Privileged Communications--Who Can Speak for a Corporate Client--Diversified Industries, Inc. v. Meredith

Milton B. Garber

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation
Milton B. Garber, Privileged Communications--Who Can Speak for a Corporate Client--Diversified Industries, Inc. v. Meredith, 44 Mo. L. Rev. (1979)
Available at: https://scholarship.law.missouri.edu/mlr/vol44/iss2/9

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
recovery when there is a breach of a covenant to repair but no other indication of control of the premises by the landlord. There still would be no duty to inspect and the landlord must exercise reasonable care only after being told of the need to repair.\textsuperscript{71}

The \textit{Henderson} court thus showed a progressive vein by indicating that in some cases a tenant may recover consequential damages occasioned by his landlord's breach of an implied warranty of habitability. With its holding that the landlord must have notice of the defect and that the tenant's reasonable inspection not discover the defect, however, the court has to some extent reinforced the landlord's immunity to liability for defects on the leased premises. Modern rejection of \textit{caveat lessee} and the frequent modern reality of the landlord's greater ability to make repairs have tended to shift many forms of liability from the tenant to the landlord. It remains to be seen whether Missouri courts will go further in this direction in the future by applying a general negligence standard to the landlord, by finding a duty to inspect the premises before leasing, by finding the landlord has a duty to do more than disclose a latent defect existing at the time of the lease, or by no longer requiring other signs of control for recovery from a breach of a covenant to repair.

\textbf{EDWARD M. PULTZ}

\section*{PRIVILEGED COMMUNICATIONS—WHO CAN SPEAK FOR A CORPORATE CLIENT}

\textit{Diversified Industries, Inc. v. Meredith}\textsuperscript{1}

In 1974 and 1975, during the course of a proxy fight, facts emerged indicating that Diversified Industries, Inc., may have used a "slush fund" to bribe purchasing agents of companies with whom Diversified dealt. When the proxy fight was settled, the Board of Directors of Diversified determined, in the Spring of 1975, to have an investigation made of the business practices that had been disclosed. The board authorized the employment of a Washington, D.C. law firm to conduct the investigation and make a report with recommendations as to a course of action. The officers, direc-

\textsuperscript{1}Strickland, 176 Neb. 633, 126 N.W.2d 888 (1964); Harvey v. Seale, 362 S.W.2d 310 (Tex. 1962).

\textsuperscript{71} \textit{RESTATEMENT (SECOND) OF TORTS} § 357, comment d (1965).
tors, and employees of the corporation were directed to cooperate fully with the investigation. In the course of the investigation the law firm interviewed several Diversified employees, and in its final report, submitted in December 1975, identified these employees and set out the substance of what they had said.\textsuperscript{2}

In July 1976 the Weatherhead Company filed suit against Diversified alleging conspiracy, tortious interference with contractual relationships between itself and its employees, and violation of section 4 of the Clayton Antitrust Act.\textsuperscript{3} Weatherhead sought discovery of several documents and memoranda including the December report to Diversified from the law firm.\textsuperscript{4} Diversified objected, contending that the documents fell within the traditional attorney-client privilege\textsuperscript{5} and also were protected under the "work product" rule.\textsuperscript{6} The district court overruled the objections, denied motions for reconsideration and certification, and ordered disclosure of the materials.

Diversified petitioned the Eighth Circuit for a writ of mandamus\textsuperscript{7} to compel Chief Judge Meredith of the district court to stay his order. A panel of the court of appeals denied the petition, holding that the documents were not protected either by the attorney-client privilege or by the work product rule. The panel found the attorney-client privilege inapplicable because the law firm was not hired by Diversified to provide legal services.

\textsuperscript{2} The December report recommended the adoption of certain specified accounting procedures, certain personnel changes, and Board consideration of the possible restoration of allegedly misused assets. \textit{Id.} at 615.


\textsuperscript{4} Weatherhead also sought discovery of a June 19, 1975, memorandum from the law firm to Diversified; copies of certain corporate minutes containing references to the December report and the June memorandum; and a letter dated January 30, 1976, from the president of Diversified that referred to the report and memorandum. The court in the instant case held the memorandum was not protected from discovery because it did not contain confidential information. 572 F.2d at 607. The corporate minutes and the January 30 letter were found to be protected because their disclosure would entail disclosure of material in the December report which was here held to be a privileged communication from attorney to client. As to the corporate minutes, there was a strong dissent by Chief Judge Gibson who argued that publication of parts of the December report in the minutes constituted a waiver of the privilege; Chief Judge Gibson was alone in this view. \textit{Id.} at 616.

