CEO, CFO, COO . . . Cube Dweller? Attorney-Client Privilege and Corporate Communication: Whose Communications Should Massachusetts Law Protect?

“[S]o numerous and complex are the laws by which . . . citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers . . . without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser . . . to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be for ever sealed.”

I. INTRODUCTION

“The attorney-client privilege is the oldest of the privileges for confidential communications.” The privilege is essential to the success of the attorney-client relationship and the ability of an attorney to provide competent representation to clients. There must be, however, a balance between protecting client confidences and fulfilling the truth-seeking function of the discovery process. Over the past several decades, courts have struggled to find this balance in the application of attorney-client privilege to corporations.

4. See infra notes 26-28 and accompanying text (noting value of each competing policy).
Courts have faced unique issues in applying attorney-client privilege—a privilege generally associated with communication between persons—to the form of the corporation, technically a legal fiction. Yet, a corporation as a fictional entity can only act through its employees. The dilemma thus arose of how far down into the corporate structure to apply the privilege. Courts developed two main tests for defining the privilege’s scope in the corporate setting: the narrow “control group” test and the broader “subject matter” test.

In *Upjohn Co. v. United States*, the Supreme Court rejected the “control group” test, pronouncing it too narrow an application of privilege law with regard to corporations. *Upjohn* gives broader protection to confidential communications by employees who supply information to corporate counsel that is relevant to a particular legal action. *Upjohn*, however, is binding only in federal question cases that use federal common law to decide privilege questions. *Upjohn* does not bind state courts and many states do not follow it, having adopted the control group test, a modified subject matter test, or no definitive approach at all. Massachusetts has not considered how to apply the privilege within a corporation, but has confronted like questions with respect to corporations—namely the issue of ex parte contact with employees of a corporation in connection with professional ethics matters.

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6. See infra Part II.B (describing problems arising from application of attorney-client privilege to corporations).
7. See id.
8. See supra note 46 and accompanying text (describing unique nature of corporations causing complications with application of privilege).
11. Id. at 392.
12. See supra note 9 at 394-95 (recognizing employees below management often holders of relevant information). Although the Supreme Court rejected the control group test as too narrow, it did not definitively adopt the subject matter test. Id. at 391-95; see also supra note 9 (indicating *Upjohn* utilized subject matter-like test, but did not explicitly endorse specific test).
14. See infra Part II.E (noting state approaches to scope of corporate privilege).
Part II of this Note discusses the current state of attorney-client privilege law with respect to corporate communications. It first provides a brief overview of privilege law and introduces the public policy argument that the pursuit of truth in litigation demands restriction of attorney-client privilege rather than expansion to cover more communications, especially within the corporate context. It then outlines the development of the two basic tests for determining the scope of corporate privilege and discusses the *Upjohn* decision and its effect on the approaches of various states. Part II goes on to explain Massachusetts’s approach to an analogous issue and introduces *Commissioner of Revenue v. Comcast Corp.*, a case the Massachusetts Supreme Judicial Court (SJC) recently decided that involved questions of privilege with respect to corporate communications involving third-party consultants. While the SJC did not specifically address the scope of attorney-client privilege within the corporate structure in this case, its discussion demonstrates that determining the boundaries of corporate privilege is an unresolved issue in Massachusetts.

Part III of this Note analyzes which test best balances the valued function of attorney-client privilege with the essential truth-seeking function of
discovery.22 Finally, it argues which test Massachusetts should adopt when it addresses the precise question of the scope of attorney-client privilege in the corporate context.23

II. HISTORY

A. Attorney-Client Privilege: A Brief Background

Attorney-client privilege allows a client to refuse to disclose—and prevents his attorney from disclosing—confidential communications the client made in seeking or obtaining legal advice.24 While historically the policy-based thrust behind the privilege centered on the confidential relationship between attorney and client, the present-day concern focuses on promoting “full and frank communication between attorneys and clients,” as stated by the Supreme Court in Upjohn.25 A central criticism of the attorney-client privilege is that it allows attorneys to conceal information harmful to their clients’ cases and frustrates the truth-seeking purpose of the legal process.26 While this may be true, the value society places on the privilege may outweigh the harm resulting from suppression of evidence.27 In order to balance these competing policies, it is

22. See infra Parts III.A, III.B (discussing benefits and detriments of each test and determining which best balances policy concerns).

