moreover, Judge Kirkpatrick noted that any extension of the attorney-client privilege to such classes of employees would conflict with *Hickman v. Taylor*.[44] Reading *Hickman* as distinguishing statements made by clients and statements made by employees of clients,[45] the court observed that the attorney-client privilege could not extend to mere employee witnesses to corporate acts.[46] Since the *United Shoe* formulation extended the privilege to all corporate employees—including mere employee witnesses—the court noted that the *Hickman* dictum was contradicted. The *City of Philadelphia* court therefore concluded that the *United Shoe* test was unsatisfactory,[47] and that a different, qualified approach was required.[48]

In devising its new approach, the court recalled the fundamental question whether the corporation *qua* corporation was seeking advice when the assertedly privileged communication was made.[49] It determined that an affirmative answer to this question is possible only when the individual communicating with the corporation's lawyer is in a position to act upon the attorney's advice.[50] The court thus held that for the privilege to attach, only those

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[36] *City of Philadelphia, supra* note 13, at 484.
[37] *Id.*
[38] *Id.* at 486.
[39] *Id.* at 485 (emphasis supplied).
[40] *Id.*
[41] See notes 32 and 33 *supra*.
[42] *City of Philadelphia, supra* note 13, at 485.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* The court stated:

if the employee making the communication . . . is in a position to control or even to take a substantial part in a decision about any action which the

officers and employees with decision-making authority are sufficiently identified with the immediate legal problem.[51] In any other case, the employee-communicator merely provides information which the lawyer may or may not use in counseling his client.[52] The "control group" test established by the *City of Philadelphia* court thus restricts the scope of the corporate attorney-client privilege suggested by *United Shoe*; the *United Shoe* problems of overbreadth are minimized. Moreover, by applying the privilege to the corporation *qua* corporation, a standard for corporate clients more closely analogous to the privilege available to individual clients is defined.

Since its formulation in the *City of Philadelphia* decision, the control group test has gained broad judicial support.[53] Recently, two other courts have applied the standard to corporations seeking the protection of the attorney-client privilege. In *In re Grand Jury Investigation*,[54] the Court of Appeals for the Third Circuit endorsed the view taken by its district court in *City of Philadelphia* and adopted the control group test. In *Grand Jury*, the defendant, Sun Company, requested its attorney to investigate allegations of illegal foreign payments made by corporate employees.[55] The law firm which conducted the investigation and advised the company regarding liability claimed that documents prepared during the course of its investigation were protected from discovery by the attorney-client privilege.[56] In holding that the documents were not privileged, the appeals court adopted the control group approach.[57] The court noted that while the control group standard had been criticized,[58] the fundamental idea underlying the test was sound: the standard restricted application of the privilege so that it "shelters only those communications that . . . [are] socially desirable to protect."[59] As applied to communications made by low-level employees to a corporation's attorney investigating possible wrongdoing, the court found that extension of the privilege was not socially desirable.[60]

In holding that Sun Company's documents were not protected from disclosure by the attorney-client privilege, the court focused on the nature of

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> corporation may take upon the advice of the attorney, . . . he is (or personifies) the corporation when he makes the disclosure to the lawyer and the privilege would apply.

Id.

[51] *Id. See also* Note, *The Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 428, 432 (1970) [hereinafter cited as HARVARD NOTE].

[52] *City of Philadelphia, supra* note 13, at 485.

[53] *See* HARVARD NOTE, *supra* note 51, at 429, and cases cited at note 12 *supra*.

[54] 599 F.2d 1224 (3d Cir. 1979).

[55] *Id.* at 1227.

[56] *Id.* at 1228.

[57] *Id.* at 1237.

[58] *Id.* at 1235-37.

[59] *Id.* at 1235, quoting Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 365-66 (1972).

[60] 599 F.2d at 1237. The court emphasized that communications which were "socially desirable" to protect were those made by an individual authorized to act upon the lawyer's advice. *Id.* at 1235.

communications between corporate employees and corporate attorneys, and upon the relationship between attorneys and their corporate clients.[61] First, the court reasoned that although an attorney needs to secure information from outside the control group to offer informed legal advice,[62] the privilege is not essential to this information gathering process.[63] Rather, because the corporation holds the privilege, and thus may waive it, the privilege's assurance of confidentiality is a mere illusion to communicating employees. Employees involved in wrongdoing communicate with an investigating attorney at their own risk if corporate managers later may waive the privilege,[64] while innocent employees have no fear of confiding in corporate counsel.[65] Since an attorney's ability to secure information thus would not be hampered by the unavailability of the privilege, its extension to low-echelon employees is neither necessary nor desirable.[66] Second, the court noted that the limit on the scope of the privilege provided by the control group test did not discourage corporate managers from soliciting legal assistance, as alleged by critics.[67] Instead, the court reasoned, corporations have "little choice."[68] Although the privilege's protection might make investigations to ensure compliance with complex regulatory laws more "palatable,"[69] the court speculated that "the potential costs of undetected non-compliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential."[70] Since corporations were "unlikely to risk . . . liability . . . by foregoing introspection,"[71] the court concluded that the control group test did not operate as a disincentive to internal fact finding.[72] Extension of the privilege would yield no additional or more useful information to the attorney than could be obtained under the more restrictive standard, yet it would deny discovery of such information to judicial fact finders. The *Grand Jury* court thus found that extension of the corporate attorney-client privilege to Sun Company's employees' conversations was unwarranted and that the restrictive control group standard was appropriate for modern corporations.