\textsuperscript{5} The common law statement of the privilege may be found in 8 J. Wigmore, \textit{Evidence} § 2292 at 554 (McNaughten rev. 1961): "(1) Where legal advice of any kind is sought (2) from a professional legal adviser 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 adviser, (8) except the protection be waived."


\textsuperscript{7} The court of appeals held that where a claim of attorney-client privilege has been raised and rejected by a district court mandamus is available as a means of immediate appellate review. See Pfizer, Inc. v. Lord, 456 F.2d 545, 547-48 (8th Cir. 1972).
or advice. Upon rehearing en banc solely on the issue of attorney-client privilege, the court held the December report and other documents which included parts of that report to be privileged.

Considering the issue on which the panel had decided the case, the court en banc held that an attorney-client relationship did in fact exist between Diversified and the law firm. Citing various authorities for the proposition "that a matter committed to a professional legal adviser is prima facie so committed for the sake of legal advice . . . unless it clearly appears to be lacking in aspects requiring legal advice," the court found that the matter in the instant case was, prima facie, committed to a professional legal adviser for the sake of legal advice and that there was no showing to the contrary. Since an attorney-client relationship was found to exist, the question became, were the Diversified employees interviewed by the law firm speaking for the corporate client within the bounds of the privilege? It is in the response to this question that the court's opinion makes a significant contribution.

Heretofore the federal courts, in a controversy not reflected in Missouri courts, have been divided between two major tests for handling

8. 572 F.2d at 603. In the panel's view, the law firm was hired "solely" to investigate the facts and make business recommendations. Since the firm was not acting in a legal capacity there was no attorney-client relationship and hence no privilege. The court found the work product rule inapplicable because the law firm's work was not done in preparation for any trial nor in anticipation of litigation as required by FED. R. CIV. P. 26(b)(3). Id. at 604.


10. Judge Henley, writing for the panel and later in dissent to the en banc opinion, preferred a strict construction of the attorney-client privilege so as to limit "the adverse effect of its application on the disclosure of truth." 572 F.2d at 602, 612. He held that the law firm was employed not to provide legal services or advice but "to make a factual investigation and business recommendations," and therefore no attorney-client relationship was established. Id. at 614.

One might query Judge Henley's argument that employment of a law firm "to make a factual investigation and business recommendations" (assuming arguing the aptness of this characterization) necessarily precludes the rendering of legal services. If the quintessence of legal practice is the application of general legal principles to specific problems, then the form of the output of that application is not determinative of whether or not a legal service was performed. The mere fact that the resulting recommendations were of a business character does not mean a legal analysis was not performed.

11. Missouri courts have not come squarely to grips with the "who speaks for the corporate client" problem in the context of the attorney-client privilege. The reason for this seems to be that from 1953 until 1975 the Missouri Supreme Court treated the work product rule as a privilege. State ex rel. Terminal R.R. Ass'n v. Flynn, 363 Mo. 1065, 257 S.W.2d 69 (En Banc 1953). If work product is treated as a privilege, material so covered is absolutely protected and is not discoverable upon a showing of substantial need coupled with inability to obtain equivalent materials by other means, as it would be under the federal work product rule.
this question, the "control group" test\textsuperscript{12} and the "Harper & Row" test.\textsuperscript{13} In *Diversified* the Eighth Circuit announced a substantially modified version of the "Harper & Row" test:

\begin{quote}
[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.\textsuperscript{14}
\end{quote}

This test actually represents the fourth in a series of answers to the question who can speak for the corporate client under the attorney-client privilege.\textsuperscript{15} The first approach was the suggestion by Judge Wyzanski in *United States v. United Shoe Machinery Corp.*\textsuperscript{16} that a confidential communication between an attorney and any "officer or employee" of a corporation involving the solicitation or giving of legal advice was privileged.\textsuperscript{17}

---

Thus, under *Flynn*, the communications of all employees, if elicited in anticipation of litigation, were absolutely privileged even if no attorney-client relationship had been established and even if the employee was not purporting to be speaking for the corporation to an attorney. Proceeding on this basis it was simply not necessary for Missouri courts to ask if a given employee spoke for the corporation for purposes of asserting the attorney-client privilege.

