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Attorney-Client Privilege -- *Diversified Industries, Inc. v. Meredith*: New Rules for Applying the Privilege When the Client Is a Corporation

Sheri A. Van Greenby

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hopes of increasing supplies and thereby reducing the need for regulation of curtailment. Even if deregulation of prices were to increase supplies dramatically, however, shortages would most likely remain sufficiently serious to require some form of regulation over curtailment. While it is difficult to predict with any accuracy the future form that natural gas allocation will take, *North Carolina v. FERC* demonstrates that future end-use curtailment plans will be subjected to close judicial scrutiny designed to ensure that such plans produce true end-use results.

CHRISTOPHER WHITMAN MOORE

Attorney-Client Privilege—*Diversified Industries, Inc. v. Meredith*: New Rules for Applying the Privilege When the Client Is a Corporation

The attorney-client privilege protects from disclosure confidential communications between an attorney and his client. The privilege applies in both individual and corporate client contexts; when the client is a corporation, however, application of the privilege may prove more complex than when the client is an individual. Two questions must be answered in determining the applicability of the privilege in the corporate client context: first, what types of activity constitute legal services by the attorney and, second, which employees of a corporation may be deemed to so represent the corporation as to be the corporate client.

1. A number of criteria must be satisfied in order for the attorney-client privilege to apply. "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure . . . , (8) except the protection be waived." 8 J. WIGMORE, EVIDENCE § 2291 (J. McNaughton rev. 1961).


3. 572 F.2d 596 (8th Cir. 1978).
Appeals for the Eighth Circuit addressed both these issues and adopted new tests for determining when an attorney is acting in his professional capacity and for deciding which employees represent the corporation.

In 1975, the Weatherhead Company, a customer of Diversified Industries, Incorporated, brought suit in the United States District Court for the Eastern District of Missouri against Diversified, alleging conspiracy to bribe Weatherhead employees. During the course of this litigation Weatherhead sought to discover a memorandum and report that had been prepared earlier for Diversified by the law firm of Wilmer, Cutler & Pickering (the Law Firm) and the corporate minutes that referred to those writings. The memorandum and report were the result of an intracorporate investigation that the Law Firm had conducted for Diversified. Endeavoring to protect the writings from dis-

4. A third issue of less importance arose in Diversified Industries that concerned the possible waiver of the attorney-client privilege. Diversified had revealed documents to the SEC (pursuant to subpoena during an official investigation); later it sought to protect the documents against discovery by plaintiff in a private lawsuit. The question was raised whether Diversified had thereby waived its attorney-client privilege with respect to those documents. The court concluded that it had not: "As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred." 572 F.2d at 611 (citations omitted). Although the Diversified Industries court devoted only three sentences to this issue, there is considerable disagreement among jurisdictions concerning whether such disclosure constitutes a waiver. Compare In re Penn Cent. Commercial Paper Litigation, 61 F.R.D. 453 (S.D.N.Y. 1973) (voluntary production of documents for the SEC constitutes waiver), with United States v. Goodman, 289 F.2d 256, 259 (4th Cir.), vacated on other grounds, 368 U.S. 14 (1961) ("It has been uniformly held that a prior disclosure to investigating officials cannot constitute a waiver of the privilege with respect to the same matter in a subsequent legal proceeding. A waiver of the privilege must occur in the same proceeding . . . in which it is sought to be invoked."); and Bucks County Bank & Trust Co. v. Storck, 297 F. Supp. 1122 (D. Haw. 1969) (testimony given to support motion to have seized property returned does not constitute general waiver), and IBM Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 (D. Del. 1968) (partial disclosure of privileged material to third party during business negotiations not waiver of privilege in subsequent patent infringement action).

5. See 572 F.2d at 610.

6. See id. at 609.

7. The conspiracy allegation charged Diversified employees with bribing Weatherhead employees to make purchases of inferior copper. Id. at 600.

