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ATTORNEY-CLIENT PRIVILEGE: A GUIDE FOR CORPORATIONS

*Pamela Taylor**

History of the Privilege

The legal profession has, since its inception, insisted on confidentiality between lawyer and client. This "privilege" has its origins in ancient Rome, where in the second century, A.D., Roman law provided that a slave could not disclose his master's secrets.¹ The slave was a member of the master's household, and loyalty and fidelity were of paramount importance in the society/family structure. Attorneys were servants; servants were slaves; a slave/servant was not permitted to testify against his master.² The privilege attached automatically by virtue of the family relationship and was very broad in scope. The master was the holder of the privilege, and only he was entitled to waive it.

During the Elizabethan period, the attorney-client privilege gained importance as an effective bar to disclosure of confidential information. The first reported case involving the attorney-client privilege was *Waldron and Ward*, 82 Eng. Rep. 853 (K.B. 1654), wherein the privilege was narrowly applied to give protection only to confidential matters ascertained by an attorney directly from the client, while serving in his official capacity. Independent observations made by the attorney were considered nonprivileged and disclosable.³ The privilege continued to develop, as English law declared the attorney to be the holder of the privilege.⁴ Consequently, only the attorney could waive the privilege; by so doing, the client could be compelled to testify against his own interests. The Court of Exchequer said "the privilege of an attorney is the privilege of the client,"⁵ and the basis of the privilege is "on the oath and honor of the attorney."⁶

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1. W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, 66 (1932).

2. *Id.*; Cicero, pro Milone, 48.18.1.3.

3. *Valiant v. Dodemead*, 21 Eng. Rep. 302 (Ch. 1743).

4. *Preston v. Carr*, 148 Eng. Rep. 634 (Ex. 1826).

5. *Id.* at 635.

6. *Ebsworth v. Alliance Ins. Co.*, 7 Q.B.D. 405 (1873).

By the end of the eighteenth century in England, the scope of the privilege had narrowed even more. The long-held "point of honor" could not be justified, so it was abandoned in favor of a new trend to foster full trust in the attorney in order to prevent inhibitions to the discovery process, and although the purpose of the privilege was to promote confidentiality for the client's secrets, the privilege was inconsistently applied.⁷

The first reported American case to address the issue of attorney-client privilege was *Dixon v. Parmalee*, 2 Vt. 185 (1829). The court said: (1) the privilege belongs to the client, not the attorney; (2) the attorney may exercise the privilege on behalf of the client; and (3) the privilege applies only to disclosures with regard to legal advice in a current attorney-client relationship and not to other professionals.⁸

In the early twentieth century, Wigmore formulated the elements of application of the privilege: "(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 client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived."⁹

Rule 26(b) of Federal Rules of Civil Procedure, adopted in 1938, addresses the privilege and permits "discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending action."¹⁰ Such discovery may include "the existence, description, na-

7. See *Greenough v. Gaskell*, 39 Eng. Rep. 618 (Ch. 1833); *Bolton v. Corporation of Liverpool*, 39 Eng. Rep. 614 (Ch. 1833).

8. *Dixon v. Parmalee*, 2 Vt. 185 (1829).

9. J. WIGMORE, 8 EVIDENCE, § 2292 (McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE].

10. Fed. R. Civ. P. 26(b)(1) states:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the impor-

ture, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter."¹¹ Federal courts gave the rule broad construction,¹² which improved the status of the privilege, since the rule excludes privileged communications. The privilege itself, being narrower in scope, began to receive attention as attorneys and courts alike tried to define its parameters.

In modern application, the attorney-client privilege guarantees that the client's discussions with his attorney will remain confidential. Privilege allows the attorney to calm the client's fears that embarrassing or legally damaging statements may become public knowledge. Also, assurance of the privilege enables the attorney to extract from the client *all* information pertinent to his proper representation of his client. Conventional application of the privilege has been to the relationship between an attorney and an individual. However, the rationale for the privilege may also apply to corporations and other entities who to seek legal advice.

Definition of Client

The Model Code of Evidence published by the American Law Institute in 1942 states in Rule 209, "'client' means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service from him in his professional capacity. . . ."¹³ The Uniform Rules of Evidence (issued in 1953 by the National Conference of Commissioners on Uniform State Laws, in cooperation with the American Law Institute) gives the same definition of "client" as in the Model Code.¹⁴ Arkansas Statutes Annotated Section 28-1001.502 defines "client" to include corporations.¹⁵

tance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision(c).

11. *Id.*

12. From September 16, 1938 (date of adoption) to May, 1939, there were over 200 cases generally construing this Rule.

13. MODEL CODE OF EVIDENCE RULE 209(a) (1942).

14. UNIF. R. EVID. 502(a)(1)(1974):

"A 'client' is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him."