Federal courts have criticized the *Flynn* holding and have refused to follow it in diversity proceedings even though Fed. R. Evid. 501 requires federal courts in diversity cases to follow state law of privilege. Parrett v. Ford Motor Co., 47 F.R.D. 22 (W.D. Mo. 1968); Whitaker v. Davis, 45 F.R.D. 270 (W.D. Mo. 1968). \textit{See also} 4 J. Moore, MOORE'S FEDERAL PRACTICE ¶ 26.64(5) at 455 (2d. ed. 1976). The *Flynn* rule was followed in Missouri until 1975. Lindberg v. Safeway Stores, Inc., 525 S.W.2d 571 (Mo. App., D.K.C. 1975). Missouri Supreme Court rules effective January 1, 1975 adopted the federal work product rule. MO. R. CIV. P. 56.01(b)(3). Missouri courts have yet to face directly the problem of who can speak for the corporate client within the attorney-client privilege.

\textsuperscript{12} The "control group" test was initially formulated in City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

\textsuperscript{13} The "Harper & Row" test was initially formulated in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by vote of 4 to 4 without opinion, 400 U.S. 348 (1971).

\textsuperscript{14} 572 F.2d at 609.

\textsuperscript{15} For a seminal analysis of the attorney-corporate client problem see Simon, \textit{The Attorney-Client Privilege as Applied to Corporations}, 65 YALE L.J. 953 (1956).


\textsuperscript{17} The central focus of United Shoe, however, was whether or not attorneys in the corporation's patent department were acting as legal advisers or merely as businessmen. If they were not acting in a legal capacity, as the court held, there
Zenith Radio Corp. v. Radio Corp. of America also suggests that any employee can speak for the corporation. This is the broadest of the four approaches in that it protects the largest number of communications.

The advantages of the broad approach are that it is easy to follow, it is predictable, and it provides maximum encouragement for the disclosure of full and truthful information to attorneys. Full disclosure by a client to his attorney is, of course, the policy goal which the attorney-client privilege in its modern form seeks to achieve. On the other hand, the broad approach to the privilege, especially in the corporate context, runs counter to the modern trends of expansive discovery. It also runs counter to United States Supreme Court dictum in Hickman v. Taylor that mere witnesses are not covered by the attorney-client privilege even if they happen to be employees of the client.

The implications of Hickman, while apparently not considered in United Shoe and Zenith, where explicitly taken into account in City of Philadelphia v. Westinghouse Electric Corp., when the second, and narrowest, of the four tests was formulated. Referring to United Shoe, Judge Kirkpatrick said, "Judge Wyzanski ... suggested that the privilege extends to an extremely broad class of employees, but I cannot help feeling that he is in conflict with Hickman v. Taylor, which very clearly shows the distinction between statements by employees of the client and statements by the client himself." Judge Kirkpatrick then stated the "control group" test which, according to the Diversified court, remains the dominant approach:

was no attorney-client relationship and communications to and from them were not privileged. Judge Wyzanski was probably not attempting a precise answer to the "who can speak for the corporate client" problem. Still, the case is cited for the proposition that any employee can speak for the corporation. See City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).

19. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 503(b) [04] (1975).
20. Originally the privilege belonged to the attorney, not to the client, as a point of honor; it permitted the attorney to preserve his honor by keeping the secrets confided in him. Id. ¶ 503[02].
21. FED. R. CIV. P. 26(b); C. MCCORMICK, LAW OF EVIDENCE § 96 at 202 (2d ed. 1972).
22. "[T]he protective cloak of this privilege does not extend to information which an attorney secures from a witness. ..." 329 U.S. 495, 508 (1947). In Hickman the witnesses were in fact employees of the attorney's client.
24. Id. at 485. Another reason for Judge Kirkpatrick's abundance of caution may have been indicated in his reference to Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771 (N.D. Ill. 1962) which had held that a corporation could not plead the attorney-client privilege. This case was on appeal at the time the Westinghouse case was being decided. The holding in Radiant Burners was subsequently reversed. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 814 (7th Cir.), cert. denied, 375 U.S. 920 (1963).
25. 572 F.2d at 608.
[I]f 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, 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.26

Several arguments have been advanced on behalf of the control group test. Perhaps the most fundamental argument is based on Wigmore's observation that the attorney-client privilege should be narrowly construed because its "benefits are all indirect and speculative; its obstruction is plain and concrete."27 The narrow parameters of the control group test minimize the obstructive suppression of relevant evidence.