8. In 1974 and 1975 Diversified became involved in litigation relating to a proxy fight. During the course of this litigation evidence revealed that Diversified might have maintained a fund with which to bribe purchasing agents of other companies, including Weatherhead. Following this litigation, Diversified's Board of Directors felt that an investigation should be made of the corporation's practices. The Law Firm was then hired to make an investigation, interview employees, draw conclusions about the propriety of employee conduct, and make recommendations to the board concerning a future course of action. The Board of Directors instructed all employees to cooperate fully with this investigation. The memorandum outlined the manner in which the Law Firm planned to conduct the investigation. Id. The report detailed the actual investigation, made findings with respect to the question whether a slush fund had been used in violation of Diversified's standard business practices and internal controls, and made recommendations. Id. at 601. Certain corporate minutes restated parts of the report.
covery, Diversified asserted that the documents were not subject to
discovery because they were protected by the attorney-client privilege.9
The district court refused to deny discovery and Diversified petitioned
the Court of Appeals for the Eighth Circuit for a writ of mandamus.10

The petition was first considered by a three-judge panel. Judge
Henley, speaking for the majority, concluded that because the Law
Firm had merely acted as an investigator and had not provided Diver-
sified with legal services or advice when it prepared the memorandum
or the report, the attorney-client privilege did not apply to the docu-
ments.11 He therefore found it unnecessary to decide if the employees
interviewed by the Law Firm represented the corporate client. Judge
Heaney dissented, finding that the Law Firm had provided legal ser-
vices and that the employees interviewed by the Law Firm sufficiently
represented the corporation to be deemed the corporate client for pur-
poses of application of the privilege.12 The case was then reheard en
banc. After the hearing, Judge Heaney, this time for the majority,
wrote an opinion similar to his prior dissent. The court adopted the
position that a corporation's commitment of a matter to an attorney
raises a presumption of legal services in favor of the corporation. The
court thus found that while performing the investigation and preparing
the report the Law Firm was acting in its professional capacity as a
provider of legal services.13

The court then turned to the question whether the corporate cli-
ent's communication was privileged, and in particular, to the question
of when an employee communication can be classified as a corporate
client's communication. Traditionally this has been decided using ei-
ther the control group test or the subject matter test.14 Under the con-
trol group test only a corporate employee who can act on the attorney's

9. Diversified also claimed that the documents were protected under the "work product"
privilege of rule 26(b)(3) of the Federal Rules of Civil Procedure. Under the rule, however, an
attorney's work product must be "prepared in anticipation of litigation or for trial." The Court of
Appeals for the Eighth Circuit found that the documents sought by Weatherhead had not been so
prepared. Id. at 604.
10. Diversified had asked the district court to certify the question of privilege as appropriate
disclosure of the documents, and Diversified petitioned the court of appeals for relief. 572 F.2d at
598-99.
11. 572 F.2d at 603.
12. Id. at 605-06 (Heaney, J., dissenting).
13. Id. at 610. While this served to protect the Law Firm's report, it did not protect the
memorandum, which was merely a preliminary document. In this respect, the en banc opinion
affirmed the earlier opinion.
14. Id. at 608.
advice may be deemed to represent the corporation.\textsuperscript{15} Under the subject matter test only a corporate employee who communicates to the attorney at the direction of his superior concerning the subject matter of his employment may be identified as the corporate client.\textsuperscript{16} The court of appeals concluded that the control group test “is inadequate for determining the extent of a corporation’s attorney-client privilege”\textsuperscript{17} and proposed instead a modified subject matter test.\textsuperscript{18}

The attorney-client privilege protects the confidentiality of communications between attorney and client made for the purpose of securing legal advice. The history of the privilege extends back to the reign of Elizabeth I.\textsuperscript{19} The privilege as originally conceived belonged to the attorney—it was a point of honor for the attorney to protect a client’s secrets.\textsuperscript{20} By the late 1700’s, however, this theory had been repudiated and replaced by the contemporary view that the privilege belongs to the client.\textsuperscript{21} As presently understood, the purpose of the rule is to encourage clients to seek legal advice freely and to speak openly with their attorneys by removing clients’ apprehension that their communications will be divulged.\textsuperscript{22}

The attorney-client privilege may be invoked to protect communication between an attorney performing legal services and his client, when the communication is intended to be confidential.\textsuperscript{23} A communication by an attorney to a client is protected to the same extent as a communication by a client to an attorney, since the former may reveal


\textsuperscript{17} 572 F.2d at 609.

