

Chief Justice Rehnquist and The Attorney-Client Privilege

BY ROY SIMON

During Chief Justice Rehnquist's thirty-three years on the United States Supreme Court (1972–2005), the Supreme Court decided at least two dozen important cases regarding the regulation of lawyers. (I am counting cases typically discussed or reprinted in legal ethics casebooks used in law school courses on professional responsibility.) The issues covered by these cases include minimum fee schedules, bar admission requirements, lawyer advertising and solicitation, conflicts of interest, effective assistance of counsel, client perjury, and the attorney-client privilege.

Chief Justice Rehnquist did not write the majority opinion in most of these cases, but the handful of cases in which he did write the majority opinion were important ones. And the most important of these was *Upjohn v. United States*, 449 U.S. 383 (1981), still the definitive opinion on the scope of the attorney-client privilege for corporations engaged in federal court litigation. This article tells the story of the *Upjohn* case.

Background

In 1886, Dr. W. E. Upjohn of Kalamazoo, Michigan established The Upjohn Pill and Granule Company. By 1975, Upjohn had grown into a multinational pharmaceutical corporation doing business in approximately 150 foreign countries and generating worldwide sales exceeding \$890 million. In 1976, Upjohn's outside auditors discovered that from 1971 through 1975 one of Upjohn's foreign subsidiaries had made more than \$4 million in questionable payments to foreign government employees for the purpose of securing government business. (The United States referred to these payments as "bribes or kickbacks.")

When the auditors informed Upjohn's General Counsel (Gerard Thomas) about the questionable payments, Mr. Thomas conducted a factual investigation to determine the nature and extent of the questionable payments and so that he could give legal advice to the Company about the payments. As a part of the investigation, Mr. Thomas and outside counsel prepared a written questionnaire about the payments, which the Chairman of the Board mailed to 53 foreign managers of the Company. The questionnaire directed the addressee to return the form to Mr. Thomas. In addition, Mr. Thomas interviewed (either by telephone or in person) every person to whom a questionnaire had been sent, and he and outside counsel interviewed others as well. Mr. Thomas and outside counsel took notes at the interviews, and these notes were treated as confidential and were not disclosed to anyone except Mr. Thomas and outside counsel.

In March of 1976, after Mr. Thomas had completed the initial investigation, the Company preliminarily reported the questionable payments to the SEC on the Company's Form 8-K. The Company also sent the Form 8-K to the IRS. The IRS sent a summons to Upjohn seeking all files from Upjohn's internal investigation into the questionable payments, including the completed questionnaires and counsel's notes

of the interviews with Upjohn's officers and employees. Upjohn refused to produce the questionnaires and interview notes on the grounds of attorney-client privilege. (Upjohn also raised work product protection, but this article is limited to a discussion of the attorney-client privilege.) At that point, the IRS petitioned the federal district court to enforce the summons.

The dispute was initially referred to Magistrate Karr, who wrote a long and scholarly Recommendation and Report. *United States v. Upjohn*, 1978 WL 1163 (W.D. Mich. 1978). The Magistrate began his analysis by quoting the definition of the attorney-client privilege from Judge Wyzanski's classic opinion in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950):

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

The Magistrate then noted the well established principles that the attorney-client privilege extends to corporations and that communications with "house counsel" were protected by the attorney-client privilege under the same circumstances as communications with "outside counsel." However, the Magistrate noted that the attorney-client privilege was difficult to apply when the client is a corporation because a corporation is an artificial legal entity that can act only through its agents or employees. The Magistrate phrased the problem this way:

Since the attorney-client privilege applies only to communications by or to a "client," and since a corporation can communicate only through its employees or agents, the question arises as to the circumstances under which a communication of an employee or agent of the corporation may be deemed to be the communication of the corporate client enabling the corporation to claim the attorney-client privilege.

Relying chiefly on *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), the Magistrate sided with the IRS and adopted the "control group" test for the attorney-client privilege. The control group test provided that if a corporate employee was (a) in a position to control (or even to take a "substantial part" in) a decision about any action which the corporation might take based on the advice of the attorney, or (b) if the corporate employee was an authorized member of a body or group which had that authority, then the employee "personified" the corporation when communicating with counsel, and the privilege would apply. But in all other cases an employee's communications with counsel were not privileged. The control group test, the Magistrate said, had met with "overwhelming acceptance." He cited seven opinions that had endorsed the control group test, including one case from New York, *United States v. International Business Machines Corp.*, 66 F. R. D. 154, 178 (S.D.N.Y. 1974).

