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CONTROL GROUP TEST FOR CORPORATE ATTORNEY-CLIENT PRIVILEGE REJECTED

*Upjohn Co. v. United States*¹

An internal audit revealed that an overseas subsidiary of Upjohn Company had made payments to foreign government officials, apparently to assist in securing business.² Upjohn requested its general counsel, Mr. Gerard Thomas, to investigate. Mr. Thomas directed all foreign general and area managers to respond to a detailed questionnaire concerning the questionable payments.

The company subsequently informed the Securities and Exchange Commission and the Internal Revenue Service of the payments.³ The IRS promptly investigated and issued a summons requesting the “written questionnaires sent to managers of the Upjohn Company’s foreign affiliates, and memoranda or notes of the interviews . . . with officers and employees of the Upjohn Company and its subsidiaries.”⁴ Upjohn, claiming that the material was protected from disclosure by the attorney-client privilege and the work product doctrine,⁵ refused to comply with the summons.

The IRS successfully sought enforcement of the summons in federal district court.⁶ On review, the United States Court of Appeals for the Sixth Circuit sustained the summons, holding that the attorney-client privilege

1. 449 U.S. 383 (1981).

2. *Id.* at 386. The payments totaled approximately \$4,000,000 to officials of “many of the 136 foreign countries in which Upjohn does business.” *United States v. Upjohn Co.*, 600 F.2d 1223, 1225 (6th Cir. 1979), *rev’d*, 449 U.S. 383 (1981).

3. Upjohn prepared a preliminary report for the Securities and Exchange Commission, Form 8-K, disclosing information on a limited number of the payments. A copy of the report was provided to the IRS. 449 U.S. at 387.

4. *Id.* at 388. The IRS possesses broad statutory power to issue summons enforceable in federal district courts under 26 U.S.C. §§ 7402(b), 7602, 7604(a) (1976).

5. For a further discussion of the court’s handling of the work product claim, see *United States v. Upjohn Company: The Sixth Circuit Adopts the Control Group Test*, 9 CAP. U.L. REV. 809, 815 n.41 (1980).

6. *United States v. Upjohn Co.*, 78-1 U.S. Tax Cas. (CCH) 84,152 (W.D.

did not apply “[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn’s action in response to legal advice . . . for the simple reason that the communications were not the ‘client’s.’ ”⁷ In a well-reasoned opinion authored by Justice Rehnquist,⁸ the Supreme Court of the United States reversed the court of appeals, holding that the “control group” test was unduly restrictive and frustrated the purpose of the attorney-client privilege.⁹

Upjohn has further defined the scope of the attorney-client privilege with a corporate client. Although the existence of the privilege in this setting had been established,¹⁰ distinguishing privileged from nonprivileged communications was difficult. To claim the privilege, the *client* must have communicated with the attorney. It was necessary, therefore, to determine which agents

Mich. Apr. 29, 1978), *aff'd in part, rev'd in part*, 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

7. 600 F.2d at 1225.

8. Although agreeing with the reasoning and result of the majority, Chief Justice Burger urged that the Court adopt a general rule to govern the application of the privilege to corporations, instead of the case-by-case approach favored in the majority opinion. 449 U.S. at 402-03 (Burger, C.J., concurring).

9. *Id.* at 392. The *Upjohn* opinion failed to discuss the important issue of whether Upjohn waived the attorney-client privilege by selective disclosure to the SEC and the IRS of data on the questionable payments. The district court held that the disclosure to the SEC and the IRS was a complete waiver of the privilege with respect to all other communications concerning the payments. United States v. Upjohn Co., 78-1 U.S. Tax Cas. (CCH) 83,597, 83,603 (W.D. Mich. Feb. 23, 1978) (Report and Recommendation of Magistrate), *adopted by court*, 78-1 U.S. Tax Cas. (CCH) 84,152 (W.D. Mich. Apr. 29, 1978), *aff'd in part, rev'd in part*, 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

The United States Court of Appeals for the Sixth Circuit rejected the district court’s holding of waiver, finding instead that Upjohn’s disclosures amounted to a waiver “only with respect to the facts *actually disclosed*.” 600 F.2d at 1227 n.12 (emphasis added). The Supreme Court mentioned the rulings of the lower courts, but did not analyze them. *See* 449 U.S. at 388.