15. ARK. STAT. ANN. § 28-1001.502 (Repl. 1979).

By definition, a corporation is a creature of the law and has no existence apart from the law. It "possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality"¹⁶ There are no cases which historically endow corporations with benefit of the attorney-client privilege. One commentator noted: "It is generally assumed that corporations and other legal entities are entitled to the privilege just as much as individuals are. The idea seems to go unchallenged — perhaps because in law, as in life, many of the most deeply believed assumptions are unspoken."¹⁷ The lack of precedent on which to base the application of the attorney-client privilege to corporations was addressed in *Radiant Burners, Inc. v. American Gas Association*,¹⁸ a pre-trial discovery proceeding to determine whether certain corporate documents were privileged. Judge Campbell concluded that a corporation is not entitled to assert "a privilege historically created only for natural persons,"¹⁹ and said that in order to claim the privilege,

[T]he communication [must] be completely confidential between the attorney and client [We] are . . . presented within the anomalous situation of determining what persons within the corporate structure hold its confidence and may properly be considered as its *alter ego* and therefore the "client" [S]hould we include within the scope of the term "client" the corporation's president? What then of other officers, members of the board of directors, executive committee members, supervisory personnel, office workers, or for that matter any employee, and finally what about the individual stockholders?²⁰

The court believed the privilege had been too closely tied to the privilege against self-incrimination and said "both [are] limited to a purely personal application and both [are] restricted as obviously is the one, solely to the field of criminal law."²¹ However, the court subsequently allowed the parties to file additional briefs on the issue.

On rehearing, the district court adhered to its original determina-

16. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

17. Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956).

18. 207 F. Supp. 771 (N.D. Ill. 1962).

19. *Id.* at 773.

20. *Id.* at 773-74.

21. *Id.* at 775.

tion.²² The court took notice of the Model Code and Uniform Rules and concluded "that both works were intended to set forth what the law *should be* and not necessarily what the law is."²³ The district court urged appeal so that the question could be placed squarely before a court "of sufficient importance or authority to create such a privilege by judicial ordination."²⁴

The United States Court of Appeals for the Seventh Circuit reversed the district court's holding.²⁵ Judge Hastings, writing for the court sitting en banc, cited Wigmore's conditions to the establishment of the privilege.²⁶ Judge Hastings noted that "no litigant has heretofore thought there was merit enough in the proposition to warrant a challenge to the availability of the privilege to a corporation."²⁷ He cited a number of cases in which the court had not been concerned with the corporate or non-corporate identity of the client and reiterated that the purpose of the privilege is to facilitate the administration of justice by encouraging full disclosure by the client to its attorney.²⁸ Quoting the definition of "client" in the Model Code of Evidence and the Uniform Rules of Evidence, Judge Hastings held the district court erred in his interpretation of the Codes: "Our view is that the scholars were giving expression to their view of the law as they found it."²⁹

Judge Hastings urged a strict construction of the privilege, however, adopting Wigmore's admonition that "[i]t ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."³⁰ He said the privilege should not allow a corporation to "funnel" its documents through its attorney to prevent disclosure, and that courts will attempt to prevent that by realizing "that they are not dealing with a blanket privilege."³¹ In short, "[a] corporation is entitled to the same treatment as any other 'client' — no more and no less."³²

22. *Radiant Burners, Inc. v. Am. Gas Ass'n*, 209 F. Supp. 321 (D. Ill. 1962).

23. *Id.* at 323.

24. *Id.* at 325.

25. *Radiant Burners, Inc. v. Am. Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963).

26. *Id.* at 318.

27. *Id.* at 319.

28. *Id.* at 322.

29. *Id.*

30. *Id.* at 323, citing WIGMORE, *supra* note 9 at § 2291.

31. *Id.* at 324.

32. *Id.*

In-House vis-a-vis Outside Counsel

The emergence and growth of corporations in the twentieth century has prompted the need for economic, convenient legal advice. Most companies, especially publicly held corporations, must have day-to-day guidance to ensure compliance with securities regulations and other laws. If the on-staff hiring of an attorney is economically unfeasible, a small company is likely to retain an outside firm and provide it with company letterhead and the designation "General Counsel." For all practical purposes, the Company has "in-house counsel."

Larger corporations are often represented by both in-house attorneys and one or more retained outside law firms. The major distinctions between in-house and outside counsel are that in-house counsel receive annual salaries and are employees working exclusively for the corporation, whereas outside counsel are independent contractors who have diverse clients and are compensated on a per-service basis.

Because in-house counsel is more readily accessible, company employees tend to consult them on non-legal matters. Therefore, courts have historically been more careful in applying the attorney-client privilege to communications with in-house counsel.