The Court of Appeals for the Sixth Circuit also recently indicated its endorsement of the control group test. In *United States v. Upjohn*,[73] the court declined to protect documents prepared by the defendant corporation's attor-

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[61] *Id.* at 1236.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 1237.
[68] *Id.*
[69] *Id.*
[70] *Id.* In the next breath, however, the court questioned its own speculation, noting that "application of the control group test . . . [might] result in less frequent use of attorneys as corporate sleuths." *Id.*
[71] *Id.*
[72] *Id.*
[73] 600 F.2d 1223 (6th Cir. 1979), *cert. granted,* United States v. Upjohn, No. 79-886 (March 17, 1980).

ney while investigating allegations that employees had bribed foreign government officials.[74] In reaching its decision, the court focused on the problems it perceived extension of the privilege beyond corporate decision makers would effect, and adopted the limited control group standard. Although noting that corporate clients can communicate with their attorneys only through agents and employees,[75] the court reasoned, first, that extension of the privilege would defeat its underlying purpose of encouraging clients to solicit legal advice.[76] Ultimately, the court found, corporate managers would be dissuaded from asking attorneys to conduct factual investigations if the privilege extended to low-echelon employees.[77] Since litigants would have difficulty obtaining information gleaned from privileged investigations, an enterprise's exposure to liability would be minimized. Managers consequently could avoid ordering internal investigations at little risk and thus shield themselves from information about possibly illegal transactions.[78] The court therefore determined that extension of the privilege's scope would encourage corporate officials to ignore "important information they have good business reasons to know and use."[79] Second, the court observed that extending the privilege would have the effect of funneling corporate information about questionable activities to corporate counsel for concealment.[80] If communications between attorneys and low level employees were protected from disclosure, corporate attorneys might become the "exclusive repository of unpleasant facts."[81] The court feared that the discovery burden imposed upon litigants would thus become overly severe. Because such a discovery burden would create broad "zones of silence"[82] for fact finders, the court adopted the more restrictive control group approach.

While *U.S. v. Upjohn* and *In re Grand Jury Investigation* are manifestations of the support which the control group test has received, each case also reveals the flaws of the standard. For, while each decision reasoned carefully that a broad extension of the privilege in the corporate setting would needlessly overprotect information, documents or wrongdoing, neither case sets out a means of applying the privilege in the corporate context that is distinctly related to the purpose underlying the rule, or to corporate purposes in performing internal investigations. Both *Upjohn* and *Grand Jury* are concerned with the privilege's goal of encouraging clients to solicit professional legal advice, yet reach dramatically opposite conclusions about the effects of extending the privilege's scope. The *Grand Jury* court's view argues that internal fact finding will proceed notwithstanding the unavailability of the privilege, and that extension is therefore unnecessary.[83] The *Upjohn* court, conversely, takes

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[74] *Id.* at 1225.
[75] *Id.* at 1226.
[76] *Id.* at 1227.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*, citing Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 955 (1956).
[83] See text accompanying notes 67-72 *supra*.

the unique view that extension itself inhibits introspection, and that limits therefore should be imposed.[84] That the same result can be reached from such opposite reasoning indicates that neither court fully understands the true nature and purpose of corporate introspection. Informed advice on compliance with regulations and correction of problems depends upon counsel's knowledge of facts held only by low-level employees. If the corporate purpose in conducting an internal investigation is legitimately related to legal problems, failure to extend the privilege to communications by low-level employees contradicts the privilege's goal of encouraging the resort to effective legal advice. Indeed, this contradiction is especially apparent in the compliance investigation context presented in these cases, because of the corporation's inability to meet complex regulatory directives without professional assistance.[85] The courts' failure to accord any protection to the attorneys' documents therefore foils the corporate purpose in performing compliance investigations and relies on sheer speculation about a corporation's response to the availability *vel non* of the attorney-client privilege. Moreover, neither decision precisely defines the applicability of its standard; no accurate definition of membership in the control group is provided.[86] The ambiguity of a term of art such as "control group" is apparent. Without a predictable means of attaching the privilege to corporate communicators, any standard is likely to fail.[87]

B. *The Subject Matter Test*

Criticism of the control group test led the Seventh Circuit to adopt a broader and less restrictive test in *Harper & Roe Publishers, Inc. v. Decker.*[88] In *Harper*, a corporate antitrust defendant, Harper & Roe, sought mandamus to vacate a district court order compelling production of documents containing employee-attorney communications.[89] Harper & Roe attorneys had inter-

[84] See text accompanying notes 77-79 *supra*.