The general rule is that a partial disclosure of privileged material is a waiver of the privilege to all communications concerning the same subject matter. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1161-63 (D.S.C. 1974); 8 J. WIGMORE, EVIDENCE § 2327, at 636-38 (rev. ed. 1961). The reasoning behind the rule is that it would be unfair to allow a party to reveal only privileged material that favored the party’s position while shielding any damaging material. *Id.* For a general discussion of the waiver issue, see Comment, *Corporate Self-Investigation Under the Foreign Corrupt Practices Act*, 47 U. CHI. L. REV. 803, 808-10 (1980); *The Attorney-Client Privilege, the Self-Evaluative Report Privilege, and Diversified Industries, Inc. v. Meredith*, 40 OHIO ST. L. J. 699, 714-21 (1979).

10. United States v. Louisville & N. R.R., 236 U.S. 318, 336 (1915). *See* Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 953-54 (1956), Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899, 906-07 (1980).

of the corporation spoke for it. This determination, however, was fraught with problems.¹¹

Initially, the courts assumed that the privilege covered all corporate employees, officers, and directors.¹² Reconsideration of this broad approach, in light of the modern emphasis on full discovery, led to a more limited application of the privilege.¹³ Often called the "control group" test, this approach was first adopted in *Philadelphia v. Westinghouse Electric Corp.*¹⁴ The *Westinghouse* court held that the privilege applies 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 corporation may take upon the advice of the attorney . . ."¹⁵ In other words, the corporate client communicates only through its control group; only their communications to counsel are privileged.¹⁶

11. See, e.g., *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968). See generally Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 362 (1972).

Wigmore's classic statement of the attorney-client privilege lists the necessary elements for applying the privilege:

- (1) Where legal advice of any kind is sought
- (2) from a professional legal adviser in his capacity as such,
- (3) the communication 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, *supra* note 9, § 2292, at 554 (emphasis added).

The Court did not directly address the issue of whether the communications were made by the client. Statements by the Court that the communications were made "by Upjohn employees . . . at the direction of corporate superiors . . .," 449 U.S. at 394, and "in order that the corporation could obtain legal advice," *id.*, however, suggest that the corporation was speaking as a client when it communicated to its attorney through its employees.

12. The most frequently cited case for this proposition is *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950). See also *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 795 (D. Del. 1954).

13. The turning point came in 1962 with *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir. 1963). A federal district court held the attorney-client privilege inapplicable to corporations. Although the decision was promptly reversed by the United States Court of Appeals for the Seventh Circuit, the district court's opinion prompted a more thoughtful analysis of the special problems presented when the privilege is claimed by a corporation. See generally Kobak, *supra* note 11, at 362.

14. 210 F. Supp. 483 (E.D. Pa. 1962).

15. *Id.* at 485.

16. *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3rd Cir. 1979). See also Note, *Attorney-Client Privilege For Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 430 (1970).

The control group test was unchallenged until the 1970 decision, *Harper & Row Publishers, Inc. v. Decker*.¹⁷ This case established the "subject matter" test, the second major approach to the corporate privilege.¹⁸ Under this test, communications by employees outside the control group may be protected if they are made at the direction of the employee's superiors, and the subject matter of the communication relates to the performance of the employee's job.¹⁹ The majority of courts considering the questions have adopted the control group test.²⁰

The *Upjohn* Court, in analyzing the appropriateness of the control group test, adopted the major criticisms of that test expressed by other courts and commentators.²¹ The Court began by stressing the underlying purpose of the attorney-client privilege:

17. 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd per curiam by an equally divided Court*, 400 U.S. 348 (1971).

18. The debate between the two alternatives reflects basic policy differences held by the proponents of each test. Proponents of the control group test favor full and complete discovery of all the relevant evidence over competing concerns. In contrast, the proponents of the subject matter test favor complete disclosure of all the relevant facts by the client to the attorney. *See* 9 CAP. U.L. REV., *supra* note 5, at 825.

19. The *Harper & Row* court articulated the subject matter test as follows: [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 in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. 423 F.2d at 491-92.

20. Representative of cases that have adopted the control group test are *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3rd Cir. 1979); *United States v. Upjohn Co.*, 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981); *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968); *In re Grand Jury Subpoena*, 81 F.R.D. 691, 694 (S.D.N.Y.), *rev'd on other grounds*, 599 F.2d 504 (2d Cir. 1979); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 35-36 (D. Md. 1974); *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).

For commentators' support of the subject matter test, *see, e.g.*, J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1980); Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COM. L. REV. 873 (1971).

