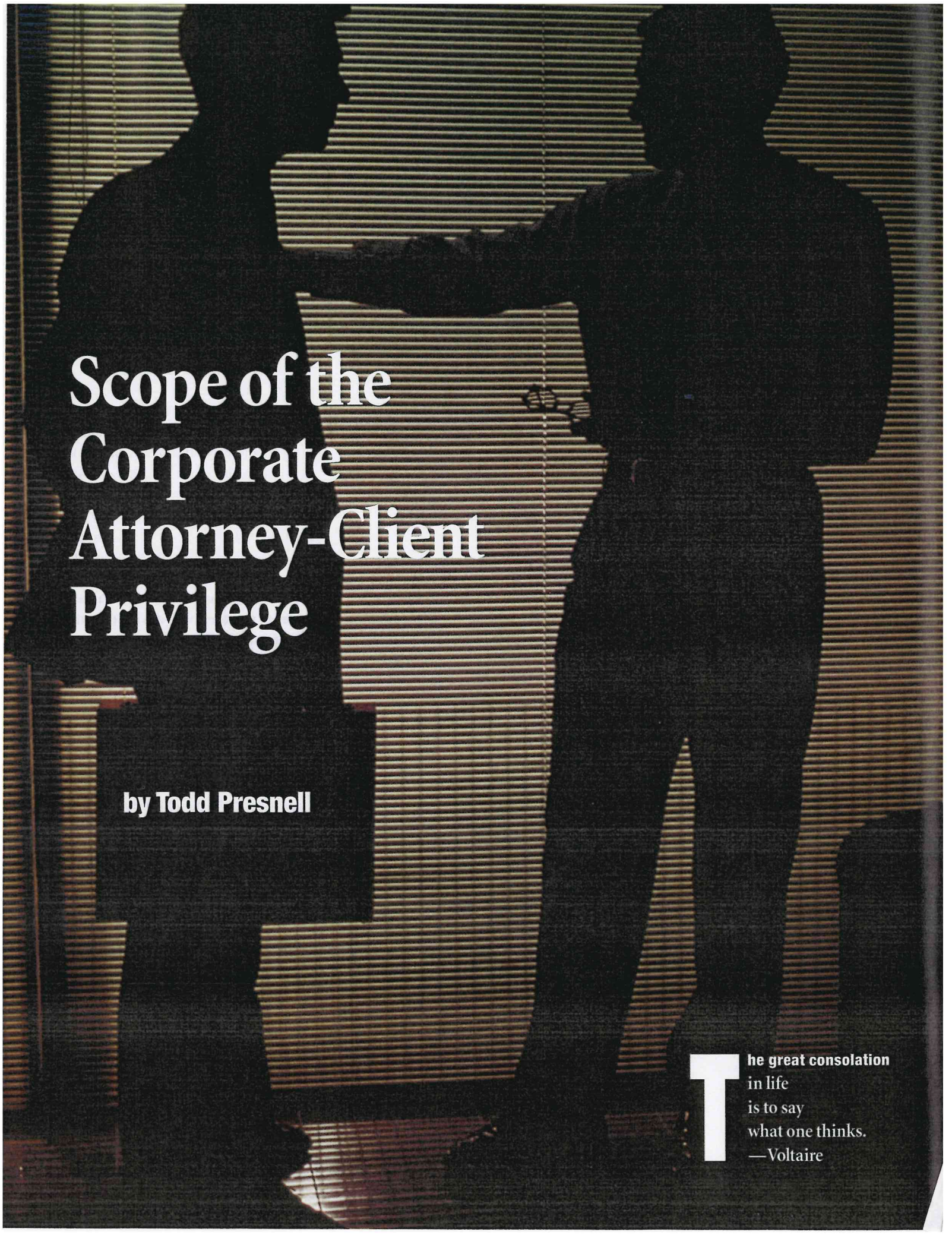

Scope of the Corporate Attorney-Client Privilege

by Todd Presnell

The great consolation in life is to say what one thinks.
—Voltaire

Such a consolation possibly serves its greatest function in the arena of attorney-client relations. Indeed, the ability to reveal confidences to one's attorney without fear of disclosure and retribution is one of the hallmarks of societies governed by the rule of law. This attorney-client privilege permits the client to be open and forthright with his or her attorney which, in turn, permits the attorney to provide informed representation and legal advice. The privilege is simultaneously viewed as silencing the truth and, therefore, courts narrowly interpret the scope of the privilege. When an attorney's client is an individual, the scope of protected communications is clear—it is the client's privilege that covers communications made by the client or his representatives and only he may assert it or waive it. When the client is a corporate entity, however, the scope of the attorney-client privilege is imprecise, inconsistent, and uncertain.

The scope of the attorney-client privilege is becoming a more prevalent issue in today's corporate legal environment, and can arise in an unlimited number of situations. Consider, for example, this small sampling:

- Is an employee-driver's communications to his company supervisor following an automobile accident protected in subsequent litigation against the company?
- Are hospital nurses' communications to the corporate-hospital's attorneys protected in a subsequent malpractice suit against the hospital?
- Is an employee's statement to corporate counsel regarding his working environment protected in a subsequent sexual harassment or hostile work environment claim against the corporate employer?
- Are employees' communications to in-house corporate counsel regarding personal compliance with federal regulations protected in a subsequent third party lawsuit against the company?
- Is an employee's statement made during an internal investigation conducted by in-house counsel protected in subsequent litigation arising from the subject of the investigation?
- Is a questionnaire completed by a corporate employee and turned over to outside attorneys protected in subsequent litigation?
- Is a corporate director's statement to corporate counsel protected when he merely witnessed a slip-and-fall accident?
- Is the substance of a corporate attorney's deposition preparation meeting with a former company employee discoverable?

Unfortunately, the answers to these questions and others are not uniform, and depend upon a variety of factors, the most influential of which is the forum in which the questions are asked.