The Magistrate noted the decision in *Harper & Row Publishers, Inc. v. Decker*, 423 F. 2d 487 (7th Cir. 1970), affirmed per curiam by an equally divided court, 400 U. S. 348 (1971), reh. den., 401

U. S. 950 (1971), in which the Seventh Circuit had criticized the control group test as “not wholly adequate” and had instead held:

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.

The Supreme Court had not written any opinion in the *Harper & Row* case, and Magistrate Karr did not attempt to read anything into the Court’s silent affirmance. But the Magistrate rejected the Harper & Row formula on its merits because it “would exclude virtually nothing from its sweep and flies in the face of the well-established principle that the privilege ‘should be strictly confined with the narrowest possible limits consistent with the logic of its principle.’” The broad *Harper & Row* formula also appeared to invite the danger envisioned by the Supreme Court in *Hickman v. Taylor*, 329 U. S. 506 (1947): “the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents.”

The district court judge, Chief Judge Fox, said Magistrate Karr’s opinion was “an excellent opinion and is the prevailing law,” and therefore adopted the Report and Recommendation. *United States v. Upjohn*, 1978 WL 1221 (W.D. Mich. 1978).

Upjohn appealed to the Sixth Circuit, arguing that confidential communications to counsel by all of its employees, including “regular and middle management employees as well as top management,” were protected by the attorney-client relationship. The Sixth Circuit disagreed. Adopting the control group test, the unanimous panel stated: “To the extent that the communications were made by officers and agents not responsible for directing Upjohn’s actions in response to legal advice, we disagree for the simple reason that the communications were not the ‘client’s.’”

The Sixth Circuit also expressly rejected the broader “subject matter” test, explaining its aversion to the subject matter approach as follows:

[O]nce management is informed in a general way of transactions posing legal problems, it can order subordinate agents to communicate the full details directly to counsel. ... This, in turn, fosters situations in which the only record of the full details of a particular transaction is in the hands of corporate counsel and, under the “subject matter” test, undiscoverable. Discovery, then, would have to be directed at the corporate agents who know the details of the transaction rather than at the corporation’s management. When the knowledgeable agents are located in several foreign countries, as here, the burden on discovery is severe. We, therefore, decline to accept Upjohn’s argument because of the broad “zone of silence” it would tend to create.

The court’s adoption of the control group test rather than the subject matter test did not end the inquiry, however, because Upjohn argued that some of the communications at issue had been made by members of the control group, including the Chairman of the Board, the Vice Chairman, and the President. These senior officers, and possibly others, were probably members of the control group, the court said, and their

communications to counsel should be privileged. Therefore, the court remanded the case to the district court “to determine which communications sought by the IRS were made by members of the ‘control group’ and to deny enforcement of the summons with respect to these ‘control group’ communications.”

Upjohn petitioned for certiorari, and the Supreme Court took the case, and luminaries of the legal profession wrote the briefs for the parties and amici.

Briefs in the Supreme Court

Upjohn’s brief on the merits was written by powerhouse lawyers at Covington & Burling, including Alex Kozinski, who had clerked for Chief Justice Burger during 1976-1977 and was appointed to the Ninth Circuit in 1985. Upjohn’s brief described the question presented as follows:

Whether the attorney-client privilege protects the confidentiality of communications between attorneys for a corporation and corporate officers and employees, where the subject of the communications is a matter about which the attorneys’ advice has been sought by the corporation, and the communications relate to the performance by the officers and employees of the duties of their employment.

Upjohn then summarized its argument in these compelling terms:

The purpose of the attorney-client privilege is to enable clients to obtain legal assistance from counsel fully informed of the relevant facts. The privilege thus plays an important role in promoting observance of law and the effective administration of justice. This purpose applies to corporate as well as individual clients. Almost every aspect of a corporation’s conduct is subject to statutory or regulatory requirements. Many of these are complex and pervasive. In order to achieve and maintain compliance with these requirements, corporations need continuing assistance from counsel fully informed of all relevant aspects of the corporation’s conduct.