21. For articles that criticize the control group test, *see, e.g.*, Burnham, *Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois*, 56 ILL. B.J. 542 (1968); Comment, *The Corporate Attorney-Client Privilege in the Federal Courts*, 22 CATH. LAW. 138 (1976); *The Privileged Few: United States v. Upjohn—What is the Scope of the Attorney-Client Privilege for a Corporation?*, 25 S.D. L. REV. 415 (1980).

Its purpose is 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. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice . . . depends upon the lawyer being fully informed by the client.²²

The Court concluded that the "control group test . . . frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."²³

The restricted flow of information to corporate counsel leads to problems. In the modern corporate setting, the members of the control group rarely will possess all the information counsel requires to formulate legal advice properly.²⁴ Much of the necessary information is known only by middle and lower level employees.²⁵ These employees are excluded from the protection of the privilege by the control group test. That test, therefore, discourages full disclosure because attorneys realize that any communications between these employees and the attorney would be subject to discovery.

Another criticism the Court directed at the control group test was that the restricted flow of information to the attorney "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."²⁶ The argument is that management will be less likely to have counsel conduct internal investigations to determine compliance with the law if the information given to the attorney would be subject to discovery.²⁷

The Court aimed its final criticism at the unpredictability of control group membership.²⁸ If counsel were unsure whether an employee was a member of the control group, full disclosure would suffer. Counsel would

22. 449 U.S. at 389. See *Trammel v. United States*, 445 U.S. 40, 51 (1980).

23. 449 U.S. at 392.

24. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164-65 (D.S.C. 1974).

25. *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 385-86 (D.D.C. 1978).

26. 449 U.S. at 392.

27. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977) ("[T]he [control group] test may result in discouraging communications to lawyers made in a good faith effort to promote compliance with the complex laws governing corporate activity."). The value to federal enforcement agencies of corporate self-policing and disclosure is discussed in Comment, *Voluntary Disclosure Programs*, 47 *FORDHAM L. REV.* 1057, 1063-68 (1979).

28. 449 U.S. at 393. See Note, *Applicability of the Attorney-Client Privilege to Corporate Communications*, 48 *U. CIN. L. REV.* 819, 822 (1979).

be hesitant to interview employees in the questionable zone for fear that the courts would not apply the privilege.²⁹

Despite an express rejection of the control group test, the Court refused to adopt an alternative standard. Instead, the Court chose a case-by-case approach to the problem because any other approach would "violate the spirit of Federal Rule of Evidence 501."³⁰ Under this flexible approach, a court can examine the facts and circumstances surrounding the communication instead of relying exclusively on rigid criteria.³¹

Although not expressly adopting the subject matter test, the Court took a similar approach.³² It responded to the criticism that the subject matter test would unduly burden discovery:³³ "Application of the attorney-client privilege to communications such as those involved here . . . puts the adversary in no worse position than if the communications had never taken place."³⁴ Stressing that only communications and not facts are protected,³⁵ the Court noted that "the Government was free to question the employees who communicated with Thomas and outside counsel."³⁶ Discovery of the underlying facts may be more difficult than discovering the completed results of an internal investigation, but the opportunity for discovery of all the relevant facts does exist. In balancing the easing of discovery burdens against the value of the privilege, the Court concluded that "such considerations

29. To buttress this final criticism, the court pointed to two irreconcilable cases. The first held that managers and assistant managers of a patent division were within the control group. *Hogan v. Zletz*, 43 F.R.D. 308, 315-16 (N.D. Okla. 1967), *aff'd in part sub nom. Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968). The second held that a vice-president for production and research and two directors of research were not members of the control group. *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82, 83-85 (E.D. Pa. 1969), *aff'd mem.*, 478 F.2d 1398 (3rd Cir. 1973). Ironically, one of the strengths of the control group test was thought to be the certainty with which it could be applied. Note, *supra* note 16, at 430.

30. 449 U.S. at 396. FED. R. EVID. 501 directs that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts . . . in the light of reason and experience."

31. For a similar approach, see *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35, 40 (E.D.N.Y. 1973).

32. 449 U.S. at 391-92, 394-95. See also *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 387 (D.D.C. 1978); 9 CAP. U.L. REV., *supra* note 5, at 821.

33. Illustrative of such criticism is Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 40 U. DET. L. J. 299, 344 (1963).

34. 449 U.S. at 395.

35. *Id.* at 395-96. See also *City of Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962); J. WEINSTEIN & M. BERGER, *supra* note 20, ¶ 503(b)[03], at 503-37; 8 J. WIGMORE, *supra* note 9, § 2326, at 633.

36. 449 U.S. at 396.