History of the Privilege

To understand the scope of the corporate attorney-client privilege, it is important to understand the purposes underlying the privilege. The attorney-client privilege has long been recognized in English and American jurisprudence. See *Annesley v. Anglesea*, 17 How.St.Tr. 1139 (1743); *Hunt v. Blackburn*, 128 U.S. 464 (1888). The privilege is traditionally a creature of common law, but has been codified in many states. The statutes in some states are simple restatements of the common law, *see, e.g.*, Tenn.Code §23-3-105, while others specifically outline the elements of the privilege, *see, e.g.*, Ariz.Rev.Stat. §12-2234.

The purpose of the privilege is two-fold. First, this privilege "serves the function of promoting full and frank communications between attorneys and their clients." *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348 (1985). In addition, legal "advice does not spring from lawyers' heads as Athena did from the brow of Zeus." *In re Sealed Case*, 737 F.2d 94, 99 (D.C.Cir. 1984) (Ginsburg, J.). Thus, the privilege also "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51 (1980). In short, the privilege encourages the client to be forthcoming, complete, and honest in speaking with his attorney, and this full disclosure therefore enables the lawyer to provide appropriate representation.

The attorney-client privilege must be distinguished from the work product doctrine, especially when the client is a corporate entity. While these doctrines are similar, "the work product doctrine is distinct from and broader than the attorney-client privilege." *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975). The attorney-client privilege covers communications made by the client to the attorney or communications made by the attorney that incorporate or are based upon the client's communications. Once properly invoked, the privilege against disclosing confidential communications is virtually absolute. Conversely, the work product doctrine is "a qualified privilege for certain materials prepared by an attorney 'acting for his client in anticipation of litigation.'" *Id.* at 237-38. Under the work product doctrine, opposing counsel may gain access by showing that he has a "substantial need" of the documents and "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed.R.Civ.P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947). Therefore, it is important for attorneys to seek protection of documents containing evidence of client communications under the attorney-client privilege in order to avoid the possibility of opposing counsel overcoming the work product doctrine.