23. See infra Part III.C (advocating choice of test for Massachusetts).


25. 449 U.S. 383, 389 (1981). In Upjohn, the Supreme Court stressed the importance not only of the privilege’s protection of attorney advice to clients, but also the protection of information given to the lawyer that enables him to provide sound legal advice. Id. at 390; see United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997) (noting present-day rationale behind privilege to protect communication thereby encouraging disclosure); see also Thornburg, supra note 2, at 160 (tracing historical policies supporting attorney-client privilege). Originally, under Roman law, attorney-client privilege formed based on considerations of loyalty to a client. Thornburg, supra, at 160. The privilege rendered the attorney incompetent to testify against his client; as such, an attorney’s decision to testify would be considered immoral and the resulting testimony unworthy of belief. Id. Later, English law concentrated on the notions of honor and gentlemanliness—as opposed to concerns regarding frankness of communication—and English courts granted “gentlemen” a privilege against testifying so as not to violate promises of secrecy to clients. Id. But see CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5472 (2008) (challenging historical roots of attorney-client privilege and its policy-based considerations).


27. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68, cmt. c (2008) (explaining while trials generally considered searches for truth, truth not sole objective of judicial system). The Restatement proclaims that truth-seeking may be secondary to other, more important policy goals, most especially those underlying evidentiary privilege law. Id.; see also Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc. 870
generally accepted that privileges should be narrowly construed based on the circumstances surrounding the communication.28

Both federal and state courts recognize testimonial privilege law as an exception to the duty to disclose information relevant to a matter at hand.29 State law governs privileges at the state level as well as in federal diversity cases, and federal common law governs in federal question cases.30 The attorney-client privilege is as follows:

N.E.2d 1105, 1111 (Mass. 2007) (opining hindrance on disclosure outweighed by societal interest attorney-client privilege serves).


[F]ederal courts are forever grappling with the tension between reaching a just result by finding the ‘truth,’ and preserving a privileged relationship that society has decided is worth protecting. Because of that tension, many courts are more than willing to find that a privilege has been waived or that it never existed in the first place.

McErlean & Teplinski, supra, at 41.

29. See FED. R. EVID. 501. Federal Rule of Evidence (FRE) 501 states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof 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.

Id.; see also James Heckmann, Evidence—Upjohn v. United States—Corporate Attorney-Client Privilege, 7 J. CORP. L. 359, 369 (1982) (detailing application of FRE 501 and Congress’s intentions in passing rule); Smith, supra note 26, at 392 (noting privilege law exists at federal and state levels as exception to duty to disclose). In passing FRE 501, Congress intended that courts apply the privilege—based on recognized confidential relationships to be protected at law—under the circumstances of each individual case. See Heckmann, supra, at 369-70. Congress gave federal courts leeway in determining privilege law at the federal common-law level, but also wanted to avoid superseding state law with federal common law in diversity cases. Id. State law of privileges may also apply in federal civil actions where there is a substantial question of state law to be determined. Id.

30. See Becker, supra note 24, at 249 (explaining what type of law governs privilege determinations). Materials protected by attorney-client privilege at state and federal levels may also be protected by the work product doctrine. Id. The work product doctrine, laid out by the United States Supreme Court, is also partially codified by the federal rules of civil procedure and state civil procedure rules. Id. at 266; see also Hickman v. Taylor, 329 U.S. 495, 510-14 (1947) (setting forth work product doctrine). The work product doctrine limits discovery of documents and other tangible items prepared in anticipation of litigation or trial by or for a party or the party’s agent or representative. See Becker, supra note 24, at 266. While attorney-client privilege and work product protections may overlap, the largest distinction between the two doctrines is that privilege is generally an absolute bar to discovery, while work product provides limited immunity from discovery. Id. at 268. Essentially, some documents or items prepared in anticipation of litigation may be discoverable, in spite of work product protection, upon a showing of substantial need for the information and the inability otherwise to obtain it. Id. at 267. See generally id., at 266-82 (setting forth general overview of work product doctrine, including other differences from attorney-client privilege).
(1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.”

The lawyer’s ethical responsibility to maintain confidences extends to potential clients and current clients, both during and after representation.