\textsuperscript{18} Three judges dissented from the opinion. Judge Henley, dissenting, reasserted his conclusion that the Law Firm acted merely as an investigator, not as legal counsel. Id. at 614 (dissenting opinion). Judge Gibson, also dissenting, concluded that the corporate minutes were not protected from disclosure because they were open to the shareholders and thus their confidentiality had been waived. Id. at 616 (dissenting opinion). Judge Bright, in a third dissenting opinion, argued that the entire controversy was moot because Weatherhead had already uncovered the information it sought from SEC files. Id. at 617 (dissenting opinion).

\textsuperscript{19} J. WIGMORE, supra note 1, § 2290, at 542.

\textsuperscript{20} Id. at 543.

\textsuperscript{21} Id.

\textsuperscript{22} Id. § 2291. See also Radiant Burners, Inc. v. American Gas Ass’n, 320 F.2d 314, 322-23 (7th Cir.), cert. denied, 375 U.S. 929 (1963).

\textsuperscript{23} J. WIGMORE, supra note 1, § 2292.
the substance of the latter. The attorney-client privilege is a personal privilege and as such, might be thought of as being available only to individuals, but it has been held applicable to communications to or from a corporate client. Corporations, like individuals, must be free to communicate openly with their attorneys in order to procure needed legal advice without fearing the repercussions of disclosure. Deciding when the privilege may properly be invoked is, however, more difficult in the corporate context because of the greater difficulty of determining whether the attorney's services are actually legal services and identifying who constitutes the client. Moreover, proper resolution of these issues in the corporate context requires accommodating conflicting interests—the need of the corporation for confidentiality on the one hand, and on the other, the desire for disclosure on the part of the public and of those businesses dealing with the corporation—while not extending the benefits of the attorney-client privilege beyond the interests the privilege was designed to protect.

Because the privilege exists only when the attorney is acting in his professional capacity as a lawyer, the first question that must be addressed in determining the scope of the privilege in an attorney-corporate client situation is what constitutes performance of legal services. The lawyer must be engaged in legal activities such as offering legal advice, applying law to fact, and preparing for and carrying on litigation. When an attorney is performing tasks that could as easily have been accomplished by laymen, the privilege does not apply. Nor does the privilege apply when the attorney is acting, for instance, as a busi-

26. See text accompanying notes 36 & 37 infra.
28. There is a privilege only if . . . the person to whom the communication was made is acting as a lawyer in connection with this communication . . . . "Acting as a lawyer" encompasses the whole orbit of legal functions. When he acts as an adviser, the attorney must give predominantly legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice . . . . [Attorneys act as lawyers] when in specific matters they are engaged in applying rules of law to facts known only to themselves and other employees of their client-companies, and in preparing cases . . . and prosecuting appeals . . . . They do not "act as lawyers" when not primarily engaged in legal activities.

ness adviser. Since a corporate attorney often acts as both legal and business adviser, the two functions must in some way be distinguished. Most courts have employed a case-by-case factual analysis when addressing the issue of legal services. *Diversified Industries* departs from this practice in adopting a rule that the existence of legal services is prima facie established by commitment of a matter to a legal adviser. Moreover, these prior cases concerned house counsel or counsel in the corporation's patent department, while *Diversified Industries* involved outside counsel. Therefore, *Diversified Industries* also constitutes recognition that there is potential for intermingling of legal and business advice even when outside counsel is involved.