In order to assert the privilege, several factors must be met. While these elements are now set forth in many state statutes and state rules of evidence, the general requirements of the privilege were succinctly set forth by Judge Wyzanski as follows:

The privilege applies only if (1) the asserted holder of the privilege is or sought

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to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Co., 89 F.Supp. 357, 358-59 (D.Mass. 1950). In other words, "where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived." *Wonneman v. Stratford Securities Co.*, 23 F.R.D. 281, 285 (S.D.N.Y. 1959). These factors will be used by any court to determine whether a communication enjoys the attorney-client privilege irrespective of whether the client is an individual or corporation.

It is now well established that the attorney-client privilege applies to the corporate client. *United States v. Louisville & Nashville Railroad Co.*, 236 U.S. 318 (1915). (One aberrant court held otherwise, but its decision was reversed on appeal. *Radiant Burners, Inc. v. American Gas Association*, 207 F.Supp. 771 (N.D.Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir. 1963)). Yet, while the necessary requisites listed above are rather straightforward when the client is an individual, they are not applied as simply when the client is a corporate entity. The primary and most obvious difference is that the corporate entity speaks through the many voices of its employees, agents, and representatives. Thus, when a corporation asserts the attorney-client privilege, the questions become (1) whose communications are protected, (2) who may assert the privilege, and (3) who may waive the privilege.

Regrettably, there is no uniform answer to these questions either among the states or between state and federal law. In this area, courts have adopted and applied two general tests: (1) the control group test, and (2) the subject matter test. Furthermore, as explained below, the determination of which test applies in a given situation depends entirely on the jurisdiction and that jurisdiction's conflict of laws rules. Therefore, in order to prevent unwanted disclosures of client communications, it is imperative that the corporate attorney understand the basic tenets of each test.

The control group test is extremely narrow in scope. It protects only the communications of the corporation's top management.

Control Group Test

The so-called "control group test" originated in the case of *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D.Pa. 1962). Defendant General Electric asserted the attorney-client privilege in order to prevent disclosure of an employee's statement to its general counsel. In rejecting this contention, the court adopted the following boundaries for the attorney-client privilege in the corporate setting:

> [I]f 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. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

Id. at 485. While these are the elements of the control group test, some states have expanded the control group to include advisors to top management if management personnel actually rely on the advisors' communications in making legal decisions. See, *e.g.*, *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.App.3d 103, 432 N.E.2d 250 (1982).

Accordingly, combining the general requirements of the privilege set forth by Judge Wyzanski in *United Shoe* with these criteria, an employee's communication is protected if (1) the communication is intended to be and actually kept confidential, (2) the communication is sought for the purpose of the attorney rendering legal advice, and (3) the employee is a corporate decisionmaker, or a close advisor to a corporate decisionmaker, who has authority to obtain legal advice or is in a position to act on legal advice on behalf of the corporation. See *Hercules Inc. v. Exxon Corp.*, 434 F.Supp. 136 (D.Del. 1977).

It is obvious that the control group test is extremely narrow in scope. Although evident to all corporate attorneys that low-level employees will often possess information vital in providing legal advice to the corporation, the control group test protects only the communications of the corporation's top management. For example, a written communication from a low-level employee of a company sent to the corporate attorney for purposes of ensuring the company's compliance with regulatory standards will not be protected under the control group test. Also, this test will not protect communications from a middle management employee to his company's general counsel regarding the working atmosphere of a particular shift in a hostile work environment case. Despite this narrow application, however, many states continue to follow this doctrine. See, *e.g.*, Alaska R.Evid. 503(a)(2); Hawaii R.Evid. 503(a)(2); *Consolidation Coal v. Bucyrus-Erie*, *supra*; Maine R.Evid. 502(a)(2); N.H.R.Evid. 502(a)(2); N.D.R.Evid. 502(a)(2); Okla.Stat.tit.12, §2502(A)(4). See generally, Hamilton, "Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege," 1997 Ann.Surv.Am.L. 629.