If the privilege is to serve its intended purpose, all corporate employees who have relevant knowledge of matters on which counsel’s assistance has been sought must be able to speak candidly to the attorney without fear that he may subsequently become a witness against them or their employer. Adoption of a subject-matter test for the application of the attorney-client privilege to corporations will protect from involuntary disclosure, and thus encourage, candid communications between corporate employees and counsel. Such a test will ... best promote the essential objectives of the privilege. In addition, it will facilitate counsel’s important efforts to bring about compliance with the multitudinous laws and regulations that govern corporate conduct.

The subject-matter test does not protect relevant evidence from discovery or encourage irresponsibility on the part of company executives; indeed, as in this case, it encourages voluntary compliance efforts and facilitates enforcement action by public authorities. The control-group test adopted by the court of appeals rests upon a misconception of the nature and structure of a corporation, which acts through and is bound by all its employees – not merely by a few senior executives who cannot have full knowledge of every corporate action that may have legal implications. To define the privilege so narrowly would deprive corporations of informed legal

assistance and seriously prejudice observance of the law and the efficient administration of justice. In addition, because of the unpredictability inherent in the concept of the control group, it would significantly hamper the efforts of corporate managers and counsel to comply with the law's complex requirements, without the intervention of public authorities, and would discourage voluntary legal investigations, such as that involved in this case.

Amicus briefs filed by the ABA, the American College of Trial Lawyers, the United States Chamber of Commerce, the New England Legal Foundation, and the Association of the Bar of New York City (through the joint efforts of the Committee on Federal Courts and the Committee on Corporate Law Departments) all lined up behind Upjohn. Not a single amicus brief supported the government or the control group test. The ABA's brief, whose principal author was Leon Jaworski of Fulbright & Jaworski, for example, argued that the control group test "arbitrarily excludes all communications made to counsel by the vast majority of a corporation's employees, [and] has no inherent logic; it is simply an artificial means of narrowing the scope of the attorney-client privilege." The New York City Bar's amicus brief, whose authors included John G. Koeltl (now a federal judge in the S.D.N.Y.), said that the Sixth Circuit had regarded the attorney-client privilege as an obstacle to a determination of the truth, a view that the City Bar criticized as "a fundamental misconception."

The United States counterattacked by arguing that the subject matter test sought by Upjohn "would cloak virtually all communications between corporate employees and corporate counsel" with the attorney-client privilege, without regard to the employee's function in the corporate structure. The United States argued that the control group test was more consistent with the policies underlying the attorney-client privilege. However, the government's brief included a telling concession:

If damaging information could more readily be obtained from an attorney following disclosure than from the client himself in the absence of disclosure, a client aware of that fact would be reluctant to confide in his lawyer. The result would be greater difficulty in obtaining fully informed legal advice. ...

But, the government continued, "since the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures necessary to obtain informed legal advice – which might not have been made absent the privilege."

The Supreme Court's Opinion

The Supreme Court sided unanimously with Upjohn. Justice Rehnquist wrote the Court's opinion. He began his analysis with Rule 501 of the Federal Rules of Evidence, which provides that "the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." Succinctly summarizing the accumulated reason and experience of our legal system, Justice Rehnquist said:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 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 or advocacy depends upon the lawyer's being fully informed by the client. ...

The control group test adopted by the Court of Appeals is flawed, Justice Rehnquist said, because it "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." The first step in resolving any legal problem is "ascertaining the factual background and sifting through the facts with an eye to the legally relevant." To bolster this point, Justice Rehnquist quoted the following excerpt from EC 4-1, which is virtually identical to New York's EC 4-1:

A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

The control group test thus "frustrates the very purpose of the privilege" by discouraging a corporate client's employees from communicating relevant information to attorneys seeking to advise the corporation. Moreover, legal advice will frequently be more significant to the lower level employees who will actually implement the advice than to the high level executives who officially requested the advice. Thus, the control group test "makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy."