The Massachusetts district court, in *United States v. United Shoe Machinery Corporation*,³³ held that a communication between client and attorney neither inviting nor expressing any legal opinion but involving mere soliciting or giving of business advice is not privileged.³⁴ In this civil antitrust action, Judge Wyzanski, writing for the court, said:

[T]he apparent factual differences between . . . house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation's buildings, and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege It follows that United's general counsel and his clerks constitute for purposes of the privilege attorneys. However, no doubt a high percentage of the communications passing to or from them fall outside the privilege because they report or comment on information coming from persons outside the corporation or from public documents, or are summaries of conferences held with or in the presence of outsiders.³⁵

33. 89 F. Supp. 357 (D. Mass. 1950).

34. *Id.* at 359.

35. *Id.* at 360.

What, then, of attorneys whose employee responsibility is in another department of the corporation? Judge Leahy addressed this issue in a patent litigation proceeding in Delaware district court.³⁶

There is a privilege only if . . . the person to whom the communication was made is a member of the bar of a court or his immediate subordinate and . . . is acting as a lawyer in connection with this communication Organizational charts to the contrary, I do not regard patent department attorneys as "house counsel"

By "immediate subordinate" I mean to include in general office clerks and help, law clerks, junior attorneys, and the like who habitually report to and are under the personal supervision of the attorney through whom the privilege passes. However, a privilege available to the attorney-in-chief of a department . . . does not . . . protect everyone in his department or everyone organizationally under him; his privilege, if any, extends only to his immediate subordinates³⁷

Judge Leahy emphasized that when the attorney acts as an advisor, he must give predominantly legal advice to retain the privilege, not solely, or even largely, business advice.

A corporation's in-house counsel sometimes seeks advice of outside counsel on behalf of the corporation. These communications may also be privileged:

[O]nce the corporate . . . counsel is established as the "attorney," may he . . . turn around and label [him]self as the "client" in dealings with outside attorneys[?] Again, although the question appears incongruous, the courts have consistently answered in the affirmative. Thus, communications between "in-house" counsel seeking legal advice for the corporate client and outside counsel giving legal advice as an attorney are covered by the attorney-client privilege.³⁸

Work Product Doctrine

Now well established is the attorney-client privilege regarding confidential communications. What, though, of an attorney's written opinions, documents, notes and memoranda? This issue was addressed in 1947 when the United States Supreme Court decided the landmark

36. *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792 (D. Del. 1954).

37. *Id.* at 794.

38. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D. S.C. 1975). *See also* *Natta v. Zeltz*, 418 F.2d 633 (7th Cir. 1969); *Dura Corp. v. Milwaukee Hydraulic Products, Inc.*, 37 F.R.D. 470 (E.D. Wis. 1965); *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463 (S.D.N.Y. 1956).

case of *Hickman v. Taylor*.³⁹ During a tugboat accident, surviving crewmen witnessed the death of other crewmen, and families of the deceased crew members sued the tugboat company and its owners. The plaintiff families sought discovery of the recorded statements taken from surviving crewmen by defendant company's counsel. The Third Circuit Court of Appeals (reversing the district court) said the attorney-client privilege applied to the statements of the tugboat company employees, saying the information sought was the "work product of the lawyer."⁴⁰ The Supreme Court disagreed. Justice Murphy spoke for the Court: "[T]he protective cloak of [attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation."⁴¹ However, Justice Murphy broadly interpreted Rule 26 of the Federal Rules of Civil Procedure (offered by plaintiff's counsel as the basis for demands for production of certain documents prepared by defendant's counsel). He said:

[An] attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel . . . falls outside the arena of discovery and contravenes the public policy Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney It is essential that a lawyer work with a certain degree of privacy . . . without undue and needless interference Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own.⁴²

Plaintiffs also attempted to require defendant's counsel to commit to writing or testify as to oral statements made to him by witnesses to the accident. The Court took exception, saying that "forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and trustworthiness [and] . . . [s]uch testimony could not qualify as evidence."⁴³

The Court realized, however, that not all written materials are free from discovery. If relevant and non-privileged information is essen-

39. 329 U.S. 495 (1947).

40. *Hickman v. Taylor*, 153 F.2d 212 (3rd Cir. 1945) (en banc).

41. 329 U.S. at 508.

42. *Id.* at 510-11.