Subject Matter Test

The subject matter test arose out of courts' increasing dissatisfaction with the narrowly tailored control group test. In the leading case of *Harper & Row Publishers, Inc. v. Decker*,

423 F.2d 487, 491 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971), the court "conclude[d] that the control group test is not wholly adequate." As a result, it adopted a "subject matter test" for applying the attorney-client privilege under which "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." 423 F.2d at 491-92.

Whereas the control group test was viewed as too narrow, however, the *Harper & Row* two-pronged subject matter test was criticized as too broad. Thus, the court in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), offered a "modified subject matter test" or "Weinstein test" as a more balanced rule. This test to determine whether an employee's communication is privileged includes five elements, as listed at 572 F.2d 609:

- the communication was made for the purpose of securing legal advice;
- the employee making the communication did so at the direction of his corporate superior;
- the superior made the request so that the corporation could secure legal advice;
- the subject matter of the communication is within the scope of the employee's corporate duties; and
- the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

These elements ultimately gained acceptance by the Supreme Court. Although expressly declining "to lay down a broad rule or series of rules to govern all conceivable future questions in the [corporate attorney-client privilege] area," the Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981), essentially approved the modified subject matter test outlined in *Diversified Industries v. Meredith*. In *Upjohn*, the Court held that answers to questionnaires sent to several corporate employees by the general counsel constituted privileged communications. *Id.* at 394-96. The Court found these communications protected because (1) they involved matters within the scope of the employees' job duties, (2) the employees were aware that the questionnaire was considered confidential, and (3) the communication was made by employees directly to the general counsel (4) at the specific instruction of corporate superiors (5) for the exact purpose of obtaining legal advice of the general counsel. *Id.* at 394-95. Accordingly, although refusing to expressly adopt a set of requirements, the Court implicitly followed the subject matter test and explicitly rejected the control group test. Therefore, the modified subject matter test is utilized in federal courts when federal common law supplies the rule of decision.

In addition, since *Upjohn*, at least some variation of the subject matter test has become the more widely followed rule among the states. See, *e.g.*, Ala.R.Evid. 502(a)(2); Ariz.Rev.Stat. §12-2234; *Courteau v. St. Paul Fire & Marine Insurance Co.*, 307 Ark. 513, 821 S.W.2d 45 (1991); *Denver Post Corp. v. University of Colorado*, 739 P.2d 874 (Colo.App. 1987); *D. I. Chadbourne, Inc. v. Superior Court (Smith)*, 60 Cal.2d 723, 36 Cal.Rptr. 468 (1964); *Shew v. Freedom of Information Commission*, 245 Conn. 149, 714 A.2d 664 (1998); *Southern Bell Telephone & Telegraph Co. v. Deason*, 632 So.2d 1377 (Fla. 1994); *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga.App. 497, 277 S.E.2d 785 (1981); Ky.R.Evid. 503(a)(2); La. Code Evid. art. 506(A)(2); Miss.R.Evid. 502(a)(2); *National Employment Service Corp. v. Liberty Mutual Insurance Co.*, 1994 Westlaw 878920 (Mass.Super.Ct. 1994); *Fruehauf Trailer Corp. v. Hagelthorn*, 208 Mich.App. 447, 528 N.W.2d 778, *appeal denied*, 543 N.W.2d 314 (Mich. 1995); *Delaporte v. Robey Building Supply, Inc.*, 812 S.W.2d 526 (Mo.App. 1991); *Wardleigh v. Second Judicial District Court (Clear Acre, Ltd.)*, 111 Nev. 345, 891 P.2d 1180 (1995); Or.Evid.C. §40.225; *Union Planters National Bank v. ABC Records, Inc.*, 82 F.R.D. 472 (W.D.Tenn. 1979) (predicting Tennessee law); Tex.R.Evid. 503(a)(2); Utah R.Evid. 504(a)(4); *Baisley v. Missisquoi Cemetery Association*, 167 Vt. 473, 708 A.2d 924, 931 (1998). Moreover, the *Upjohn* subject matter test is approvingly cited even among states that have not adopted a specific set of criteria.