[85] Were the investigations to have been conducted in anticipation of litigation instead of prospectively for compliance purposes, a qualified privilege would be available. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); FED. R. CIV. P. 26(b)(3). Indeed, in *Grand Jury*, with respect to some documents, the court indicated that Sun Company's anticipation of litigation was strong. 599 F.2d at 1229. By failing to accord any protection to these documents, however, courts following the control group approach lift an otherwise difficult discovery burden; litigants may thus proceed on "wits borrowed from . . . [one's] adversary." 329 U.S. at 516 (Jackson, J., concurring).

[86] Indeed, in *Upjohn*, the court of appeals remanded the case to the district court for consideration of which officials' communications might still be protected under the control group test. 600 F.2d at 1228.

[87] *See* WEINSTEIN, *supra* note 2, at ¶ 503(b)[04]. *See also* HARVARD NOTE, *supra* note 51 at 426-27 (suggesting "bright line" test to define privilege precisely). The troublesome nature of defining membership in the control group is evident in cases adopting that standard. *See, e.g.*, Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968) (division managers and assistant division managers); Congoleum Industries, Inc. v. GAF, 49 F.R.D. 82 (E.D. Pa. 1969) (corporation vice-presidents, division vice-presidents, and general managers); Garrison v. General Motors, 213 F. Supp. 515 (S.D. Cal. 1963) (directors, officers, department heads, division managers and first assistant division managers, and division chief engineers).

[88] 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd per curiam*, 400 U.S. 348 (1971).

[89] 423 F.2d at 490. The memoranda were sought pursuant to FED. R. CIV. P. 34.

viewed employees after their testimony before a grand jury investigating aspects of the publishing industry.[90] In granting mandamus, and thereby preventing discovery of the documents, the Seventh Circuit relied on two ideas. First, the court noted that the control group test was not "wholly adequate."[91] Observing that the test had been criticized in learned commentary,[92] the court held that the privilege extended to individuals outside the control group and concluded that a broader test was required.[93] In response to criticism of the control group standard, the court felt that internal corporate investigations were essential to management of the modern corporation. Extension of the privilege to communications between attorneys and employees necessary to the resolution of an immediate legal problem was thus appropriate. As applied to the "debriefing" of employees who had appeared before the grand jury,[94] the nexus between the conversations and a corporate decision on legal advice was sufficiently close to invoke the privilege.[95] The *Harper* court concluded that communications with employees would be privileged if made at the direction of a superior and if the communications concerned matters within the scope of the employee's duties.[96] The court's test thus relied not upon the status of the communicator-employee, but upon the "subject matter" of the communication.[97]

Second, the court considered the problem of statements made by bystander witnesses to corporate activity, the issue which had motivated the *City of Philadelphia* court to formulate the control group test.[98] The *Harper* court read *Hickman v. Taylor* as denying protection to statements made by corporate employees fortuitously observing corporate acts.[99] The court reasoned that its subject matter test, by contrast, would apply when employee-

[90] 423 F.2d at 490.

[91] *Id.* at 491.

[92] *Id.* The court noted in particular the case of D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 736, 388 P.2d 700, 709, 36 Cal. Rptr. 468, 477 (1964). In *Chadbourne*, the Supreme Court of California attempted to analogize application of the corporate attorney-client privilege to the privilege enjoyed by individuals. The court concluded that the privilege would apply if the employee-communicator was the "natural person" to be speaking for the corporation. 60 Cal. 2d at 736, 388 P.2d at 709, 36 Cal. Rptr. at 477. In reaching this decision, the court focused on the intent of the parties—corporation and employee—in making the communication. To the extent that their intentions were related to the resolution of a particular legal problem, the privilege would apply. 60 Cal. 2d at 738-39, 388 P.2d at 710, 36 Cal. Rptr. at 478. *See also* Burnham, *Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois*, 56 ILL. B.J. 542, 545-48 (1968); Heininger, *The Attorney-Client Privilege as it Relates to Corporations*, 53 ILL. B.J. 376, 384 (1965); Maurer, *Privileged Communications and the Corporate Counsel*, 28 ALA. LAW. 352, 375 (1967).

[93] 423 F.2d at 491.

[94] *Id.* at 490.

[95] *Id.* at 491.

[96] *Id.* at 491-92.

[97] The characterization of *Harper*'s rule as a "subject matter" test has been widespread. *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1165 (D.S.C. 1975).

