

**PRESERVATION OF CONFIDENTIAL INFORMATION
IN THE CORPORATE ENVIRONMENT**

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I. THE ATTORNEY-CLIENT PRIVILEGE

- A. The most widely accepted definition of the attorney-client privilege is one developed by Dean Wigmore:

(1) Where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

8 J. Wigmore, Evidence § 2292 at 544 (Rev. ed. 1961).

- B. The party asserting the attorney-client privilege has the burden of establishing that it applies. See, e.g., In re LTV Securities Litigation, 89 F.R.D. 595, 600 (N.D. Tex. 1981); Weisel Enterprises, Inc. v. Curry, 718 S.W.2d 56 (Tex. 1986).
- C. The purpose of the attorney-client privilege is to promote freedom of consultation between a lawyer and his client and to encourage full discussion of the facts without apprehension of disclosure. Fisher v. United States, 425 U.S. 391, 403 (1976); First Chicago Int'l v. United Exchange Co., Ltd., 125 F.R.D. 55, 56 (S.D.N.Y. 1989).
- D. The assumption that a corporation is entitled to claim the attorney-client privilege was first directly challenged in 1962. The appellate court in Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929 (1963), ultimately decided that the attorney-client privilege was available to a corporate client. The applicability of the attorney-client privilege was recognized conclusively by the Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1981).
- E. Application of the attorney-client privilege in the corporate setting, however, raises conceptual difficulties. There are problems inherent in adapting a doctrine, which originated in the context of an attorney's relationship with an *individual*, to a *corporation* that must necessarily act only through its employees and representatives.
- F. Three central considerations normally arise:

1. Will the attorney-client privilege protect communications made by the attorney to the client as well as those made by the client to the attorney?
 2. Will the privilege extend to communications by or to *all classes* of corporate employees or is the privilege limited to communications *originating from* or *directed to* only a specific class of such employees?
 3. Due to the often "compartmentalized" structure of corporations, what is the scope of the privilege if the person giving the information to the attorney is *not* the same person who will later act upon the attorney's advice? See Note, Attorney-Client Privilege and Work Product Doctrine - Application in the Corporate Context, 28 Wayne L. Rev. 1577, 1580 (1982).
- G. In responding to these considerations, courts have developed various tests to determine which corporate communications are within the attorney-client privilege: the "control group" test, the "subject matter" test, and the "modified subject matter" test. Although the United States Supreme Court rejected the "control group" test in Upjohn Co. v. United States, 449 U.S. 383 (1981), the Court declined to provide a standard for applying the attorney-client privilege to corporations, urging that this should be determined on a case-by-case basis. Moreover, some state courts still apply the "control group" test.

II. HOW ARE CORPORATE COMMUNICATIONS CLASSIFIED AS PRIVILEGED?

A. The Control Group Test

1. Under the "control group" test an employee's statement to corporate counsel is not privileged unless the employee "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" City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa.), mandamus and prohibition denied sub nom. General Electric Company v. Kirkpatrick, 312 F.2d 742 (3rd Cir. 1962), cert. denied, 372 U.S. 943 (1963).
2. The "control group" test was the original standard developed for determining applicability of the attorney-client privilege to corporations. Kanwit and Ossyra, The Corporate Client and the Attorney-Client Privilege, 66 Chicago Bar Record 84 (1984).
3. Under the "control group" test, the only communications protected are those between the control group of a corporation and its attorney. Thus,

the "control group" test rests almost exclusively on the *status* and *responsibility* of the communication within the corporate hierarchy. Id.

4. Prior to Upjohn Co. v. United States, the "control group" test was followed by the Third, Sixth and Tenth Circuits, as well as district courts in Colorado, Texas, Virginia, Maryland, New York and Pennsylvania. J. Gergacz, Attorney-Corporate Client Privilege at 3-50 - 3-53 (Garland Law Pub. 1987); Note, The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn, 81 Mich. L. Rev. 665, 669 (1983).