Federal Court and Conflict of Laws Rules

Despite the rule of *Upjohn*, there is no guarantee that the subject matter test will be applied in all federal court actions. Rule 501 of the Federal Rules of Evidence provides that "the privilege of a witness [or] person... 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 [or] person... shall be determined in accordance with State law." In federal court, therefore, when the court's subject matter jurisdiction is based upon a federal question, *see* 28 U.S.C. §1331, issues concerning the attorney-client privilege will be governed by federal common law. The applicable common law in this instance, of course, is supplied by the subject matter test of *Upjohn*. For example, when plaintiff sues ABC Corporation for violations of the Americans with Disabilities Act, *Upjohn* will determine whether communications of ABC employees are protected under the attorney-client privilege.

Attorney-client privilege issues become murkier, however, when ABC Corporation is brought into federal court under diversity jurisdiction. 28 U.S.C. §1332. In that situation, the substantive law of the state supplying the rule of decision applies. Normally, this means that the law of that state will govern privilege issues. Fed.R.Evid. 501; *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Depending on the geographic location, therefore, a federal court may apply the *Upjohn* subject matter test in an ADA case involving ABC Corporation, and the control group test in a breach of contract case involving the same company.

This incongruence is not limited to federal courts. State conflict of laws rules, forum selection clauses, and choice of law provisions in contracts may ultimately determine whether the particular state court applies the subject matter test or the control group

test. The *Restatement (Second) of Conflict of Laws* §139, for instance, favors the forum that will more likely hold the communication unprotected by the privilege. Thus, a state that applies the subject matter test but also follows Section 139 of the Restatement may be forced to forsake its own privilege laws and apply the control group test under certain circumstances.

In-House Counsel

Whether applying the control group or subject matter test, in-house corporate counsel face additional problems in invoking the attorney-client privilege. First, it should be noted that many countries do not recognize the privilege when the attorney to whom the communication is made is an employee of the corporation. See generally, Hill, "A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community," 27 Case W.Res.J.Int'l L. 145 (1995). Of course, the privilege certainly applies to in-house counsel working for corporations in the United States. See, *e.g.*, *Kahl v. Minnesota Wood Specialty, Inc.*, 277 N.W.2d 395, 399 n.5 (Minn. 1979). One problem, therefore, is that in-house counsel for companies doing business internationally may not find protection for communications with overseas employees.

A second problem arises when the in-house lawyer provides business advice in addition to legal advice to his corporate employer. It is normally presumed that communications sent to outside corporate counsel are for the purpose of seeking legal advice. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 610 (8th Cir. 1977). This presumption does not apply to in-house counsel, however, because many times the in-house lawyer provides business as well as legal advice to his corporate client. In fact, courts are quick to note that the in-house lawyer supplies both forms of advice. See *McCaugherty v. Siffermann*, 132 F.R.D. 234 (N.D.Cal. 1990). Interestingly, at least one commentator perceives an actual prejudice by the courts against in-house counsel asserting the attorney-client privilege. See Giesel, "The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations," 48 Mercer L.Rev. 1169 (1997). If the communication is made in order for in-house attorneys to render business advice, even if to a small degree, the protection of the privilege evaporates.

Third, because of in-house lawyers' dual role, some courts actually apply a heightened standard in determining whether an employee communication to in-house counsel should receive protection of the privilege. In *In re Sealed Case*, 737 F.2d 94 (D.C.Cir. 1984), then-Judge Ginsburg was presented with the issue of whether the attorney-client privilege protected the communications of an in-house attorney, identified as C, who also served as the company's vice president. The court outlined the burden of the proponent of the privilege as follows:

> We are mindful, however, that C was a Company vice-president, and had certain responsibilities outside the lawyer's sphere. The Company can shelter C's advice only upon a *clear showing* that C gave it in a professional legal capacity.