[98] 423 F.2d at 491. The court noted that, in the case at bar, they were "not dealing with the communications of employees about matters as to which . . . [the employees] are virtually indistinguishable from bystander witnesses . . . ." *Id.*

[99] *Id.* See also note 33 *supra*.

communicators were corporate actors, not corporate witnesses.[100] Since the test permitted the privilege to attach only to communications involving an employee's duties, it would, by definition, involve only communications relating to an employee's acts. Thus, the *Harper* test avoided the problems of *Hickman*'s dictum, while expanding the scope of the corporate privilege. The Supreme Court, in an equally divided *per curiam* decision, affirmed the Seventh Circuit's opinion.[101]

As with the control group test enunciated in *City of Philadelphia*, the subject matter test announced in *Harper* spawned critical comment.[102] Several courts adopted the *Harper* reasoning;[103] others expressly rejected it.[104] In its attempt to relate more closely the communications of corporate attorneys to the purpose of encouraging the solicitation of legal advice, the *Harper* subject matter test was a step in the right direction. Focusing on the substance of a communication offers a better approach to determining how the attorney-client privilege should be applied to the unique situations and requirements of a modern corporation. Since corporate managers and decision makers frequently do not possess complete and detailed information about all corporate activity, some extension of the privilege beyond the control group is desirable. Such application offers several positive benefits. First, it provides more information to attorneys than might be gleaned absent the privilege; attorneys are thus more likely to offer more informed and reasoned advice. Second, it assists in informing management of information about wrongdoing. Since all communications are protected, it is more likely that facts relating to questionable activity actually will be transmitted to corporate management. Thus, the test relates attorney-employee communications to the privilege's purpose of encouraging clients to seek legal help. Finally, the subject matter standard permits a more precise analogy between the scope of the privilege extended to individual clients and that accorded the corporate client. In both cases, communications are protected on the basis of their substance. The analogy offered by the control group test, by contrast, works imprecisely. An individual's communications are not protected on the basis of the communicator's status as are the corporate client's communications under the control group test. By looking at both information "givers" and "deciders,"[105] the subject matter test makes comparison to individual clients more exact. Ultimately, such analogy is appropriate; the privilege attaches only to the corporation *qua* corporation.

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[100] 423 F.2d at 491-92.

[101] 400 U.S. 348 (1971).

[102] *See, e.g.*, HARVARD NOTE, *supra* note 51, at 432-34.

[103] See note 15 *supra*.

[104] *See, e.g.*, United States v. Upjohn, 600 F.2d 1223, 1227 (6th Cir. 1979); In re Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979) (both cases specifically rejecting *Harper*). *See also* Federal Trade Commission v. Lukens Steel Co., 444 F. Supp. 803, 807 n.4 (D.D.C. 1977) (acknowledging the split in circuits between the "control group" and "subject matter" tests without deciding which test to adopt); Attorney General of the United States v. Covington & Burling, 430 F. Supp. 1117, 1121 (D.D.C. 1977) (same).

[105] Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 374 (1970).

Despite the attempt to relate attachment of the privilege more closely to the purpose underlying the rule and to a more precise analogy to individual clients, the *Harper* test is not without its critics. In its broad application, the *Harper* subject matter standard might be unpredictable and unworkable.[106] Since the test first requires that communications be made only at the direction of a superior, attorneys conducting corporate investigations would have to consult a variety of middle management personnel to be sure that each employee communicating with him did so only at the request of a superior. Complete knowledge of corporate structure and a workable definition of "superior" are therefore essential to the preservation of the privilege.[107] Absent such knowledge or such a definition, the privilege might extend to any employee. This would strain the relationship required between the assertedly privileged communication and the rendering of legal advice which is the essence of the privilege in any context. More importantly, however, for those corporations that successfully meet *Harper*'s two step approach to attachment of the privilege, the standard might permit corporations to "funnel" information through their attorneys, and thus escape disclosure indefinitely. As the court in *Upjohn* later lamented, corporate attorneys might become the "exclusive repository of unpleasant facts."[108] A corporate manager could circumvent the purpose of the privilege and liberal discovery rules by ensuring that the two simple aspects of the subject matter test[109] had been met.

The subject matter standard announced in *Harper* thus suffers from problems similar to those confronted by the control group approach. The two standards are somewhat unpredictable because they ambiguously suggest individual corporate officials to whom protection may extend. Moreover, the standards fail to balance appropriately a corporation's needs for introspection and low-level information against the burden of discovery imposed on opposing litigants. Finally, and most significantly, neither standard articulates a method for attaching the privilege to corporations which distinctly relates the substance and transmittal of corporate information to a corporate decision on legal advice. It is this element which defines the correct application of the privilege in a manner consistent with its underlying principles.

II. New Directions

Because of flaws in both the control group and subject matter tests, a few courts recently have experimented with new standards. Although most circuit courts still cling to the established methods of applying the attorney-client privilege to corporations,[110] three recent decisions indicate a willingness on the part of judges to fashion a rule which more closely relates application of the privilege in the corporate setting to its goal of encouraging clients to seek professional legal assistance. This section of the note will examine those decisions, and their attempts to extend the privilege where socially desirable, while

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[106] *See* Weinstein, *supra* note 2, at ¶ 503(b)[04].
[107] *See* 11 Conn. L. Rev. 94, 103 (1978).
[108] 600 F.2d at 1227.
[109] 423 F.2d at 491-92.
[110] See notes 12 and 15 *supra*.

preventing a universal interpretation of the privilege which would make all corporate documents and communications immune from discovery.