B. The Subject Matter Test

1. The "subject matter" test, formulated by the Seventh Circuit, is more expansive than the "control group" test. Miller, 29 Prac. Law. at 36. See also Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970), aff'd, 400 U.S. 348 (1971) (affirming decision by an equally divided court).
2. Under this test, communications by a company employee outside the control group to the corporation's attorney are privileged when made *at the direction of his superiors*, and if the subject matter upon which the attorney's advice is sought and dealt with in the communication is the performance by the employee of the duties of his employment. Id.
3. The "subject matter" test came about when dissatisfaction arose with the "control group" test because of the seemingly arbitrary nature of its application. Kanwit & Ossyra, 66 Chicago Bar Record at 85. Specifically, critics complained that the "control group" test failed to reflect the reality of corporate decision-making in that the communicator in a particular situation may not be the person who later acted on the legal advice. Id.
4. The advocates of the "subject matter" test believed that the attorney-client privilege should reflect the *group nature* of the corporate decision making and the corporate need for input from lower echelon employees. Id.
5. Thus, the subject matter test has two principal virtues: it recognizes the interdependency of corporate personnel by extending the privilege to communications from lower-level employees, and it encourages the flow of information to corporate counsel. The test, however, fails to provide an entirely satisfactory solution to the unique problems posed by applying the attorney-client privilege to communications from corporate clients due to the difficulty in distinguishing between communications to secure legal

advice and communications made for other purposes. See Note, 81 Mich. L. Rev. at 675.

6. Another major flaw in the "subject matter" test is the corporation's ability to create a "zone of silence" where all the employees are directed to channel reports to corporate attorneys and where superiors *routinely* approve or direct communications between lower-level employees and corporate counsel. Id. at 676.
7. Very few courts have relied wholly on Harper & Row's "subject matter" test because of its overbreadth. Id. at 676 n. 41, citing Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974); Hasso v. Retail Credit Co., 58 F.R.D. 425 (E.D. Pa. 1973).

C. The Modified Subject Matter Test

1. The "modified subject matter" test was adopted by the Eighth Circuit in order to prevent the assertion of the attorney-client privilege in a situation where an employee *routinely* consulted with an attorney for business purposes and at the direction of a superior. This test was also designed to prevent assertion of the privilege for communications where the employee was simply a bystander or witness to an event. Kanwit & Ossyra, 66 Chicago Bar Record at 87.
2. The "modified subject matter" test was proposed by Judge Weinstein, see 2 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 503(b)[04], at 503-41 to 44 (1981), and first recognized in Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977), modified on rehearing en banc, 572 F.2d 606 (8th Cir. 1978):

[T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction 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. We note, moreover, that the corporation has the burden of showing that the communication in issue meets all of the above requirements.

572 F.2d at 608-09.

3. The Eighth Circuit reasoned that the "modified subject matter" test offered a reasonable compromise between the "control group" test and the "subject matter" test. Note, 81 Mich. L. Rev. at 677. Unlike the "control group" test, the "modified subject matter" test is said to "properly account" for the realities of corporate life because communications from "information holders" is privileged even when they are not "high-level decision makers." At the same time the "modified subject matter" test avoids the "zone of silence" abuse of the "subject matter" test by imposing a legal advice requirement. *Id.*, citing 572 F.2d at 608-09.

D. The Upjohn Decision

1. In Upjohn Co. v. United States, 449 U.S. 383 (1981), the Supreme Court reaffirmed the application of the attorney-client privilege and work product immunity doctrine to the rendition of legal services in the corporate setting. See R. Porter, Voluntary Disclosures to Federal Agencies--Their Impact on the Ability of Corporations to Protect From Discovery Materials Developed During the Course of Internal Investigations, 39 Cath. U.L. Rev. 1007 (1990); Cody, The Attorney Client Privilege and the Work Product Immunity Doctrine For the Corporate Client, 15 U. Balt. L. Rev. 251, 258 (1986).
2. The Upjohn Court specifically rejected the "control group" test as being too narrow and frustrating the purpose of the attorney-client privilege by discouraging communication between middle and lower level corporate employees and the attorney rendering legal services to the corporation. The Court was in favor of a broader privilege for a corporation's interaction with its attorneys, but it declined to embrace specifically the "subject matter" test, and it did not "lay down a broad rule" for the application of the privilege in the corporate environment. See Miller, 29 Prac. Law. at 21-22.
3. The Court held that the attorney-client privilege did not apply *solely* to communications between corporate counsel and the so-called "control group" of key corporate officers and executives authorized to act upon counsel's advice. Instead, the Court ruled that the attorney-client privilege encompasses communications between corporate counsel and lower level employees *when the employees are aware that the communication has undertaken to allow the corporation to obtain legal advice*. Cody, 15 U. Balt. L. Rev. at 258-59.
4. Under Upjohn, a corporate employee's communication to corporate counsel, made at the direction of his superior, regarding matters within

the scope of the employee's job responsibilities, constitutes a privileged attorney-client communication.