Id. at 99 (emphasis added). The requirement of a clear showing that the communication was for legal rather than business advice is a heightened standard, and means that the proponent "must show by affidavit that *precise facts* exist to support the claim of privilege." *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 515 (M.D.N.C. 1986) (emphasis added); see also, *Borase v. M/A Com, Inc.*, 171 F.R.D. 10 (D.Mass. 1997).

Former Employees

In today's transient working environment, it is not uncommon for corporate employees, at any level, to change jobs or otherwise leave the company. Consequently, corporate attorneys, especially outside counsel, are forced to seek information from the client's former employees. The inquiry, then, is whether the attorney-client privilege, under either test, remains applicable.

If an employee's communication to corporate counsel meets the requirements of either test, it is logical to assume that his employment status at the time of the communication should be irrelevant for attorney-client privilege purposes. Indeed, one court has recognized that "a formalistic distinction based solely on the timing of the interview cannot make a difference if the goals of the privileges outlined in *Upjohn* are to be achieved." *Command Transportation, Inc. v. Y.S. Line (USA) Corp.*, 116 F.R.D. 94, 97 (D.Mass. 1987). Logic, however, is a quality not always predominant in the attorney-client privilege arena.

The Supreme Court in *Upjohn* expressly refused to offer an opinion on the application of the privilege to former corporate employees. 449 U.S. at 394 n.3. Since *Upjohn*, however, federal courts interpreting the subject matter test of federal common law include former employees within the scope of the privilege. Shortly after *Upjohn*, the Ninth Circuit noted that "[f]ormer employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties." *In re Coordinated Pretrial Proceedings*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981). According to this court, therefore, "although *Upjohn* was specifically limited to current employees,... the same rationale applies to ex-employees." *Id.* Other federal courts applying *Upjohn* also follow this rule.

The application of *Upjohn* to former employees is in no way consistent, especially in courts applying state law. In *Shew v. Freedom of Information Commission*, *supra*, 714 A.2d at 670-71 n.12, for example, the Connecticut Supreme Court essentially adopted the *Upjohn* subject matter test, yet refused to extend the privilege to former employees. This court, rather, followed Section 123 of the *Restatement (Third) of the Law Governing Lawyers,* which states that the privilege applies only when the person is "acting as an agent of the principal-organization" at the time of the communication. *Id.* In short, the scope of the privilege does not extend to former employees under this analysis. See also, *Connolly Data Systems, Inc. v. Victor Technologies, Inc.*, 114 F.R.D. 89 (S.D.Cal. 1987).

The issue is almost nonexistent in control group states because the range of employees to whom the privilege applies is more narrow. As the privilege applies to communications of the corporation's top management, former employees will by definition fall outside the recognized control group. Thus, if a top management employee communicates

with corporate counsel after he leaves the company, the communication will not receive protection from disclosure.

Assertion and Waiver

The last requirement necessary to garner protection under the attorney-client privilege as set forth by Judge Wyzanski in *United Shoe* is that "the privilege has been claimed and not waived." 89 F.Supp. at 358-59. In the corporate setting, it is generally held that the privilege may only be asserted by an authorized company representative. *Restatement (Third) of the Law Governing Lawyers* §123. The corporate attorney is the representative in the best position to assert the privilege, whether at a deposition, responding to written discovery, or at trial.

Waiver of the privilege, though, is a deeper concern for the corporate attorney. If a corporate employee's communication receives attorney-client protection, may that same employee waive the privilege as well? At least one court thinks so. *Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 693 (E.D.Va. 1987). Most courts, however, follow Section 128 of the Restatement and hold that only an authorized agent of the corporation may waive the privilege. Accordingly, a corporation's privilege generally cannot be waived through an unauthorized disclosure by either a current or former employee.