An attorney may not disclose confidential information unless the client consents or waives the privilege, the law requires the attorney to disclose, or the attorney must disclose to prevent a crime or fraud. If the privilege applies, it is absolute absent one of the aforementioned circumstances. The client is the holder of this absolute privilege, not the attorney. Thus, it is the client, as proponent of the privilege, who has the burden of demonstrating its application in a particular case. This personal and individualized element of attorney-client privilege is what complicates its application to a fictional entity, such as a corporation.

31. Smith, supra note 26, at 392; see United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (outlining oft-cited elements of attorney-client privilege); Restatement (Third) of the Law Governing Lawyers § 68 (2008) (stating when privilege may be invoked). According to the Restatement, “the attorney-client privilege may be invoked as provided in § 86 with respect to: (1) a communication, (2) made between privileged persons, (3) in confidence, (4) for the purpose of obtaining or providing legal assistance for the client.” Restatement (Third) of the Law Governing Lawyers § 68 (2008); see also Becker, supra note 24, at 250 (describing briefly effects of waiver). Waiver is one of the ways in which an opponent may overcome the protections of the attorney-client privilege. Becker, supra note 24, at 250. A client, as holder of the privilege, may expressly and intentionally waive the privilege. Id. A client may also impliedly waive the privilege by behaving as though it did not intend to invoke the privilege, such as by allowing the presence of a third party at a supposedly confidential disclosure. Id.; see also Fed. R. Evid. 502 (proscribing federal limitations on waiver of privilege). See generally McErlean & Teplinski, supra note 28 (describing types of waiver and courts’ willingness to find privileges waived).

32. See Laredo, supra note 2, at 144 (explaining when and how attorney-client privilege applies); see also Becker, supra note 24, at 250 (noting attorneys may face severe disciplinary sanctions for violation of attorney-client privilege). The relationship protected by attorney-client privilege begins when a person seeks legal advice from an attorney, the advice sought concerns matters within the attorney’s professional capacity, and the attorney expressly or impliedly gives such advice. Becker, supra note 24, at 249. The privilege applies to communications made both by the client to the attorney and by the attorney to the client, and courts may not compel either party to disclose such communications when the privilege applies. See Laredo, supra note 2, at 144. An important distinction to make is that the privilege only applies to the actual communications and not the underlying facts involved that are relevant to the litigation. Id.


35. See 19 William G. Young et al., Massachusetts Practice Series § 501.1 (2d ed. 2008) (noting personal nature of privileges). When discussing whether a corporation is entitled to the privilege, the focus is generally on which employees—through whom the entity speaks—are entitled to the privilege. Id.

36. See Mulroy & Muñoz, supra note 34, at 51 (discussing burden of proof issues for attorney-client privilege cases).

37. See supra note 35 (noting discussions of corporate privilege focus on employees as voice of
B. Introduction to Attorney-Client Privilege and the Corporate Form

Attorney-client privilege is available to corporations as well as individuals. The Seventh Circuit applied attorney-client privilege to corporations in the landmark case *Radiant Burners, Inc. v. American Gas Ass’n*. In reversing the trial court, the appellate court set the stage for general application of the privilege to corporations. This, however, led to an ongoing struggle to determine the scope of the privilege in the corporate context.

Much difficulty arises in the application of attorney-client privilege to a fictional legal entity. Attorney-client privilege applies to the corporation itself, which is an artificial entity, and not directly to the individuals who control the entity’s operation, such as directors, officers, managers and shareholders. As such, there is a general assumption that a corporation’s attorney represents the entity itself and not the entity’s employees or agents. A corporation, however, can only act through its human agents. Due to the

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38.  *Brodsky & Adamski, supra* note 24, § 10:1 (noting application of privilege to natural persons and legal entities); see also *Heckmann, supra* note 29, at 359 (acknowledging attorney-client privilege for corporations “firmly established” in 1963).

39.  320 F.2d 314, 323 (7th Cir. 1963) (holding attorney-client privilege available to corporations).