A. *The Combination Approach*

In *Duplan Corp. v. Deering Milliken, Inc.*,[111] a patent owner invoked the protection of the attorney-client privilege for some 4,500 documents sought by former patent licensees in multi-district antitrust litigation.[112] The District Court for South Carolina applied both the control group and subject matter tests *seriatim* to determine if the documents were privileged.[113] The *Duplan* court thus devised a combination test, viewing the subject matter and control group tests as necessary corollaries of each other.[114] In formulating this approach, the court noted that a corporation cannot function without many individuals at many levels possessing important information.[115] For an attorney to render useful advice, the court reasoned, he must be able to speak with all of these people in the strictest confidence.[116] Otherwise, the court felt, corporations would be reluctant to divulge information, and indeed, might hesitate to seek legal advice.[117] In analyzing the subject matter and control group tests, the court determined that each test, standing alone, did not sufficiently relate attachment of the privilege to the decision making process involved in rendering legal advice.[118] The court concluded that combining aspects of the two tests would be more effective.[119]

The *Duplan* court reasoned that the "main consideration is whether the particular representative of the client, to whom or from whom the communi-

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[111] 397 F. Supp. 1146 (D.S.C. 1979).

[112] *Id.* at 1156.

[113] *Id.* at 1163. Having devised its test, the court subsequently ordered the parties to submit lists to the court of documents for which a privilege was still asserted under the adopted standard. *Id.* at 1157.

[114] *Id.* at 1165.

[115] *Id.* at 1164. The court was particularly concerned with the modern corporation and the problems attendant to it. It therefore decided to take "a common sense look at the practicalities of the 'control group' test and its applicability in the day-to-day workings of a lawyer." The court then observed:

> Obviously, if a corporation needs legal advice it cannot deal solely through the chairman and the board of directors. There has to be a sufficient number of persons within a corporation who are authorized on behalf of the corporation to seek advice, to give information with respect to the rendition of advice, and to receive advice . . . .
>
> If only one, two, three, or four persons within a corporate structure could be the corporation when it must seek legal advice, then, for all practical purposes, any corporation would not have an effective attorney-client privilege.

Id.

[116] *Id.*

[117] *Id.* The court pointed out the danger of preventing attorneys from speaking with information holders because of the unavailability of the privilege. The court reasoned that corporations would become "reluctant to seek help absent the privilege's protection." *Id.*

[118] *Id.* at 1165.

[119] *Id.*

cation is made, is involved in rendering information necessary to the decision-making process concerning a problem on which legal advice is sought."[120] *Duplan* interpreted the control group test broadly, as extending to lower echelon employees where the individual employee provided access to information essential to giving legal advice.[121] The court observed, however, that such an application of the control group test did not determine which lower level employee commnications would be sufficiently identified with a particular legal problem for the privilege to attach. For guidance, the *Duplan* court turned to the *Harper* subject matter test, which it characterized as a "necessary corollary" to the control group approach.[122] The *Duplan* court determined that the subject matter standard announced in *Harper* imposed the additional requirement that the subject matter of an employee-attorney communication concern the performance of the worker's duties.[123] Thus, under the standard articulated in *Duplan*, a communication between an attorney and a corporate employee would be privileged if it were necessary to the rendering of legal advice to the corporate control group, and if it involved the activities of the employee during the course and within the scope of his employment.[124] The *Duplan* standard therefore looks first at the control group to determine if a legitimate request for legal advice has been initiated, and second, the standard evaluates the substance of an employer's communication. If the communication is related to one's duties of employment, the *Duplan* standard presumes it is linked to the rendering of legal advice.

Although the *Duplan* court misread the control group and subject matter tests,[125] the court's ultimate approach is sound. The *City of Philadelphia* control group test and the *Harper* subject matter test each inadequately protect employee communications to a corporation's attorney that are necessary to an informed legal opinion. *Duplan*'s standard, by contrast, notes that information

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[120] *Id.*

[121] *Id.*

[122] *Id.* The court noted that even where the individual communication contains information necessary to rendering legal advice, the privilege required more accurate characterization. *Id.* This would be true because, as the court pointed out, "one can envision that in some situations, the attorney has to go far down in the ranks; in other instances, the attorney can obtain the necessary information close to the top. The extent of the attorney-client privilege will vary with the individual situation; the climates are seldom identical." *Id.*

[123] *Id.*

[124] *Id.*

[125] *Duplan* appears to characterize the control group and subject matter tests erroneously. *City of Philadelphia* proposed the control group standard as a necessary qualification to the extension of the attorney-client privilege permitted for corporations under earlier definitions; it was not intended, as the *Duplan* court apparently reads it, to permit extension beyond corporate employees with actual authority to act upon legal advice. Similarly, *Harper* was not intended as a "necessary corollary" to the control group standard, but as an alternative to it. *See* In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 386-87 (D.D.C. 1978). *Harper* rejected the limited extension of the attorney-client privilege to corporate decision makers because of the imperfect analogy to individual clients which it offered, and because of the disincentives to the solicitation of legal advice which it effected. The two standards, although premised on the same principles, achieve radically different results and intend different objectives.