The corporate attorney should be proactive rather than reactive in this arena. An unauthorized disclosure of confidential information by a corporate employee rarely has a positive consequence, regardless of whether a court subsequently denies that a waiver was accomplished. The attorney, therefore, should instruct employees with whom he or she communicates that the communication is confidential. In addition, the attorney must be cognizant of the ever-present potential for waiver at employee depositions. When a question at an employee's deposition calls for disclosure of privileged information, the attorney must be prepared to instruct the witness not to answer the question, or terminate the deposition and seek a protective order from the court. Fed.R.Civ.P. 26. Any lesser objection may constitute waiver of the privilege. *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455 (N.D.Cal. 1978).

Written client communications may also lose protection if used at trial to refresh the client's recollection. Rule 612 of the Federal Rules of Evidence provides that, "if a witness uses a writing to refresh memory... while testifying,... an adverse party is entitled to have the writing produced at the hearing...." Accordingly, if the attorney uses an otherwise privileged document to refresh his client's memory on the witness stand, Rule 612 in effect mandates that waiver has occurred. See, *e.g.*, *Hannan v. St. Joseph's Hospital & Medical Center*, 318 N.J.Super. 22, 722 A.2d 971, 975-76 & n.1 (1999).

If interviewing a corporate employee, the lawyer should inform him that the conversation is confidential and is necessary to render legal advice.

Practice Tips

The attorney-client privilege is one of the oldest and worthiest evidence rules. But, as the Supreme Court has recognized, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn*, 449 U.S. at 393. Unfortunately, the ability to predict application of the attorney-client privilege in the corporate setting is anything but certain. Some states apply the control group test, others a form of the subject matter test, and still others have offered no specific rule. Moreover, even if a company or its attorney could predict the jurisdiction, conflict of laws rules and choice of law contract provisions eliminate any guarantee that a particular test will be applied. There are, however, some things a corporate attorney can do to put his or her client in the best possible position to invoke the privilege.

If the corporate client ultimately finds itself subject to the law of a control group state, there is little an attorney can do to avoid the narrow scope of that rule. If possible, the attorney should first communicate only with those corporate representatives who have authority to obtain legal advice and act upon it. Inevitably, though, the attorney will also need to communicate with mid-level management or low-level employees in order to render legal advice. These communications, whether oral or written, will not be protected. The attorney should keep the employee's written communications to a minimum, memorialize the communications himself (if necessary), and seek protection under the work product doctrine.

The corporate attorney has more options outside the control group jurisdictions. Initially, it should be remembered that the existence of the privilege is determined as of the time the communication is actually made. Thus, pre-communication safeguards should be implemented. These can be determined by combining the factors of *United Shoe* and *Upjohn*.

Legal Advice v. Business Advice

Under any privilege scenario, the communication must be sought for the purpose of rendering legal advice. This is even more critical when the communication is made to in-house counsel. If the employee communication is oral, the employee should be informed that it is for a legal purpose. If written, such as a questionnaire or memorandum, the document should expressly state it if for a legal purpose and expressly state that there is no business aspect involved in the communication. *Malco Manufacturing Co. v. Elco Corp.*, 45 F.R.D. 24 (D.Minn. 1968). The written communication should also identify the employee, state that it is requested by a superior, and be addressed to the corporate attorney.

Privilege Stamp

Written documents that contain potentially privileged information should be stamped with some variation of the phrase "privileged communication to attorney for legal advice." While such a stamp is not conclusive of its privileged status, *In re Air Crash Disaster*, 133 F.R.D. 515 (N.D.Ill. 1990), it

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use fair and honest claims handling and settlement practices. Because third party liability insurance contracts also impose a duty to defend, a carrier's extracontractual duties also encompass the defense obligation.

As noted above, some courts have found that a carrier can be liable for bad faith in the absence of any covered claim. In these cases, courts have observed that the benefits due to an insured are not limited solely to those expressly set out in the insurance contract. Insureds are also entitled to receive the security of knowing they will be dealt with fairly and in good faith. Other courts have found that a carrier cannot be liable for bad faith when there are no covered claims. Many such cases simply hold that extracontractual actions cannot proceed when there is no contract upon which to base them. Other complaints allege damages for both covered and non-covered claims. As in all attempts to present bad faith actions, the courts remain somewhat split regarding the duties owed and the resultant liability in the absence of coverage.