43. *Id.* at 512-13.

tial to the preparation of opposing counsel's case, discovery may be had so long as sufficient need is shown. Rule 30(b)⁴⁴ gives the trial judge discretion to allow discovery where need is shown, not simply upon "a naked, general demand for . . . materials."⁴⁵

While the attorney-client privilege is intended to preserve the confidences of the client, the work product doctrine is intended to protect from disclosure the attorney's strategy, enabling him to represent his client more effectively. Judge Wyzanski addressed the work product line in *United Shoe*. While denying that working papers prepared by attorneys in a corporation's patent department were immune from discovery on the basis of the work-product doctrine, Judge Wyzanski set out guidelines for determining the scope of the doctrine. He held a document (or exhibit) is exempt from discovery if it meets all of the following three tests:

- (a) the exhibit itself was prepared by or for either (1) independent counsel or (2) defendant's general counsel or one of his immediate subordinates; and
- (b) as appears upon the face of the exhibit, the principal purpose for which the exhibit was prepared was to solicit or give an opinion on law or legal services or assistance in a legal proceeding; and
- (c) the part of the exhibit sought to be protected consists of either (1) information which was secured from an officer or employee of defendant and which was not disclosed in a public document or before a third person, or (2) an opinion based upon such information and not intended for disclosure to third persons.⁴⁶

Judge Leahy, in *Zenith Radio Corp.*, elaborated on Judge Wyzanski's opinion, stating that "work product encompasses the impressions, observations and opinions recorded by an attorney, as the product of his investigation of a case in his actual preparation for trial"⁴⁷ But, the extension of the privilege does not automatically "immunize" the work of entire departments which may be headed by an attorney and "[r]emote possibility of litigation . . . is an insufficient showing"⁴⁸

In a more recent patent and antitrust litigation,⁴⁹ Judge Hemphill of the South Carolina district court addressed the issue of discoverabil-

44. FED. R. CIV. P. 30(b).

45. 329 U.S. at 512.

46. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 361 (D. Mass. 1950).

47. *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792 (D. Del. 1954).

48. *Id.*

49. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. at 1158.

ity of working documents from a prior terminated litigation. "Upon a showing of substantial need and undue hardship, both factual and opinion work product documents, from *prior terminated* litigation became discoverable only if the documents contained operative facts relevant to issues involved in the present litigation"⁵⁰ The "operative facts" theory, if applied to current work product of pending litigation, would negate Rule 26(b)(3) of the Federal Rules of Civil Procedure,⁵¹ so no such exception is allowed.

The Seventh Circuit Court of Appeals disagreed, in part, with *Hickman*, and stated, in *Harper & Row Publishers, Inc. v. Decker*:⁵²

Where an attorney personally prepares a memorandum of an interview of a witness with an eye toward litigation such memorandum qualifies as work product even though the lawyer functioned primarily as an investigator [T]he qualified privilege might even attach to a document prepared under the supervision of the attorney even though not drafted by the attorney himself Of course, the less the lawyer's "mental processes" are involved, the less will be the burden to show good cause.^{52.1}

Waiver of the application of privilege to work product was ad-

50. *Id.*

51. FED. R. CIV. P. 26(b)(3):

Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

52. 432 F.2d 487 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971), *reh'g denied*, 401 U.S. 950 (1971).

52.1. *Id.* at 492.

dressed, inter alia, in *Duplan Corporation v. Deering Milliken, Inc.*⁵³ wherein the court stated that if a client voluntarily waives application of the privilege to one or more documents discussing a certain subject, he waives the privilege as to all communications between the same attorney and the same client on the same subject.⁵⁴ Also, a client cannot waive privilege as to some documents and disclaim waiver as to others; the privilege, as to the remaining documents, is nevertheless waived.⁵⁵ The court also listed some of the documents considered not privileged in the patent litigation at bar: client authorizations to file patent applications and registrations; papers submitted to the patent office; filing fee compendiums; resumes of applications; technical information; business advice with regard to marketing; documents written by or obtained from third parties; communications whose confidentiality has been waived; and transmittal letters.⁵⁶

Tests To Determine The Privilege

A corporation, by its very nature an intangible and artificial entity, cannot be harmed or helped by its "relationship" to its attorney. However, the people in the corporation can be. Most often the directors and shareholders carry the liability for the actions of the corporation. Yet, courts have realized the need for determining just who, in a corporation, personifies the client. The "control group" test has been adhered to as the basis for granting attorney-client privilege to corporations. The merits of this test were established in *City of Philadelphia v. Westinghouse Electric Corp.*,⁵⁷ where plaintiffs moved for default judgment against a defendant who refused to answer interrogatories. Defendant corporation claimed privilege with respect to information acquired by its general counsel in the course of his investigation of facts relating to the pending indictment of the company.

District Judge Kirkpatrick, writing for the majority, recognized the existence of the attorney-client privilege, but said that "if the communication is made to enable the lawyer to advise someone else or if it is made by someone other than the client (the corporation) it is not privileged."⁵⁸ He realized, though, that before the privilege could be applied, the identity of the client (the person personifying or acting on

53. 397 F. Supp. 1146 (D. S.C. 1975).