A second and separate issue in applying the privilege is the determination of when a corporate employee communication can be classified as the corporate client's communication. Corporations function differently from individuals in several important respects. While an individual client is usually the only source of disclosure to an attorney, the corporate client potentially has numerous spokesmen. An individual client both gives information and makes decisions based on the attorney's advice, while in a corporation these functions may be split in such a way that some employees are information-givers and others are decisionmakers. While it is easy to determine whether a communication by an individual client is intended to be confidential, this is not the case for the corporate client. Communications divulged to numerous

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31. "The corporate lawyer is ... often a business as well as legal advisor ... However, privileged protection does not extend beyond communications necessary for legal advice and therefore a job of line-drawing is inevitable." Burnham, *Confidentiality and the Corporate Lawyer*, 56 ILL. B.J. 542, 543 (1968).

32. See, e.g., Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546 (D.D.C. 1970) (when communications by corporation's patent attorney concern tasks which could have been performed by nonlawyers privilege does not apply); United States v. Aluminum Co. of America, 193 F. Supp. 251 (N.D.N.Y. 1960) (house counsel's requests to corporate executive for factual information on which to base legal opinion and executive's reply held privileged); Georgia-Pacific Plywood Co. v. United States Plywood Co., 18 F.R.D. 463 (S.D.N.Y. 1956) (when in-house counsel doing mostly patent work primarily communicated business advice, communications not privileged).

33. The court never stresses that it is dealing with outside rather than house counsel, and thus the court in all likelihood intended the presumption of legal services to apply to both. However, it is possible to argue that the presumption only applies to outside counsel since the court only addressed that factual setting.


35. Id.

36. Id.
corporate employees may still be intended to be confidential.\textsuperscript{37} Because of these distinct characteristics of the corporate client, the courts have been called upon to create devices for determining when an employee speaks for the corporation and may thus be deemed to be the corporate client. Several different approaches to this problem have been employed.

\textit{United States v. United Shoe Machinery Corp.}\textsuperscript{38} suggested that a communication by any officer or employee of a corporation is privileged.\textsuperscript{39} This blanket approach has not generally been accepted.\textsuperscript{40} Most courts use either the control group test or the subject matter test to identify the corporate client. The control group test, introduced in \textit{City of Philadelphia v. Westinghouse Electric Corp.}\textsuperscript{41} attempts to equate the corporate client with the individual client by holding that only those employees who help control the corporation by giving information and participating in decisions about future action on the basis of the attorney's advice represent the corporation.\textsuperscript{42} In \textit{Harper & Row Publishers, Inc. v. Decker},\textsuperscript{43} the Court of Appeals for the Seventh Circuit found the control group test inadequate and expanded the attorney-client privilege to protect some communications by corporate employees not within the control group. The court created the subject

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\textsuperscript{37} The issue of personification of the corporate client does not frequently appear in the cases prior to 1963, the year that \textit{City of Philadelphia v. Westinghouse Elec. Corp.}, 210 F. Supp. 483 (E.D. Pa.), mandamus and prohibition denied sub nom. General Elec. Corp. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), \textit{cert. denied}, 372 U.S. 943 (1963), introduced the control group test. Apparently, until 1963 it was simply assumed that the attorney-client privilege applied to corporate clients. The privilege was not explicitly held to apply to a corporation until Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir.), \textit{cert. denied}, 375 U.S. 929 (1963).


\textsuperscript{39} \textit{Id.} at 359; \textit{see} 2 J. \textit{Weinstein} \& M. \textit{Berger}, \textit{supra} note 34.

\textsuperscript{40} This broad approach to the problem could conceivably conflict with the United States Supreme Court's statement in \textit{Hickman v. Taylor}, 329 U.S. 495, 508 (1947), that the statements of employees who are merely witnesses to an incident are not privileged. \textit{See} 2 J. \textit{Weinstein} \& M. \textit{Berger}, \textit{supra} note 34.


\textsuperscript{42} If the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. 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.

\textit{Id.} at 485.