held only by employees is essential to corporate counsel. The court then recognizes that extension of the privilege is necessary to accommodate the practicalities of the modern corporation. The test is thus superior to the restrictive control group approach because it allows such information to be obtained. Moreover, by requiring that information provided by employees be necessary to rendering legal advice, the test recognizes that a close relationship between a communication and a corporate legal decision is necessary to strictly construe the privilege. The standard is therefore superior to the broad brush approach of the subject matter test. The test thus represents a significant step toward a standard which can clarify a confused area of the law. The *Duplan* opinion, however, fails to set forth an explicit rule governing application of the attorney-client privilege in the corporate setting[126] and does not require that the relationship between an employee communication and a legal decision be precisely drawn. Although *Duplan*'s reasoning is sound, a better approach would mold the *Duplan* reasoning into an easily followed, bright line rule of law which traces application of the privilege from initiation to communication to decision.

B. *The Need to Know Approach*

A second approach relating protection of employee-attorney communications to the purposes underlying the attorney-client privilege was taken in *Diversified Industries Inc. v. Meredith*.[127] In that case, the Weatherhead Company sued Diversified, alleging that Diversified had bribed the plaintiff's employees to induce them to accept inferior grades of Diversified's copper.[128] During pre-trial discovery, the plaintiff sought to discover memoranda prepared by a law firm retained by Diversified to conduct an internal investigation of employee activities.[129] In an *en banc* opinion,[130] the Court of Appeals for the Eighth Circuit held that the documents were protected by the attorney-client privilege.[131]

In reaching this decision, the *Diversified* court observed that the reasoning behind the subject matter test was superior to that underlying the control group standard.[132] The court reasoned that because *Harper*'s subject matter standard focused upon "why an attorney was consulted, rather than with

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[126] The notion that a "bright line" test is essential to proper application of the attorney-client privilege is derived from two principles. First, of course, the conflicting objectives and effect of the privilege prompt its strict construction. See note 5 *supra* and accompanying text; HARVARD NOTE, *supra* note 51, at 426. More important, however, is the predictability such a test would offer corporate attorneys and judges in asserting and applying the privilege. *See* WEINSTEIN, *supra* note 2, at ¶ 503(b)[04].

[127] 572 F.2d 596, 609 (8th Cir. 1977).

[128] 572 F.2d at 607.

[129] *Id.*

[130] A three judge panel of the Court of Appeals for the Eighth Circuit initially rejected Diversified's assertion of privilege. 572 F.2d 596 (Heaney, J., concurring and dissenting in part). The case was ultimately decided, however, in an *en banc* opinion written by Judge Heaney after rehearing by the full court.

[131] 572 F.2d at 611.

[132] *Id.* at 609.

whom the attorney communicated,"[133] the subject matter standard more closely related protected communications to the object of encouraging corporations to seek legal help.[134] The court noted, however, that a modification of the *Harper* standard was necessary to cure its potential for abuse. Specifically, the court feared that the *Harper* court's failure to guard the confidentiality of all employee-attorney communications would permit the "funneling" of information to corporate counsel for concealment.[135] The court determined that a means of relating communications to decisions on legal advice would prevent such abuse of the privilege, and that this could be accomplished by modifying the subject matter test to prevent dissemination of information beyond those in the corporation with a "need to know."[136] Thus, the *Diversified* court concluded that communications between corporate attorneys and lower echelon employees would be privileged 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.[137]

The standard thus adds the "need to know" element to *Harper*, and incorporates the test in a definite rule.

Like the standard for applying the attorney-client privilege developed in *Duplan*, the *Diversified* standard appropriately focuses on the reasons for the employee-attorney communication and on the peculiar need of corporate clients in seeking the protection of the attorney-client privilege. Yet, the *Diversified* standard goes further, and seeks to prevent the unlimited extension of the attorney-client privilege made possible by *Harper's* subject matter test. By qualifying that standard to require that communications between employee and attorney not be disseminated beyond those with a need to know of them, the *Diversified* standard ensures compliance with the privilege's insistence on confidentiality. Moreover, by noting the relationship required between an employee's communication and the rendering of legal advice, the standard

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[133] *Id.*

[134] *Id.* Indeed, the court pointed out that absent the privilege, a corporate attorney could be confronted with a "Hobson's choice." The court observed, "[i]f he interviews employees not having the 'very highest authority,' their communications to him will not be privileged. If, on the other hand, he interviews *only* those with 'the very highest authority' he may find it extremely difficult, if not impossible, to determine what happened." *Id.*, quoting Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. IND. & COMM. L. REV. 873, 876 (1970).

[135] 572 F.2d at 609.