5. In upholding the claim of privilege, therefore, the Upjohn Court emphasized the presence of these factors:
 - a. The communications were made by corporate employees to corporate counsel *upon instructions from superiors* in order for the corporation to *secure legal advice*;
 - b. The information sought and communicated concerned matters *within the scope of the employee's corporate duties*;
 - c. The employees were aware that the communications to counsel were made so that the corporation could *obtain "informed" legal advice*;
 - d. And the communications were *ordered* to be, and *remained, confidential*.

449 U.S. at 394-95 (emphasis added). These factors are considered by the court, but they are not requirements. In Baxter Travenol Laboratories, Inc. v. LeMay, 89 F.R.D. 410 (S.D. Ohio 1981), the court found most of the factors favored a finding of privilege, but that the employee had discussed matters outside his duties with counsel. The court held, "The privilege should not be denied simply because the corporation must act, obtain knowledge and communicate with counsel through other, natural persons." Id. at 414.

6. Although clearly helpful to corporate counsel seeking to invoke the attorney-client privilege or the work product immunity doctrine, the Upjohn decision left a number of questions unanswered. In rejecting the "control group" standard, the majority refused to articulate a test for application of the corporate attorney-client privilege. Instead, the Upjohn majority expressly called for a *case by case approach*. According to the court, a case by case approach is consistent with the spirit if not the letter of Fed. R. Evid. 501. Upjohn, 449 U.S. at 396-97. "The clear implication of Upjohn is that the communications of employees who discuss matters they observe as mere witnesses will not be privileged - a position that the commentators have long advocated." Note, 81 Mich. L. Rev. at 675 n. 28.
7. The Upjohn decision leaves corporate attorneys in an uncertain position. Communications with corporate employees and trial preparation efforts

sought by the other side may or may not be discoverable, depending upon the attending circumstances and case law in individual jurisdictions.

8. Even if a single test were adopted, total uniformity would not be achieved. State courts are not required to apply the Federal Rules of Evidence. Although most state courts have looked to Upjohn Co. v. United States for guidance, see, e.g., Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497 (1981); Leer v. Chicago, Milwaukee, S.P. & Pac. Ry., 308 N.W.2d 305 (Minn. 1981), cert. denied, 455 U.S. 939 (1982); Macey v. Rollins Env'tl. Servs., Inc., 179 N.J. Super. 535 (1981), some state courts have either expressly repudiated Upjohn or merely neglected to apply it. See, e.g., Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 256-58 (Ill. 1982) (repudiated Upjohn and adopted the "control group" test).
9. In Samaritan Foundation v. Maricopa County, 1992 W.L. 114727 (Ariz. App. June 2, 1992), the Arizona Court of Appeals adopted a modified version of the control group test. Anticipating litigation after a small child was neurologically damaged when he was treated for cardiac arrest at the hospital, an in-house attorney at Samaritan's legal department directed a paralegal to investigate the incident. The paralegal interviewed various witnesses and the dispute in the case concerned whether the plaintiffs were entitled to use these written interviews to refresh the recollections of four of the witnesses who claimed during depositions that they were not able to recall the surgery. In upholding the trial court's order to provide the plaintiffs with the written interviews, the court of appeals adopted a modified control group test. Employees not within the control group were given less than the absolute protection of the attorney-client privilege. The court, instead, embraced a qualified attorney-client privilege: The qualified privilege applies when management directs a corporate employee outside of the control group to communicate in confidence with corporate legal staff about matters within the scope of employment. No showing is required that the communications were taken in anticipation of litigation, but the qualified attorney-client privilege can be overcome upon a showing of substantial need.
10. No Texas court has not decided whether Texas follows the subject matter or control group test. See Cigna Corp. v. Spears, 1992 W.L. 228901 *2 (Tex. App. -- San Antonio 1992) (the court acknowledges and discusses authority for both tests but stops short of adopting or endorsing either test). Some commentators interpret Tex. R. Civ. Evid. 503(a)(2) as an adoption of the control group test. Good, Wellborn & Sharlot, Guide to the Texas Rules of Evidence: Civil and Criminal at 238 (Texas Practice 1988). However, others have harmonized Tex. R. Civ. Evid. 503(a)(2) with Upjohn. Wendorf & Schlueter, Texas Rules of Evidence Manual

127, 128 (1988). See also Sutcliffe and Holtkamp, The Attorney-Client Privilege Under Siege: Captive Law Firms and Upjohn Problems, at 299 (ABA T.I.P.S. 1990).