40.  See *Radiant Burners Inc. v. Am. Gas Ass’n*, 209 F. Supp. 321, 324 (N.D. Ill. 1962) (deciding attorney-client privilege inapplicable to corporations), rev’d, 320 F.2d 314 (7th Cir. 1963); see also Craig W. Saunders, Comment, Texas Rule of Evidence 503: Defining “Scope of Employment” for Corporations, 30 St. Mary’s L.J. 863, 874 (1999) (relating Seventh Circuit’s decision and reasoning). The trial court in *Radiant Burners* likened the attorney-client privilege to the privilege against self-incrimination and reasoned that such privileges invoke personal relationships between individuals and, as such, cannot be applied to legal entities. 209 F. Supp. at 324-25. The trial judge found that confidentiality problems inherent within the corporate structure—such as the requirement of disclosure of corporate records to shareholders under corporate law—are inconsistent the requirement of reasonable intention of confidentiality between an attorney and his client. Id. at 324. The appellate court, which reversed the trial court, found that the privilege against self-incrimination was personal and could apply only to individuals, not statutory formations such as corporations. See *Radiant Burners v. Am. Gas Ass’n*, 320 F.2d 314, 322-23 (7th Cir. 1963) (distinguishing privilege against self-incrimination as personal and applying only to individuals). The court then determined that attorney-client privilege was not similarly exclusionary and thus applied to all clients—natural persons and artificial entities—including corporations. Id.


42.  See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100 cmt. b (2008) (indicating difficulty ascertaining scope of privilege for organizational clients); *Becker, supra* note 24, at 251 (recognizing difficulty of applying privilege to “an amorphous legal fiction, such as a corporation”); *Heckmann, supra* note 28, at 359 (describing application of privilege to corporations as “controversial”); see also *Brodsky & Adamski, supra* note 24, § 10:1 (describing complications with application of attorney-client privilege to corporations); *King, supra* note 21, at 623 (discussing difficulty applying privilege to corporations).

43.  *Brodsky & Adamski, supra* note 24, § 10:1 (pointing out corporation itself holder of privilege rather than employees).

44.  See *Becker, supra* note 24, at 257 (explaining application of privilege to corporate entity and its potential application to employees).

45.  See S. Bell Tel. & Tel. Co v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994) (stating corporation can only
corporation’s unique nature, courts have struggled to determine to whom within an organization the privilege applies.46

C. Overview of the Control Group and Subject Matter Tests

Prior to the Supreme Court’s decision in *Upjohn*, two primary tests existed for determining the scope of the attorney-client privilege within the corporate structure: the control group test and the subject matter test.47 Under the original control group test, as laid out in *City of Philadelphia v. Westinghouse Electric Corp.*,48 the privilege applied to those within a corporation who had control of, or participated in, the decision-making process with corporate attorneys.49 Under the control group test, the attorney-client privilege essentially encompassed only officers and directors of corporations—those employees who had authority to speak on behalf of the entity.50

The subject matter test developed because of judicial dissatisfaction with the limitations of the control group test.51 In *Harper & Row Publishers, Inc. v. act through agents*; EPSTEIN, supra note 33, at 142 (noting individuals within corporation speak on its behalf); see also Nicci Harrell, Comments, *And the Award Goes to: Restrictions on the Advancement of Attorneys Fees Through the Thompson Memorandum*, 26 PENN ST. INT’L L. REV. 463, 465 (2007) (explaining corporation’s agents comprised of officers, directors, and employees).

46. See id.; see also Hamilton, supra note 13, at 629 (noting struggle to apply privilege to corporations).

47. See generally Heckmann, supra note 29 (noting organizational characteristics of corporations make bright line rule on scope of privilege difficult to determine). Many issues arise because of the corporate structure that can affect the application of the privilege to employees. See Heckmann, supra note 29, at 371-77. Corporations—particularly diversified enterprises with dispersed management—face issues such as communication breakdowns between upper management and lower-level employees, competing interests between employees who wish to avoid liability for improper conduct and managers who need such information to comply with corporate law, and difficulty distinguishing between when an employee is seeking legal advice as opposed to business advice. Id. at 374-76.


49. *See City of Phila.*, 210 F. Supp. at 485 (defining which corporate employees entitled to confidential communications with corporate attorneys); see also Saunders, supra note 40, at 876 (stating *City of Philadelphia* decision “subsequently formed basis for control group test”).