The control group test also had an even deeper flaw: it threatened to limit the "valuable efforts" of corporate counsel to ensure a client's compliance with the "vast and complicated array of regulatory legislation confronting the modern corporation" Unlike most individuals, corporations "constantly go to lawyers to find out how to obey the law" because compliance with the laws governing the business world "is hardly an instinctive matter." This reality led Justice Rehnquist to make one of his most telling points:

[I]f 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. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all....

The control group test is inherently uncertain. It confines the privilege to officers who play a "substantial role" in deciding and directing a corporation's legal response, but disparate decisions in cases applying the test "illustrate its unpredictability."

Finally, Justice Rehnquist refuted the arguments that the government and court below had raised in favor of the control group test. The government argued that "the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege." But this response ignored the fact that the "depth and quality" of investigations made to ensure a corporation's compliance with the law would suffer, if they were undertaken at all. In any event, the argument "proves

too much” because it applies to all communications covered by the privilege – “an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer,” Justice Rehnquist said, “yet the common law has recognized the value of the privilege in further facilitating communications.”

The court below had declined to extend the attorney-client privilege beyond the limits of the control group test because the court feared that a broader privilege would entail “severe burdens on discovery” and create a broad “zone of silence” over corporate affairs. Justice Rehnquist responded as follows:

Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney

In other words, a client cannot be compelled to answer the question, “What did you say or write to the attorney?” but may be compelled to disclose a relevant fact even though he communicated that fact to his attorney. Thus, the government was free to question the employees who communicated with Thomas and Upjohn’s outside counsel. (In fact, Upjohn had provided the IRS with a list of those employees, and the IRS had already interviewed more than two dozen of them.) It would be more convenient for the government simply to subpoena the questionnaires and notes taken by Upjohn’s attorneys, but “considerations of convenience do not overcome the policies served by the attorney-client privilege.” As Justice Jackson noted in his famous concurring opinion in *Hickman v. Taylor*, 329 U.S. at 516: “Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary.”

Here, pursuant to explicit instructions from Upjohn’s Chairman of the Board, the communications between Upjohn’s employees and Upjohn’s counsel were considered “highly confidential” when made and had been kept confidential since then. “Consistent with the underlying purposes of the attorney-client privilege,” Justice Rehnquist concluded, “these communications must be protected against compelled disclosure.” And while the Supreme Court could not undertake to “draft a set of rules” to govern challenges to investigatory subpoenas, the Court could conclude that the narrow control group test could not, consistent with “the principles of the common law as ... interpreted ... in the light of reason and experience,” govern the development of the law in this area.

Conclusion: An Enduring Legacy

Chief Justice Rehnquist’s opinion in *Upjohn* has now dominated the law of the attorney-client privilege for corporations for nearly a quarter century. In the federal system, it continues to reign as the definitive interpretation of Rule 501 of the Federal Rules of Evidence, and has not been seriously questioned. Indeed, in one of the only head-on efforts to trim back the scope of the attorney-client privilege in recent years, the Supreme Court reaffirmed the policies underlying a strong and certain attorney-client privilege – see *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (Rehnquist, C.J.) (rejecting a “balancing test” in criminal cases after a client’s death even if a prosecutor can demonstrate that the privileged information has substantial importance to the particular criminal litigation). In the states, most jurisdictions have also followed the lead of *Upjohn* – see, e.g., *Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588 (1989) – though some populous states have adhered to the control group test, see, e.g.,

Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill.2d 103 (1982), or have developed their own distinctive tests, see, e.g., *Samaritan Foundation v. Goodfarb*, 862 P.2d 870 (Ariz. 1993) (rejecting both an “expansive” subject matter test and the control group test, instead adopting a “functional approach” – later modified by statute, at least for civil litigation).

In my view, the *Upjohn* opinion is likely to be one of the most durable opinions in the Supreme Court’s canon of opinions governing lawyers and the legal profession. It is unlikely to be overruled, or even cut back, for decades to come. This is especially so because, by the time this article is published in early October, I expect that the Senate will have confirmed as the new Chief Justice of the United States a man who clerked for Justice Rehnquist during the Supreme Court’s 1980–1981 Term, when *Upjohn* was argued and decided: John G. Roberts, Jr.

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