E. Rendition of Legal Advice

The attorney-client privilege applies to communications between the lawyer and client for purposes of rendering legal advice. If an investigation is conducted by lawyers and the thrust of such an investigation is factual in nature as opposed to legal, the privilege does not attach. Spectrum Systems Int'l Corp. v. Chemical Bank, 581 N.E.2d 1055, 1060 (N.Y. 1991).

F. In-House Counsel

1. The confidences employees reveal to in-house counsel acting as attorneys are accorded the same privilege that they would be accorded if they were revealed by a client to outside counsel. Bruce v. Christian, 113 F.R.D. 554, 560 (S.D.N.Y. 1986), citing Valente v. Pepsico, Inc., 68 F.R.D. 361, 367 (D. Del. 1975); In re LTV Securities Litigation, 89 F.R.D. 595, 601-02 (N.D. Tex. 1981).
2. Citing Upjohn, the district court in Bruce v. Christian stated that "attorney-client privilege extends to any employee communication on matters within the scope of his employment when that employee is aware that he is being questioned in confidence in order for his employer to obtain legal advice." 113 F.R.D. at 560.

III. THE WORK PRODUCT DOCTRINE

- A. The work product doctrine was first announced by the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947). The doctrine was later codified in Fed. R. Civ. P. 26(b)(3), which was amended in 1970. Texas state courts also recognize that work product is exempt from discovery. Tex. R. Civ. P. 166b(3)(a).
- B. Under this doctrine, materials prepared or collected by an attorney in preparation for litigation are generally protected from discovery by opposing counsel. There is "strong public policy" underlying the work product doctrine, United States v. Nobles, 422 U.S. 225, 236-248 (1975), because "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." In re Doe, 662 F.2d 1073, 1077 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982). Thus, the work product immunity may attach even when the attorney-client privilege has been waived. See In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982).

- C. The work product privilege "creates a zone of privacy in which an attorney can investigate, prepare, and analyze a case." In re Grand Jury Subpoena Dated November 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980).
- D. Courts in the Fifth Circuit have taken differing views on the question whether the protection to be accorded an attorney's opinion work product under Rule 26(b)(3) is absolute or less than absolute. Annot., Protection From Discovery of Attorney's Opinion Work Product Under Rule 26(b)(3), Federal Rules of Civil Procedure, 84 A.L.R. Fed. 779 (1987). The court in Kent Corp. v. NLRB, 530 F.2d 612 (5th Cir. 1976), cert. denied, 429 U.S. 920 (1976), held that materials prepared in anticipation of litigation are "always" protected by a properly raised claim of work product privilege. Accord, United States v. Chatham City Corp., 72 F.R.D. 640 (S.D. Ga. 1976). However, other Fifth Circuit cases support the view that an attorney's opinion work product does not have absolute protection under Fed. R. Civ. P. 26(b)(3). See, e.g., In re International Systems & Controls Corp. Securities Litigation, 693 F.2d 1235 (5th Cir. 1982).
- E. Although the burden of establishing that materials are work product is on the one asserting the privilege, Cedrone v. Unity Savings Association, 103 F.R.D. 423, 426 (E.D. Pa. 1984), once the work product doctrine is shown to apply, the other party has the burden of showing a substantial need for the information and the inability to obtain the material by other means. Hickman v. Taylor, 329 U.S. at 511-12. Federal Rule 26(b)(3) codifies this rule and recognizes a distinction between ordinary and opinion work product; courts apply greater protection to opinion work product than to ordinary work product. In Upjohn, the court noted that strong proof of "substantial need" and "undue hardship" is required where "opinion" work product is sought (i.e., an attorney's notes of an oral interview, memorandum analyzing the situation, and legal theories of a lawyer).
- F. The attorney-client privilege and the work product doctrine traditionally have served related functions in protecting the attorney and client from discovery procedures, thus promoting the effectiveness of the adversary system. Note, 28 Wayne L. Rev. at 1578.
- G. However, there are significant differences in their application. For example, a communication may be immune from discovery as work product even though it was not made to or by a client of an attorney. Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977). Also, unlike the attorney-client privilege, work product immunity applies only to documents prepared in anticipation of litigation, not to documents prepared for ordinary business purposes. Id.; Texas Dept. of Mental Health and Mental Retardation v. Davis, 775 S.W.2d 467 (Tex. App. -- Austin 1989, no writ) (investigation initiated by lawyer for Department of Mental Health prior to the filing of a lawsuit was not in anticipation of litigation and was not protected by work product doctrine); Sterling Drilling Co. v. Spector, 761 S.W.2d 74 (Tex. App. -- San Antonio 1988,