54. *Id.* at 1161.

55. *Id.* at 1162.

56. *Id.* at 1168.

57. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962).

58. *Id.* at 484.

behalf of the corporation) had to be ascertained:

[T]he most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply . . . Of course, . . . the authority of the person speaking with the lawyer to participate in contemplated decisions *must be actual authority* [and not] apparent authority . . .⁵⁹

Although hierarchial position would normally be associated with control, it is the degree of authority which determines application of the privilege. This narrowing of scope provided a more clearly defined area within which to allow the protection of the privilege. Arkansas adopted this test by statute in 1979.⁶⁰

There have been significant problems with the application of the control group test as advanced by Judge Kirkpatrick. The test tends to ignore the complexities of a modern corporate structure and its decision-making processes. Although lower and middle-level employees furnished information to the "control group," their direct communications to the attorney were held non-privileged. Consequently, the attorney was confronted with the possibilities of depriving lower and middle-level employees of legal advice, developing his client's case without all the facts, or risking disclosure of confidential information. Any alternative was potentially harmful to the corporation and its employees.

The inadequacies of the control group test were recognized in 1971 by the Seventh Circuit in *Harper & Row Publishers, Inc. v. Decker*.⁶¹ In this antitrust case, petitioners sought mandamus to require the district judge to vacate his order to have defendants (petitioners) produce certain documents to plaintiff. Apparently, the documents were secured as the result of interviews with employees and former employees of petitioner. The court found the documents were privileged, although the employees who had given the interviews were not members of the corporation's control group.⁶² The court set forth the following "subject

59. *Id.* at 485 (emphasis added).

60. ARK. STAT. ANN. § 28-1001.502 (Repl. 1979).

61. 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971), *reh'g denied*, 401 U.S. 950 (1971).

62. The court ordered mandamus because an appeal after disclosure of the documents would be an inadequate remedy.

matter" test:

[A]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors . . . and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.⁶³

The court pointed out, however, that this case did not deal "with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses,"⁶⁴ thereby avoiding direct opposition to the *Hickman* opinion.

Although the subject matter test utilized in *Harper & Row* significantly promoted the policy of the attorney-client privilege, it also enlarged the parameters of the "zone of silence" and encouraged "funneling" of miscellaneous reports and communications through the corporate attorney. However liberal the *Harper & Row* subject matter test, it did recognize the reality of the corporate structure.

Both tests were found inadequate in *Duplan Corporation v. Deering Milliken, Inc.*, a patent antitrust suit. The court recognized that communications between the attorney and the "control group" are privileged; but it also took "a common sense look at the practicalities of the 'control group' test."⁶⁵

The chairman of the board and other top executives necessarily have more important matters to attend to than gathering information for either outside or inside counsel . . . Thus, the main consideration is whether the particular representative of the client, to whom or from whom the communication is made, is involved in rendering information necessary to the decision-making process concerning a problem on which legal advice is sought The extent of the privilege will vary with the individual situation.⁶⁶

Two years later, the Eighth Circuit Court of Appeals rejected both the control group test and the subject matter test and adopted a "modified subject matter" test.⁶⁷ The case at bar was a petition for a writ of mandamus whereby petitioners, Diversified, sought to protect from discovery the contents of a memorandum and a written report prepared by

63. 423 F.2d at 491-92.

64. *Id.* at 491.

65. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. at 1164.

66. *Id.* at 1164-65.

67. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

a law firm for Diversified, and certain of Diversified's corporate minutes referring to the memorandum report. In granting the petition in part and denying it in part, Judge Heaney spoke for the court en banc:

[T]he control group test inhibits the free flow of information to a legal advisor and defeats the purpose of the attorney-client privilege The *Harper & Row* test provides a more reasoned approach to the problem by focusing upon why an attorney was consulted, rather than with whom the attorney communicated . . . [but] the *Harper & Row* test can shield data from the discovery process.⁶⁸

Again, the court anticipated unnecessary "funneling", and so modified the *Harper & Row* test to "better protect the purpose underlying the attorney-client privilege."⁶⁹

[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.⁷⁰

In 1977, the district court of Delaware adopted a case-by-case approach in deciding *Hercules, Inc. v. Exxon*⁷¹ in an attempt to balance the competing interests of confidentiality and liberal discovery. However, this approach plunged the privilege into a totally gray area. According to one commentator, this method of determining the privilege yielded only unpredictability. "Unless a reasonable determination of confidentiality could be made at the time of the communication then the purpose of the privilege — to encourage communication through the promise of confidentiality — is frustrated."⁷²

In *In Re Ampicillin Antitrust Litigation*,⁷³ a federal district court

68. *Id.* at 609.