\textsuperscript{43} 423 F.2d 487 (7th Cir. 1970), \textit{aff'd mem. by an equally divided court}, 400 U.S. 348 (1971). In \textit{Harper & Row}, plaintiffs filed an antitrust suit against defendants and sought to inspect memoranda prepared by the defense attorneys after debriefing employees of defendant who had testified before a federal grand jury investigating the publishing industry. \textit{Id.} at 489-90.
matter test, which accords protection to a communication if it was made by an employee at the direction of a superior and if its subject matter was within the scope of the informant's employment.44 Although both these tests have been criticized,45 they are still in use. The control group test appears to be more widely used, perhaps because it is more easily applied and more clearly understood than the subject matter test.46

The court in *Diversified Industries*, in addressing the two issues of legal services and identity of the corporate client, acknowledged the importance of determining whether the Law Firm was giving legal or lay advice,47 and also recognized48 and attempted to deal with the criticisms of the control group and subject matter tests.49 These considerations led to two new rules. The first new rule arose from an issue about which there was much conflict within the court: whether the Law Firm had performed legal services for Diversified. The en banc majority announced that when a person seeks an attorney it is prima facie established that legal advice and services are being requested and given.50 When no evidence is presented to defeat this prima facie case, it will be found that the attorney was acting in his professional capacity.51 The Court of Appeals for the Eighth Circuit appears to be the first court to subscribe to this rule, first proposed by Dean Wigmore,52 although a number of commentators had previously supported it.53

44. [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.

45. See note 69 infra.


47. 572 F.2d at 610.

48. *Id.* at 608-09.

49. For a description of the criticisms, see note 69 infra.

50. 572 F.2d at 608-09.

51. *Id.*

52. It is not easy to frame a definite test for distinguishing legal from non-legal advice. Where the general purpose concerns legal rights and obligations, a particular incidental transaction would receive protection, though in itself it were merely commercial in nature . . . . [T]he most that can be said by way of generalization is that a matter committed to a professional legal adviser is prima facie so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.

53. One commentator suggested that the corporation should have the benefit of the inference.
This prima facie approach imposes limitations on discovery by making it more difficult for the party seeking discovery to show that the sought-after documents are not privileged. Judge Henley, objecting to the rule in his dissenting opinion, pointed out that the party seeking disclosure, who must rebut the presumption, often does not know why a particular matter was entrusted to an attorney. He further added that often there is no way to find out.\textsuperscript{54} The majority nonetheless did imply that the party seeking discovery is required to produce specific evidence that the attorney was acting in a business rather than a legal capacity when the particular communication in question was made. The better rule, it would seem, would be to permit the party challenging the privilege to make a general showing that the attorney has regularly acted as a business adviser and not just as a legal adviser to the corporation in a subject area that includes the communication in issue. If this showing were made, then the burden would remain on the corporation to show that the particular communication involved a legal matter.\textsuperscript{55} Under the qualified rule, it would still be relatively easy for the corporation to make an initial showing on the matter of legal services, but the corporation would bear a much heavier burden of persuasion when the party seeking discovery points to regular activity by the attorney in a business capacity. This qualification would retain the benefits of the \textit{Diversified Industries} prima facie rule while preventing some of its potential inequities.

In \textit{Diversified Industries}, the Law Firm was engaged by the corporation to provide information about the activity of the corporation's employees, the legal implications of that activity, and the wisest course to take while remaining within the bounds of the law.\textsuperscript{56} Thus, even if the party seeking discovery alleged that the Law Firm acted regularly in a business capacity, the corporation could carry its burden of persuasion by showing that the Law Firm's work pertinent to this case was essentially legal in character and, under the foregoing analysis, protected by the attorney-client privilege.

that an attorney is rendering legal advice when consulted by the corporation and that the party seeking disclosure would have the burden of indicating otherwise. Simon, \textit{The Attorney-Client Privilege as Applied to Corporations}, 65 YALE L.J. 953, 977-78 (1956). A student Note also supported this approach: "Since the prevailing motive of clients in consulting attorneys is the need for legal advice, the mere fact of legal consultation is prima facie the establishment of a professional relationship." Note, \textit{The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics and Its Possible Curtailment}, 56 NW. U. L. REV. 235, 236 (1961).