Another argument is that the control group test is a "bright line" test that is easy to follow and assures predictable results.28 Predictability is important because the full disclosure purpose of the privilege will not be attained unless communicants can tell in advance with some certainty that a communication will be protected.

Finally, it is suggested that when lower level employees are interviewed by attorneys their most significant considerations are with respect to whether management will approve or disapprove of what they say, not whether what they say will be disclosed to opposing litigants. Extending the attorney-client privilege beyond the control group to these employees does nothing to meet their real concerns and, hence, does nothing to promote full disclosure.29

26. 210 F. Supp. at 485. Illustrative applications of the control group test are Hogan v. Zletz, 43 F.R.D. 308 (N.D. Okla. 1967), aff'd sub nom., Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968) (the Manager and Assistant Manager of the Research and Development Department of Phillips Petroleum Co. and the members of the company's Patent Committee were held to be control group members, a research chemist and a group leader in the Research and Development Department were held not to be control group members); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963) (Division Manager and his Chief Engineer held to be control group members, two employees reporting to Chief Engineer but also authorized to communicate confidential information directly to General Motor's patent attorneys held not to be control group members). But see Congoleum Indus., Inc. v. G.A.F. Corp., 49 F.R.D. 82 (E.D. Pa. 1969), aff'd, 478 F.2d 1398 (3rd Cir. 1973) (an investigatory group including the Director of Research of the corporation and the Director of Research of a division of the corporation was held to be in an advisory, not a decision-making role and hence not part of the control group).

27. 8 J. WIGMORE, supra note 5, at § 2291. See also Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 HARV. L. REV. 424 (1970).


29. Id. at 429. For further support and refinement of the control group test see Virginia Elec. & Power Co. v. Sun Shipbuilding & D.D. Co., 68 F.R.D. 397 (E.D. Va. 1975) (court follows Congoleum holding that a person who merely furnishes technical information is not in the control group).
The main criticism of the control group test is that it does not comport with the realities of corporate life and, therefore, does not promote the purposes of the attorney-client privilege. It is argued that in the modern corporation middle-management executives, who may not qualify for inclusion in the control group, often have responsibility for making recommendations that are ratified perfunctorily by higher management. 30 Good social policy would "encourage a desire for legal advice at whatever level that desire exists within the corporation." 31 The central issue should not be an employee's rank, status, or function in a corporation, but rather whether he "honestly sought legal advice or services that could have benefitted the corporation." 32 This argument brings to the fore the subjective element of the employee's motivation as opposed to the objective ascertainment of the employee's position or function in the corporation.

Another criticism, which anticipated a case such as Diversified, is that the narrow bounds of the control group test may discourage a vigorous program of antitrust compliance using outside counsel to conduct internal investigations. 33 To be effective, such an investigation may well require counsel to obtain information from lower and middle level employees, and the control group test could hinder full disclosure.

Finally, it is suggested that the predictability of the control group test may be somewhat illusory. It is not always easy to tell who the members of the control group are; titles may be manipulated to protect the maximum number of communications, and courts may have difficulty discerning the real decision-making patterns behind the titles. There may be difficulty in applying the test even without any deceptive manipulation of titles. In Honeywell, Inc. v. Piper Aircraft Corp., 34 the court was confronted with documents in counsel's hands where no author was given or where the author was indicated only as "Honeywell employee," "Honeywell management," "Honeywell inventor," or "Honeywell Chief Pilot." The court said it was not possible to tell whether such persons were members of the control group, and it placed on plaintiffs the burden of showing that they were control group members. 35 Such an approach may be fair, but the putative "bright line" of the control group test has become a little less bright.