69. *Id.*

70. *Id.* It is interesting to note in this case the positions of the other judges: Judge Henley and Chief Judge Gibson wrote separate opinions, concurring in part and dissenting in part; Judge Bright wrote a dissent; and Judge Webster did not consider the case.

71. 434 F. Supp. 136 (D. Del. 1977).

72. Gergacz, *Attorney-Corporate Client Privilege*, 37 BUS. LAW. 461, 496 (1982).

73. *In Re Ampicillin Antitrust Litigation*, 81 F.R.D. 377 (D. D.C. 1978).

formulated a new test. Judge Charles Richey wrote for the court and said that the attorney-client privilege should be "strictly confined within the narrowest possible limits consistent with the logic of its principle."⁷⁴ The view of the court was that the relevance of the communication should control, which narrowed even more the purposes for which the corporate client could assert the privilege.

Upjohn Co. v. United States

In 1981, the United States Supreme Court was given an opportunity to define the parameters of the still vague attorney-client privilege and to corral the chaotic and diverse views of the courts of appeals when presented with the case of *Upjohn Co. v. United States*.⁷⁵ However, the Court sidestepped that opportunity and instead broadened the privilege further.

The Upjohn Company is a multinational corporation that manufactures and sells pharmaceuticals. During an audit of Upjohn's federal income tax returns, the IRS discovered that approximately \$4.4 million was paid to various foreign officials in order to secure their governments' business. When Gerard Thomas, Upjohn's general counsel, was informed of the payments, he consulted outside counsel and the company's chairman of the board, who directed Thomas to conduct an investigation and give the company legal advice.

A letter, drafted by Upjohn attorneys, was sent over the chairman's signature to foreign managers. The letter explained the nature of the internal investigation and instructed the managers to complete the questionnaire attached to the letter. Their responses were to be directed to Thomas and were to remain highly confidential.

In the course of the investigation, Upjohn attorneys conducted eighty-six interviews, and Thomas developed memoranda, notes and summaries of the interviews. In 1976, Upjohn filed two reports with the SEC disclosing some of the payments, and made the reports available to the IRS which began an investigation of its own into the tax implications of the payments. The IRS investigators were given a list of all Upjohn employees who had been interviewed and/or answered the questionnaire. This disclosure did not satisfy the IRS, and it filed a summons for documents collected and initiated by Upjohn's counsel in the course of the company's internal investigation. Upjohn refused to produce the documents on the ground of attorney-client privilege. The

74. *Id.* at 384, quoting WIGMORE, *supra* note 9, at § 2291.

75. 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

IRS petitioned for enforcement of the summons.

Judge Fox, relying on Sixth Circuit decisional precedent, used the control group test to determine that the privilege did not apply. He asserted that Upjohn had not carried its burden of showing that the employees interviewed were members of the control group. The court ordered Upjohn to produce the summoned documents, and ordered Thomas to testify.

Upjohn appealed, and the court of appeals *unanimously* rejected the subject matter test proffered by Upjohn as too broad, and adopted the control group test. The court affirmed in pertinent part the district court's judgment because communications by the employees were not the corporate client's. Upjohn petitioned for and was granted a writ of certiorari by the United States Supreme Court.

Mr. Justice Rehnquist, writing for eight members of the court, recited the facts of the case and the general purpose of the privilege: "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."⁷⁶

Rehnquist explained that the Court would not select between the proffered tests and would not set forth a broad rule. Although the Court held that Upjohn's communications fell within the privilege, Rehnquist, citing Rule 501 of the Federal Rules of Evidence,⁷⁷ adopted a case-by-case approach to the issue and limited the decision to the facts of *Upjohn*.

The Court clearly pointed out that the privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney, thus preventing "funneling." The Court agreed that the government's burden of discovery would be less severe if it were able to obtain the results of Upjohn's internal investigation by subpoena. (Apparently, the only other way to get the information would be for the government to inter-

76. 449 U.S. at 389.