\textsuperscript{54} 572 F.2d at 613-14 (Henley, J., dissenting).

\textsuperscript{55} See Simon, supra note 53, at 977-78.

\textsuperscript{56} 572 F.2d at 610.
The business adviser role was not presented in the facts of *Diversified Industries*; rather, the court was faced with the question whether an attorney offers legal services when he acts, at least in part, as an investigator.\(^{57}\) The court’s holding that the Law Firm in its investigatory role did offer legal services is supported by the reasoning that before an attorney can provide legal advice he must first discover and assess the facts surrounding a matter.\(^{58}\) Generally, a lawyer seeks factual information in order to evaluate it and render legal advice. If courts refused to accept this position, an attorney could only retain the privilege for his client by explaining the legal purpose behind every step of the investigation.\(^{59}\) Since it is often impossible for an attorney to know where a factual inquiry will lead until he has the facts, it is impossible for him to indicate for what legal purpose he is seeking each piece of information. Moreover, only the attorney has the training and skills necessary to evaluate the information he obtains by investigation.\(^{60}\) Thus it is essential for the attorney to conduct at least parts of the investigation himself, since only he knows what each new piece of information may portend and what pattern the investigation should follow.

The court also examined the type of advice given during the investigation to determine whether the Law Firm as investigator was providing legal services. Judge Henley, dissenting, contended that the recommendations of the Law Firm “could have been made by any firm of private investigators, or by accountants, or by bankers, or, for that matter, by any person possessing ordinary common sense and business prudence.”\(^{61}\) The majority, however, found that neither accountants nor lay investigators “would have had the training, skills and background necessary to make the independent analysis and recommendations which the Board felt essential to the future welfare of the corporation.”\(^{62}\) The majority approach apparently recognizes that, in

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57. *Id.* at 610. The court found the Law Firm to be providing legal services notwithstanding that the president of Diversified testified that he believed the Law Firm acted merely in an investigatory capacity. The court gave several reasons for this result: (1) the president, Woodlief, was not employed until some two months after the Law Firm was retained; (2) it was impossible to determine if the president thought of attorney-client advice only in a litigation context; and (3) the president’s belief was only one factor in the court’s decision, and the totality of circumstances indicated the privilege was applicable. *Id.* at 610 n.3.

Judge Henley argued that an attorney acting as an investigator is not offering legal services. *Id.* at 614 (dissenting opinion).

58. “[F]actfinding is usually the first task of the lawyer.” Simon, *supra* note 53, at 974 n.66.


60. 572 F.2d at 610.

61. *Id.* at 615 (Henley, J., dissenting).

62. *Id.* at 610.
situations involving a corporate client, there is rarely a clear-cut distinction between legal and other services, and that the determination rests on whether the attorney relied primarily on legal skills and gave advice that was predominantly legal. While the attorney-client privilege must be construed so that it does not interfere unduly with the scope of discovery, the privilege must still be broad enough to accord with the realities of corporate structure and operation. If the privilege were to be lost because some business considerations and advice were intermingled with primarily legal advice, the privilege would be of no value to the corporate client. Moreover, a broad definition of legal advice does not necessarily extend the privilege, because the other requirements of the privilege still may act to restrict its scope.

Having determined that the corporation was receiving legal services, the court had then to decide if the communications involved were made by persons who could properly be considered the corporate client so that the attorney-client privilege could be applied. To aid its decisionmaking, the court announced its second new rule—a new test for determining who may personify the corporate client:

[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

63. The considerations discussed here may apply to individual clients as well. Often an individual receives advice from his lawyer that is not purely legal, but rather contains such an intermingling of legal and nonlegal matters that it is impossible to separate the two for purposes of applying the privilege.