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Analyzing the Claim

Claims representatives expect defense counsel to provide them with legal analysis. Knowing the experience and knowledge of your representative allows you to decide how extensive such analysis should be. For example, an experienced claims representative probably does not require much analysis of a claim that is based on a common, frequently encountered set of facts. However, a representative who has worked for the company handling workers' compensation claims, and has only recently switched over to civil litigation, will appreciate what you may consider to be basic legal analysis. Complicated claims always warrant a comprehensive legal analysis. Your best bet is to ask the representative how familiar he or she is with the cause of action involved, and then provide a complete analysis of the issues.

Evaluating the Claim

The claims representative not only expects you to analyze the legal issues presented by the claim, he or she also wants to know your opinion on what the case is worth, and what the probable outcome is if taken to a jury. When providing this information, be certain to make detailed recommendations. Begin by giving a reliable, up front evaluation of the claim's worth. Describe the issues that could come up, and how the resolution of each issue could affect the value of the case. Tell the representative what additional information you may need, and how you plan on getting said information.

If there are new facts, or a recent court ruling which affects your initial evaluation of the case, inform the representative immediately. Defense counsel who get nervous at trial time and back off their previous positions put the rep in an uncomfortable position. Even worse is an attorney who doubles or triples the value of the case after a conversation with the judge who is trying to dispose of the matter on the day the trial is set to begin. This sort of behavior only sends a message that the attorney either lacks the skills or confidence necessary to try the case, or lacked the skills required to properly evaluate the case in the first place. Neither is a message you want to send. Thus, you should always explain all litigation options and strategies to the claims representative well before trial, thereby empowering him or her to make an appropriate decision.

Once the case has ended, either at trial or the settlement table, be certain to report the resolution to the claims representative. Some reps may want a detailed report of the trial, while others will be satisfied with a telephone call. The claims department will want to close its file as soon as possible. Accordingly, do all that you can to wrap things up in court and send out a final bill.

Conclusion

The outside defense attorney should consider the claims representative as a partner in civil litigation. Determine the style and preference of the particular claims representative, and keep him or her apprised accordingly. Regular discussions of the progress of the claim with the representative allow you to create a harmonious litigation plan and achieve customer satisfaction.

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will serve as additional evidence of its legal purpose. Such a stamp will also limit intra-company dissemination and add to its confidential nature.

Keep It Confidential

The communication should be confidential from the beginning and remain confidential thereafter. If interviewing a corporate employee, the lawyer should inform him that the conversation is confidential and is necessary to render legal advice. The interview should be between counsel and the single employee. The presence of disinterested third parties, such as other employees, will destroy the confidentiality and, thus, the privilege. *Smith County Education Association v. Anderson*, 676 S.W.2d 328 (Tenn. 1984).

Even stricter standards should be employed when the employee communication is written. The document should contain in the body a clear statement that it is confidential. Employees should not receive a copy, and other, non-management employees should not review it. Finally, the document should be separately filed and not co-mingled with other company files.

Avoid Waiver

While these essential elements should be met before the communication is made, it is just as important to avoid a subsequent waiving of the privilege. The corporate employee must be specifically instructed about the consequences of disclosing the substance of communications with counsel. The corporate attorney, moreover, should be prepared to protect the unknowing employee at a deposition or trial. Avoiding an unintentional Rule 612 disclosure and making proper objections are some tactics that will preserve the privilege. In short, it is the attorney who is in the best position to control waiver in most situations, and he or she should be prepared to do it.

Conclusion

The corporate attorney-client privilege is a well-recognized rule laden with uncertainties, confusion, and pitfalls. Along with courts' narrow view of the scope of this privilege, these problems will increase as corporations continue to dominate the litigation landscape. If the corporate attorney masters the basic elements of the privilege, it can be used successfully to protect many conversations, interviews, and written communications.