50. See Saunders, supra note 40, at 876; see also BRODSKY & ADAMSKI, supra note 24, § 10:1 (stating control group only those controlling or taking substantial part in decision-making following attorney advice). Accordingly, the test required the speaker, as holder of the privilege, to have enough authority to “personify” the corporation. BRODSKY & ADAMSKI, supra note 24, § 10:1

51. See Saunders, supra note 40, at 875 (noting control group test bright line but limited rule). Among the problems that developed with the control group test is that the privilege did not protect anyone outside the control group but within the corporation. Id. at 877-78. A serious issue could arise if those outsiders possessed important confidential information necessary for representation of the company or if an outsider was one that could act on advice to the company and thereby bind the company. Id. The control group test remained a viable option for federal common-law judges in analyzing corporate attorney-client privilege until the Supreme Court rejected it in *Upjohn*. Id. at 878; see also Smith, supra note 26, at 394 (discussing rising concerns regarding control group test’s limitations before *Upjohn*). In a shift from their original narrow construction of the corporate privilege—stemming from the concern that corporations would inaccurately characterize information as privileged in order to shield it from discovery—courts began to realize that the control group
Decker,52 the Seventh Circuit declined to follow the control group test and instead adopted the subject matter test.53 The court decided that corporate attorney-client privilege extended to corporate agents outside of the control group, and thus deemed the control group test inadequate.54 The court instead focused on two factors: whether an employee communicated to corporate legal counsel under order from superiors, and whether the subject matter related to the employee’s corporate duties.55 If the corporation could satisfy these requirements, courts would consider the corporate employee “sufficiently identified with the corporation”, such that corporate attorney-client privilege protects the employee’s communications.56

Following Harper & Row, the Eighth Circuit adopted a modified form of the subject matter test in Diversified Industries, Inc. v. Meredith.57 The test might result in insufficient protection of corporate communications. Smith, supra note 26, at 394; see also Upjohn Co. v. United States, 449 U.S. 383, 392-93 (1981) (criticizing control group test’s limitations and rejecting its use). But see In re Grand Jury Investigation, 599 F.2d 1224, 1235 (1979) (expounding control group test’s benefits as “bright-line rule” offering corporation “bare minimum of protection”). In In re Grand Jury Investigation, the Third Circuit Court of Appeals emphasized the need to “strictly confine privilege” because it “obstructs the search for the truth,” and noted that the control group test “shelters only those communications . . . it is socially desirable to protect.” 599 F.2d at 1235.

52. 423 F.2d 487, 491 (7th Cir. 1970) (rejecting control group test and concentrating on content of corporate communication). In this case, the plaintiffs wished to obtain debriefing reports created by Harper & Row with its employees who had testified before the grand jury. Id. at 489-90. On appeal, the Seventh Circuit reversed the trial court’s decision that attorney-client privilege protected almost none of the reports. Id. at 490. The Seventh Circuit found that while not all of the employees fell within the control group, some had acted on attorney advice in the context of the litigation and had corporate decision-making power. Id. at 491-92. The court found the test failed to protect some “corporate agents who are not within the control group” but who are protected by corporate attorney-client privilege. Id. at 491. The court concluded that the privilege should extend beyond those employees that fall within the definition of the control group. Id.

53. See id.; see also Saunders, supra note 40, at 879 (discussing Harper & Row decision and its implementation of subject matter test).

54. See Harper & Row, 423 F.2d at 491 (concluding control group test inadequate protection for corporate communications).

55. See id.; see also Heckmann, supra note 29, at 362-63 (noting Harper & Row focused on employee disclosure at direction of employers). In Harper & Row, none of the employees fell within the control group and could not individually act on the corporate counsel’s legal advice. See 423 F.2d at 491 (determining employees had supervisory or “even policy making” positions but none could control corporation’s decision-making); see also Heckmann, supra note 29, at 362 (noting Harper & Row employees unable to act on counsel’s advice and not in control group). The court, however, still focused on whether the employees could embody the corporation. See Harper & Row, 423 F.2d at 491. The court’s test required that the employee’s duties be the subject matter of the legal advice sought, thereby protecting as privileged only those communications relating to his or her participation as a corporate employee. See id. at 491-92; see also Heckmann, supra note 29, at 362-63 (explaining Harper & Row test).