77. FED. R. EVID. 501 (1975):

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

view all the people already interviewed, most of whom were in foreign countries.) But, the Court held that considerations of convenience do not overcome the policies served by the attorney-client privilege. The Court felt this expansion of the privilege "puts the adversary in no worse position than if the communications had never taken place."⁷⁸

Chief Justice Burger, in a concurring opinion, chided members of the Court for sidestepping the opportunity to set definite guidelines for the test of the privilege. Most commentators, however, feel Justice Rehnquist did outline for the lower courts a test which does not contravene congressional intent of the case-by-case approach. The following factors can be inferred from the Court's analysis of *Upjohn* and would prove useful in a generic setting: A communication is privileged when (1) it is made by corporate employees to corporate counsel; (2) by or at the direction of corporate superiors; (3) in order to secure legal advice from counsel; (4) the communication concerns matters within the scope of the employee's corporate duties; (5) corporate counsel needs the information to provide legal advice to the corporation concerning compliance with the law; (6) the employee making the communication is sufficiently aware of the purpose of his communication with counsel; (7) both parties to the communication consider it to be confidential when made; and (8) the information obtained is held confidential by the corporation. Since the Court held the communications made by *Upjohn* employees met all the above criteria, it is safe to assume that communications meeting the same criteria would be held privileged.

Upjohn, however, left many questions unanswered: Will the privilege apply to a situation in which there is no express statement from superiors or management requesting a lower-level employee to cooperate with counsel? Who are "superiors" (in Justice Rehnquist's opinion) or "management" (in Chief Justice Burger's concurrence)? May such a request from superiors be implied or must it be expressed? What level of confidentiality is considered "safe" before the privilege is waived?

Arkansas Statutory Law

Practical application and guidelines of the attorney-client privilege can be only supposed in light of *Upjohn*. First consideration is, of course, given to Arkansas statutory law. Arkansas Statutes Annotated Section 28-1001.502 sets out "Lawyer-client privilege."⁷⁹ The statute

78. 449 U.S. at 395.

79. ARK. STAT. ANN. § 28-1001.502 (Repl. 1979):

includes corporations in the definition of "client,"⁸⁰ and says the client (or his attorney under authority) may claim the privilege.⁸¹ Listed are situations in which the privilege does not attach: (1) furtherance of crime of fraud; (2) claimants through the same deceased client; (3) breach of duty by lawyer or client; (4) document attested by lawyer; (5) joint clients; and (6) public officer or agency.⁸²

502(a)(5). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

502(b). General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

80. Rule 502. Lawyer-client privilege. — (a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him

81. Rule 502(c). Who May Claim the Privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

82. Rule 502(d). Exceptions. There is no privilege under this rule:

(1) Furtherance of crime of fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two [2] or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients; or

(6) Public officer or agency. As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation,

Case Law - Arkansas Supreme Court and Eighth Circuit

In 1973, the Eighth Circuit Court of Appeals heard the appeal of an attorney whom the district court held in contempt for his disobedience of an order requiring him to produce certain information before a grand jury.⁸³ The court cited *Radiant Burners*, and noted the fact that the client is a corporation in no way affects the claim of an attorney to his "work product" privilege. Citing numerous sources (among them *Hickman v. Taylor*, and Wigmore) the court held there can be no unwarranted inquiries into the files and mental impressions of an attorney, and "[i]t is clear that [the attorney's] personal recollections, notes, and memoranda pertaining to his conversations with nonemployees of his client are within the rubric of the work product definition."⁸⁴ The court of appeals, in reversing the district court did, however, limit its holdings to the facts of the case at bar.

The Arkansas Supreme Court, in 1975, heard a suit concerning priority of two banks as to proceeds of the sale of a debtor's property being held in the court's registry.⁸⁵ In reversing the Cleburne County Chancery Court, the supreme court held that information received from third parties during the course of representation of a client did not fall within attorney-client privilege.

In 1981, the Eighth Circuit Court of Appeals reversed the district court's decision in *Citibank, N.A. v. Andros*.⁸⁶ The principal secured creditor of three bankrupt corporations moved to compel production of documents. The bankruptcy court held that the trustee in bankruptcy could not waive the attorney-client privilege. The district court affirmed, and the secured creditor appealed. Citing *Upjohn*, the court held that "the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience" determine the scope of the attorney-client privilege,⁸⁷ and "[b]ecause the right to decide whether to waive a corporation's attorney-client privilege belongs to management, the right to assert or waive that privilege passes with the property of the corporate debtor to the trustee."⁸⁸

In *Sedco, International, S.A., v. Cory*,⁸⁹ the Eighth Circuit Court

tion, or proceeding in the public interest.

83. *Duffy v. United States*, 473 F.2d 840 (8th Cir. 1973).

84. *Id.* at 848.

85. *Ark. Nat'l Bank v. Cleburne County Bank*, 258 Ark. 329, 525 S.W. 2d 82 (1975).

86. 666 F.2d 1192 (8th Cir. 1981).

87. *Id.* at 1195.