[136] *Id.*

[137] *Id.* The test adopted by *Harper* is drawn directly from WEINSTEIN, *supra* note 2 at ¶ 503(b)[04], which in turn drew from a student commentator. Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 378 (1970).

prevents the funneling of information and documents to an attorney for permanent protection.[138]

The rule announced in *Diversified* is subject to criticism, however, since the rule is ambiguous in its definition of corporate superior,[139] and because its reliance on confidentiality is misdirected. First, a more exact standard is necessary to ensure that employee communications are not protected merely because they are made at the direction of an immediately superior employee. The ambiguous definition of superior might produce a relationship between the communication and a decision on legal advice too remote to invoke the privilege's protection. A better approach would define clearly who may request legal assistance, and require even closer connection between an employee's communication and a decision on legal advice. This would ensure the strict construction of the privilege necessary to serve its purpose.[140] Similarly, reliance on dissemination of information only to those with a "need to know" does not adequately guarantee a close relationship between an employee's communication and a decision on legal advice. It is not the dissemination of information that is important for the privilege to attach, but the nature and substance of the communication—and what is done with it after transmittal—regardless of who knows it contents. While confidentiality is important still no connection between the communication and legal advice is drawn by the modification of *Harper's* subject matter test suggested in *Diversified*.

C. *The Relationship Approach*

In *In re Ampicillin Antitrust Litigation*,[141] the District Court for the District of Columbia, the third court to attempt a new direction, fashioned a rule which insisted that a close relationship between an assertedly privileged communication and a decision on legal advice must be demonstrated for the privilege to attach.[142] The court devised its new approach in examining claims of privilege asserted by antitrust defendant Beecham, Inc. for several

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[138] See text accompanying notes 111-26 *supra*.

[139] *See* 11 CONN. L. REV. at 103.

[140] *Diversified* suffers from two other problems, also noted by student commentators. First, the court apparently ignored the fact that the memoranda in question contained primarily business, as opposed to legal, advice. 572 F.2d at 610 n.3. *See* 11 CONN. L. REV. at 106. More important, however, the *Diversified* court seriously misstates the law with respect to determining whether advice is of a "legal nature." The court points out that "a matter committed to a professional legal adviser is *prima facie* so committed for the sake of . . . legal advice . . ." 572 F.2d at 610, quoting WIGMORE, *supra* note 1, at § 2296. While this presumption may in fact be appropriate, the *Diversified* court shifts the burden of the presumption to an inappropriate party. The court holds the presumption applicable unless a contrary showing is made by the discovering party. 572 F.2d at 610. It has long been held, however, that the burden of establishing the applicability of a privilege is on the asserter. *See* WIGMORE, *supra* note 1, at §§ 2321-22. Indeed, to hold otherwise would truly create a "Hobson's choice." The discovering party would have to prove the contents of a document in order to discover the document itself. *See* 57 N. CAROLINA L. REV. 306, 314-17 (1978).

[141] 81 F.R.D. 377 (D.D.C. 1978).

[142] *Id.* at 385 n.8.

hundred documents.[143] Beecham objected to the report of a Special Master finding that documents relating to patents were not privileged.[144] In upholding the Master's report the court first reviewed the history of the attorney-client privilege as applied to corporations.[145] Noting that both the control group and subject matter tests had been criticized,[146] and concluding that neither test was sufficient,[147] the court adopted a new standard applying the privilege to employee-attorney communications only when the communication was essential to a decision on legal advice.[148] This new standard attached the privilege according to the following rule:

> 1) The particular employee or representative of the corporation must have made a communication of information which was *reasonably believed to be necessary to the decision-making process* concerning a problem on which legal advice was sought;
> 2) The communication must have been made for the purpose of securing *legal* advice;
> 3) The subject matter of the communication to or from an employee must have been related to the performance by the employee of the duties of his employment.[149]

The rule thus insists upon a close relationship between an employee's communication with corporate counsel and a corporate decision on a legal problem.

The *Ampicillin* court's reasoning closely parallels that of the court in *Duplan* in that its principal concern is with the practicalities of the modern corporation.[150] The court recognized that corporate counsel require information held only by low level employees, and that the privilege should attach when that information is necessary to prepare solutions to current legal problems.[151] A balance, then, is struck between the need for information and the

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[143] *Id.* at 380.
[144] *Id.* at 383.
[145] *Id.* at 386-87.
[146] *Id.* at 385.
[147] *Id.*
[148] *Id.* The court carefully explained that, in attempting to relate a communication to a specific legal problem, the rule should not be dependent on repeated factual determinations. The court asserted:

> the Court does not intend to imply that a communication will only be protected if it, in fact, contains information necessary to the decision-making process for a particular legal problem, because such an *ex post facto* approach would discourage full disclosure by an employee who may not know what information is necessary. What is meant is that communication made in the *reasonable belief that they contain such necessary information* will be protected. However, commuications which contain no such reasonable belief, either because of the status of the employee or because of the nature of the information, will not be protected.