64. Under federal rules, any matter that is relevant to the case is subject to discovery, unless privileged or a part of the attorney's work product under the Hickman v. Taylor, 329 U.S. 495, 508 (1947), exception, discussed in note 40 supra. Fed. R. Civ. P. 26. The modern trend has been toward broader discovery because of the desirability of obtaining all the relevant facts. 2 J. Weinstein & M. Berger, supra note 34.

65. The privilege may, under these circumstances, lack viability for the individual client as well. See discussion in note 63 supra. The court recognized that such a narrow view might have severe repercussions for the existence of the privilege, as did Judge Wyzanski in United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950), when he addressed the problem of outside counsel and stated:

They were not acting as business advisors or officers . . . even though occasionally their recommendations had in addition to legal points some economic or policy or public relations aspect and hence were not unmixed opinions of law. The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the public interest that the lawyer should regard himself as more than a predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.

*Id.* at 359 (emphasis added).

66. Note 1 *supra.*
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 . . . that the corporation has the burden of showing that the communication in issue meets all of the above requirements.67

The Court of Appeals for the Eighth Circuit is apparently the first court to employ this test,68 which is a modified subject matter test that strikes a balance between the much-criticized control group and subject matter tests.69 This new test expands the amount of information that a corporation can communicate to its attorney with the assurance that it will be protected, while it avoids the potential abuse of protecting all corporate employee communications from discovery.70

Under the court's analysis, following the preliminary determination that the attorney functions as provider of legal services, the focus shifts to the reason for which the client seeks the attorney's assistance. The requirements that the communication be made for the purpose of securing legal advice, and that a superior request an employee to communicate so that the corporation can secure legal advice, assure that the corporation is barred from claiming a privilege it did not intend to create at the outset. These requirements also prevent the corporation from sending routine reports and memoranda to its attorney and then claiming they are privileged.71 With these requirements the test focuses not

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67. 572 F.2d at 609.
68. The test announced by the court was borrowed from Judge Weinstein. 2 J. Weinstein & M. Berger, supra note 34.
69. The control group test has been criticized as defeating the purpose of the attorney-client privilege because it would deny the privilege to the communications of most corporate employees, and thereby inhibit disclosure to the attorney. See Note, Privileged Communications—Inroads on the “Control Group” Test in the Corporate Area, 22 Syracuse L. Rev. 759, 767 (1971). The control group test may thus unreasonably narrow the corporate client's ability to communicate fully with the attorney. Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, 12 B.C. Indus. & Com. L. Rev. 873, 875 (1971). On the other hand, the subject matter test has been criticized because it could protect every employee’s communication and thus make discovery impossible. Note, supra; Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 Harv. L. Rev. 424, 432 (1970). Originally, the Supreme Court's proposed rule of evidence 503 on the attorney-client privilege defined a representative of the client in terms of the control group test. However, because no agreement could be reached on the matter of which test to use, the definition was simply left out of the final draft of proposed rule 503. 2 J. Weinstein & M. Berger, supra note 34, ¶ 503 [01]. In the end, Congress substituted a single rule on privilege for the 13 separate rules drafted by the Supreme Court. This single rule is Fed. R. Evid. 501.
70. Thus it remains compatible with the Supreme Court's statement in Hickman v. Taylor, 329 U.S. 495, 508 (1947), discussed in note 40 supra.
71. 572 F.2d at 609.
on who is communicating with an attorney but why.\textsuperscript{72}

The requirement that the employee make the communication at the direction of his superior is taken directly from the subject matter test\textsuperscript{73} and focuses on who is communicating with the attorney. This requirement is another means for ensuring that the establishment of an attorney-client relationship was intended at the outset. The underlying consideration of this particular aspect of the subject matter and modified subject matter tests seems to be that the employee must somehow represent the corporation, a consideration that was the main focus of the control group test. The requirement as it is presented here, however, is freed from the overly restrictive approach of that test. Under this requirement, the employees may become an extension of the control group when they are directed to communicate by their superiors. When there is such control of the employees' communications by superiors who are involved with the attorney, the employees may be deemed to personify the corporation in making these communications. The goal is to assure that the communications for which protection is sought were intended to be made by the corporation in the context of an attorney-client relationship and were not the unauthorized comments of an employee who casually gave the attorney information.