32. Id. at 369.
33. Pye, supra note 30, at 19.
35. See also Camco, Inc. v. Baker Oil Tools, Inc., 45 F.R.D. 384 (S.D. Tex. 1968) (bald assertion of attorney-client privilege without specifics as to who prepared documents in question was not sufficient to invoke the privilege).
Decker\textsuperscript{36} took the third step in the sequence by striking a middle ground between the any employee test of United Shoe and the narrow restrictions of the control group test. Characterizing the control group test as “not wholly adequate,” the court said:

We conclude that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation’s attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney’s advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.\textsuperscript{37}

Applying this test, the court found to be privileged certain employee’s statements which the district court had found not privileged under the control group test. The Harper & Row test protects, potentially at least, the communications to an attorney of any employee as long as such communications are at the direction of his superiors and deal with the duties of his employment. Thus, the principal advantage of the Harper & Row test is that, in line with the purposes of the attorney-client privilege, it gives broad encouragement to employees to make full disclosures in their communications with the corporation’s attorneys. A vigorous inhouse antitrust compliance program, which might be inhibited under the control group test, could freely move forward under the Harper & Row approach.\textsuperscript{38}

The principal criticism of the Harper & Row test has been its susceptibility to abuse. “[U]nder the Harper test, nothing prevents corporations

\begin{itemize}
  \item 423 F.2d 487 (7th Cir. 1970), aff’d by vote of 4 to 4 without opinion, 400 U.S. 348 (1971).
  \item 423 F.2d at 491-92. While not explicitly adopting the Harper & Row test, the court in Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 40 (E.D.N.Y. 1973) stated and applied a broader approach than the control group test:

[T]his court chooses to ask generally, whether, under all the relevant circumstances, including but not limited to, the nature and content of the communications, the extent of their disclosure within the corporation, and the relationship of the employees involved to the communication and to the corporation, the employees concerned may be thought to have acted as representatives of the client for purposes of recognizing the privilege.

Under this formulation the court found to be privileged documents communicated between defendant corporation’s patent attorney and a group of four employees comprising the Project Engineer and co-inventor of the patents in suit, the Chief Engineering Consultant and co-inventor, the Vice President of the corporation and his assistant, both of whom served as liaison with the patent attorney. \textit{See also} Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978) (court held plaintiff’s statements to her employer’s attorney were not privileged under either the control group or Harper & Row test).

\item For an analysis generally favorable to the Harper & Row approach see
\end{itemize}
from directing all their employees to channel all their reports to corporate attorneys, thereby rendering all such information privileged."

Another criticism has centered on the court's explicit refusal in *Harper & Row* to express an opinion with respect to employees who are no more than bystander witnesses, *i.e.*, "employees who, almost fortuitously, observe events which may generate liability on the part of the corporation." Critics point out that for the purposes of the privilege the manner in which information is acquired is irrelevant. What matters is whether the information is disclosed to counsel, not how it was acquired.

The new test announced in *Diversified* by the Eighth Circuit is the fourth and most recent attempt to resolve the spokesman-for-the-corporate-client problem. Essentially, the new test is *Harper & Row* with modifications designed to cure the main defect of that test. To the "at the direction of his superior" and "concerning the duties of his employment" requirements of *Harper & Row*, the *Diversified* test adds requirements that the employee's communication be for the purpose of securing legal advice, that the superior's request be made so that the corporation can secure legal advice, and that the confidentiality of the communication be maintained within a "need to know" perimeter. The *Diversified* test also is explicit in putting the burden on the corporation to show that all the requirements are met.

These requirements, particularly the stress on the relevance of the communications to the securing of legal advice and the superior's motives in requesting such advice, are consonant with the purposes of the attorney-client privilege, and should be effective safeguards against those who might be tempted to funnel corporate business records through their attorneys to prevent subsequent disclosure. The only communications protected are those made for the purpose of securing legal advice for the corporation; however, communications for such purpose may be protected under this test even though not made by a member of the corporate control group. Thus, the *Diversified* test is narrower than *Harper & Row*, but broader than the pure control group test.

By retaining the "duties of his employment" prong of *Harper & Row*, the *Diversified* test removes "from the scope of the privilege any communication in which the employee functions merely as a fortuitous witness." Although inconsistent with the strict logic of the privilege, the restriction avoids conflict with *Hickman* and is consistent with the current trend toward broad discovery procedures.

---


40. 423 F.2d at 491. This reticence on the court's part is no doubt due to the continuing implications of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). See note 22 *supra*.


42. 572 F.2d at 609.

43. See text accompanying note 41 *supra*. 

Published by University of Missouri School of Law Scholarship Repository, 1979