88. *Id.*

89. 683 F.2d 1201 (8th Cir. 1982), *cert. denied*, 459 U.S. 1017 (1982).

of Appeals heard an action against an investor brought by an oil company seeking to recover secured payments for services of an offshore drilling rig. Affirming the trial court, the court held (1) the attorney-client privilege does not protect *facts* communicated to an attorney;⁹⁰ (2) clients cannot refuse to disclose facts which their attorneys conveyed to them and which the attorneys obtained from independent sources;⁹¹ (3) the privilege does not protect ordinary business advice, although it may be difficult to distinguish, at times, from legal advice;⁹² and (4) a client may waive the privilege expressly or by implication.⁹³

In 1982, a pedestrian who was hit with a rim which came off the wheel of a passing truck brought a products liability action against the truck owner, the service station owner and the rim manufacturer, Firestone Tire & Rubber Company. The circuit court awarded damages against only the manufacturer, and the manufacturer appealed.⁹⁴ The pertinent facts of the case concerned the admission into evidence of a letter written by a Firestone lawyer to other Firestone counsel. The letter had attachments and a copy of one of the attachments was sent to the author (an engineer at the Budd Company). The court held:

The letter made its way to the Budd Company and Budd surrendered it in a lawsuit in answer to a discovery motion. Firestone argues the letter was inadmissible under Ark. Stat. § 28-1001, Rule 502, which provides a privilege for confidential attorney/client communications. We deem the privilege waived. Firestone should have never allowed the letter into the hands of Budd; by doing so Firestone has waived any right to claim the privilege.⁹⁵

Practical Application

Since the Court in *Upjohn* gave no explicit parameters of what communications *can* be considered privileged, and Arkansas and Eighth Circuit case law tells us only what *cannot* be considered privileged, the safest course to follow is to assume the privilege will apply only when all eight points used by the Supreme Court to determine *Upjohn* have been met. Again, a communication appears to be privileged when (1) it is made by corporate employees to corporate counsel, (2) by or at the direction of corporate superiors, (3) in order to secure

90. *Id.* at 1205.

91. *Id.*

92. *Id.*

93. *Id.* at 1206.

94. *Firestone Tire & Rubber Co. v. Little*, 276 Ark. 511, 639 S.W. 2d 726 (1982).

95. *Id.* at 519, 639 S.W.2d at 730.

legal advice from counsel; (4) the communication concerns matters within the scope of the employee's corporate duties; (5) corporate counsel needs the information to provide legal advice to the corporation concerning compliance with the law; (6) the employee making the communication is sufficiently aware of the purpose of his communication with counsel; (7) both parties to the communication consider it to be confidential when made; and (8) the information obtained is held confidential by the corporation. Generic communications within a company, which may happen to be routed through the company's counsel, are not privileged. Information gathered from "third parties," those persons not acting on behalf of the company, is not privileged. Documents prepared by counsel (or by management for benefit of counsel) which are routed to "third parties" are not privileged. Application of the privilege will be left to the discretion of the court when the content of a communication claimed to be privileged is partially business advice and partially legal advice.

Matters the company considers "confidential" may indeed be so. However, "privilege" does not attach until a matter goes to trial. In that light, all eight precautions listed in the analysis of *Upjohn* must be taken ahead of time with regard to matters which may eventually be litigated. Companies are constantly communicating with their attorneys with regard to SEC requirements, employee discharges, contractual obligations, and other corporate matters. These communications should be kept confidential as a matter of course. No one who does not specifically "need to know" should receive copies of correspondence or be orally informed about these matters. Once a "third party" sees confidential material or is spoken to about a confidential matter, all potential for application of the privilege is lost.

Should the company need to conduct an internal investigation of any nature, especially in contemplation of litigation, precautions should be taken to prevent rejection of a claim of attorney-client privilege with regard to communications made during the investigation. First, the company counsel should be directed (preferably by the chairman of the board or other superior) to make the investigation. Second, counsel should determine who has the information sought. Third, the superior initiating the investigation should, in writing, direct the pertinent employees to (a) cooperate fully and candidly with counsel in the investigation, and (b) to treat the investigation as highly confidential. Fourth, counsel should restrict the investigation to exclusively legal matters and to employees who have direct responsibility to the subject matter of the investigation. Fifth, counsel should issue a confidential report to the

Board of Directors giving the results of its investigation. Sixth, and possibly most important, an extensive effort must be made to maintain confidentiality of all communications with regard to the investigation. Also, documents to which counsel may later claim privilege under the "work product doctrine" should be located solely in the office of counsel where access to such documents can be safeguarded. The privilege will probably not apply if a communication on which the privilege is sought is copied in a "reading file."

A company would be well advised to take all precautions outlined in order to prevent discovery of confidential communications in the event of litigation. If the above precautions are taken, the court faced with evaluating such communications should "in the light of reason and experience"⁹⁶ apply the attorney-client privilege.

96. FED. R. EVID. 501.