The requirement that the subject matter of the communication be within the scope of the employee's duties is the other element of the original subject matter test that is carried over into the new test. This requirement denies the privilege to the communications of an employee who was merely a witness to an event.\textsuperscript{74} In situations in which the employee is performing his corporate duties, he can be deemed to act for or personify the corporation. When he is merely a witness, this is not a valid assumption. Moreover, this requirement ensures that only work expressly done on behalf of the corporation and which is thus entitled to be kept a corporate confidence will be privileged.

The last requirement demands that a communication not be disseminated beyond those with a need to know its contents. This requirement aims at protecting only those communications intended to be confidential, a traditional prerequisite for the assertion of the privilege.\textsuperscript{75} This test recognizes that, because of the structure of a corpora-

\textsuperscript{73} See note 44 supra.
\textsuperscript{74} See note 40 supra.
\textsuperscript{75} In order for a communication to be protected it must be a confidential communication. "The requirement that the communication be made 'without the presence of strangers' means that
tion, and in order for the corporation to function, there must be some dissemination of information beyond the employee who makes the communication and the attorney who receives it.\textsuperscript{76} On the other hand, indiscriminate dissemination of information within the corporation tends to indicate that such information was not intended to be confidential, and the corporation cannot assert confidentiality at a later date simply because changed circumstances make it desirable to claim the privilege. This requirement strives to achieve an appropriate balance and permits communications to be disseminated within the corporation to a limited extent and still be deemed confidential.\textsuperscript{77}

When applying the attorney-client privilege to corporations, the ultimate goal is to achieve a balance that fosters the purposes of the privilege while protecting the scope of discovery. The court must deal with the complexities of the corporate structure and be aware of the characteristics that distinguish a corporate from an individual client. The Court of Appeals for the Eighth Circuit, in its examination of the questions of performance of legal services and of personification of the corporation, has adopted rules that advance the pursuit of the goal. The rule that matters committed to a lawyer are prima facie so committed in order to obtain legal services brings some order into a confusing area. By using this approach, courts need no longer depend on an entirely case-by-case approach. The prima facie rule will make decisions in this area more uniform, and will alleviate some of the enormous confusion that results from attempts to distinguish between legal and nonlegal advice. This rule would, however, be improved if qualified to permit the party seeking discovery to defeat the prima facie case by


\textsuperscript{77} The court in \textit{Diversified Industries} found that Weinstein's requirements had been satisfied in the case of the report prepared by the Law Firm. The communications were made and directed by the Board of Directors to be made for the purpose of securing legal advice, the interviews only covered matters within the employees' corporate duties, and the corporation avoided disseminating the information to anyone other than those directly concerned with the investigation.

\textsuperscript{id} at 378.
showing that an attorney has regularly acted in another capacity for a corporation. Finally, even though the modified subject matter test will probably have its critics, this new test appears to effect a balance between the narrowness of the control group test and the expansiveness of the traditional subject matter test on the issue of personification of the corporation. In a confused field the Court of Appeals for the Eighth Circuit has provided much needed clarity.

SHERI A. VAN GREENBY


Occupational Safety and Health Act (OSHA) inspectors have since OSHA’s passage seven years ago1 entered and inspected the business premises of thousands of employers to ascertain compliance with the myriad of job safety standards promulgated by the Secretary of Labor.2 A great number of these inspections have been made pursuant to section 8(a)3 of OSHA, which apparently authorized warrantless inspec-

2. The stated congressional purpose behind OSHA was
   [T]o assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—
   . . . .
   3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to business affecting interstate commerce.
3. Section 8(a) of OSHA provides:
   In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized
   1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
   2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equip-