Id. at n.10.
[149] *Id.* at 385.
[150] The court characterized *Duplan* as the "most well-reasoned" case on the issue of applying the privilege to corporate clients. *Id.* at 386.
[151] *Id.* at 386-87.

potential for large "zones of silence" [152] by examining both the subject matter of the communication and the context in which it was made. Unlike *Diversified's* somewhat ambiguous rule requiring the direction of a superior for a communication to be protected, *Ampicillin* insists that the employee know that his information is needed for a decision on a legal problem. Its rule is precise in drawing the relationship between an employee's communication and a legal decision, and most analogous to the individual client. *Ampicillin* therefore represents the most clearly focused rule applying the attorney-client privilege to corporations. The standard's sole failing lies in its omission of a mechanism for communicating the relationship between required information and the legal problem to the communicating employee. Although the *Ampicillin* court focused appropriately only on legal problems and the nature of attorney-employee communications, the standard fails to articulate how corporations solicit legal advice leading to such conversation. A better approach, defining a bright line rule, would begin with the initiation of a request for legal assistance and trace the steps required to relate an employee's communication to a corporate legal decision.

III. A Suggested Approach

Ampicillin and *Duplan* each reflect an approach to application of the attorney-client privilege which accomodates the needs and characteristics of the modern corporation while serving the purpose underlying the attorney-client privilege. In applying both the control group and subject matter tests *seriatim*, *Duplan* establishes a base point from which application of the privilege to the corporation *qua* corporation is possible. Its requirement that the control group instigate a request for legal advice is useful to establish a reference point from which further examination of the particular communication is possible.[153] *Ampicillin* provides the means of examining particular communications. Its focus on subject matter and context [154] permits the necessary relationship between the protected communication, a decision on legal advice, and the purpose of urging corporate clients to seek professional legal help to be drawn precisely. A test which combines both of these two aspects of *Ampicillin* and *Duplan* to trace all steps required to attach the privilege is therefore recommended.

A test combining elements of *Duplan* and *Ampicillin* would look first to the source of a corporate request for legal advice, and then relate an employee's communication to corporate decisions on that advice. Thus, the privilege should attach if:

> (1) individuals with authority to act upon legal advice sought such advice on behalf of the corporation; (2) the fact that legal advice was being sought was transmitted to an employee; (3) the employee communicated with the corporation's attorney (a) concerning a matter within the scope of his duties of employment, (b) as a result of a

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[152] *Id.*

[153] See text accompanying note 125 *supra*.

[154] See text accompanying note 151 *supra*.

request from corporate officers with authority to act upon legal advice, and (c) in the reasonable belief that the communication was necessary to the corporate decision making process on a particular legal problem; and (4) the communication was not disseminated beyond those with authority to act upon the legal advice rendered.

The test thus attempts to trace corporation's legal problem from the initiation stage to the legal decision, and distinctly relates an employee's communication to corporate legal decision making.

It is submitted that such a standard would neither limit attachment of the privilege so severely as to discourage corporate managers from seeking legal advice, nor permit the unlimited extension of the privilege to keep all corporate affairs permanently secret. Rather, because the test requires that instigation of requests for legal advice, and instructions that employees speak with the corporation's attorney, emanate from those officers with authority to act upon such advice, the standard urges the corporate structure to devote attention to its legal affairs. Moreover, by providing protection only for those communications distinctly related to current legal problems and limiting dissemination, no funneling of information to attorneys is permitted, and no artificial limit on attachment of the privilege is established.

The proposed standard also establishes objective and predictable criteria for attorneys and judges to invoke the privilege's protection. Under the proposed test, for example, when a corporation requests its attorney to investigate alleged wrongdoing and then to advise the corporation regarding possible liability, both corporate manager and attorney will know if the privilege properly may be asserted. The attorney first will look to the source of the request for legal assistance. If it falls within the group of individuals within the corporation who may act upon any advice he renders—probably those he deals with regularly—the attorney may then analyze the individual communication to be made. If the fact of the request for legal assistance has been transmitted to the communicating employee, and if as a result the employee realizes that his communication is necessary to resolve a legal problem, the privilege may be invoked. The only remaining requirement, as with all privileges, is that the communication remain confidential. To ensure this, the attorney must make certain that only those in authority to act upon his advice learn the substance of the low level employee's communication. These steps provide an efficient means of determining applicability of the attorney-client privilege to corporations. They thus establish a predictable rule which minimizes significant problems encountered by earlier approaches.

CONCLUSION

Application of the attorney-client privilege to communications between corporate employees and a firm's attorney have been difficult for three reasons. First, courts are divided about the extent to which such communications should be protected. As a matter of fundamental policy, the established control group and subject matter standards offer radically different approaches. Second, courts have been unsuccessful in closely relating assertedly privileged communications to the privilege's goal of encouraging corporations

to solicit professional legal assistance and to the resolution of immediate legal problems. Finally, even where policy arguments have been isolated, courts have not established objective criteria upon which predictable invocation of the privilege may be based. A new approach which extends the privilege in an appropriate and unambiguous manner, and which distinctly relates corporate communications to corporate legal decisions is therefore needed.

The test proposed in this note fosters the purpose of the attorney-client privilege without artificially restricting its extension to corporate communications. The standard recognizes the needs of modern corporations for introspection and closely relates privileged communications to a decision on a particular legal problem. In an era where corporate managers increasingly rely on professional legal advice, and where lawyer's duties to corporate clients are changing, such a predictable and reasoned standard should be adopted.

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