57. 572 F.2d 596, 609 (8th Cir. 1977). In Diversified Industries, attorneys prepared a report of company business practices, including employee interviews relevant to a claim of bribery that arose during a proxy fight. Id. at 600-01. Diversified Industries, the defendant, sought to make undiscoverable both this report and a memorandum outlining plans for an investigation and discussing the possibility that the privilege would protect the report. Id. at 600. Diversified claimed that corporate attorney-client privilege protected the report and the memorandum from discovery. Id. The Eight Circuit instituted a new, more limited version of the subject matter test to determine whether the privilege indeed covered the documents. Id. at 609. The court also noted
modification addressed concerns that the Seventh Circuit’s test concentrated on fitting the communicator within the protection of the corporate privilege by identifying him or her with the corporate persona rather than focusing on the corporation’s intentions regarding the confidentiality of the information.\footnote{See Heckmann, supra note 29, at 363-64 (describing Diversified Industries decision and court’s reasoning for limiting subject matter test).} As a result, the corporation might be able to characterize many routine communications as privileged merely by having an employee discuss any matter within the scope of his employment with corporate legal counsel, even if not to seek legal advice.\footnote{See id. at 369-69 (laying out facts of case).}

The modified test laid out five requirements limiting the privilege accordingly.\footnote{See id. at 386-89 (laying out facts of case).} Corporate attorney-client privilege would apply to employee communications if: the employee made the communication for the purpose of securing legal advice; the employee communicated with the attorney at the request of a superior; the superior requested the communication in order to help resolve the corporation’s legal dispute; the subject matter of the communication fell within the scope of the employee’s duties; and the communication was not communicated beyond those necessarily told as a result of their position in the corporate structure.\footnote{See 449 U.S. 383 (1981).} In making this modification, the Eighth Circuit sought to prevent the overextension of attorney-client privilege to routine business matters and widely available corporate communications.\footnote{One of Upjohn’s foreign subsidiaries made the potentially improper payments to foreign government officials. Id.; see also Heckmann, supra note 29, at 364-69 (outlining facts of Upjohn and}

D. The Upjohn Decision

In 1981, the Supreme Court took on the challenge of applying attorney-client privilege to corporations in \textit{Upjohn}.\footnote{See Diversified Industries, 572 F.2d at 609 (establishing five requirements for application of corporate privilege). Under the new test, the court held that the interviews were confidential communications protected under attorney-client privilege. Id. at 610.} In 1976, an independent audit of the Upjohn Company uncovered questionable payments made to foreign government officials to gain government business.\footnote{Id. at 609 (requiring satisfaction of all five elements for privilege to apply).} Upjohn began an internal
investigation into these alleged payments.66

Following voluntary disclosure of a report discussing the payments, the IRS began to investigate the resulting tax implications.67 The IRS demanded production of the questionnaires that Upjohn’s foreign subsidiary managers completed at the request of general counsel, along with other memoranda and notes from interviews counsel conducted with company officers and employees.68 Upjohn refused to produce the documents, claiming protection under both attorney-client privilege and the work product doctrine.69 The United States District Court for the Western District of Michigan found Upjohn had waived the attorney-client privilege.70 The court of appeals rejected the finding of waiver, but, after applying the control group test, held that the privilege did not apply.71

Upon review, the United States Supreme Court rejected the use of the control group test, stating, “[i]t frustrates the very purpose of privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.”72 The Court reasoned that frequently, within a corporation, employees beyond the control group are responsible for acting on the corporation’s behalf in response to legal advice, and “[m]iddle-level—and indeed lower-level—employees” can bind the corporation by their actions and thus subject the corporation to litigation.73 As such, these employees naturally would have relevant information to share with corporate counsel.74 In this context, 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.”

After deeming the control group test too restrictive, the Court broadened the protections of attorney-client privilege in the corporate context to include confidential communications of corporate employees who share information relevant to litigation with corporate counsel. Although the Court did not adopt an explicit “test” to decide whether the communications were protected in *Upjohn*, the Court did apply a broader, more subject matter-like test to the facts at hand. The Court considered multiple factors in deciding that the privilege applied to Upjohn’s documents, including the fact that employees communicated with Upjohn’s counsel at the direction of superiors in order to secure legal advice and that information relevant to the investigation was not available from control group members. In addition, all employees were aware of the legal implications of the questionnaires and the company intended to keep the questionnaires confidential.

While the Court allowed for broader application of corporate privilege, it pointedly noted that the privilege only applies to the communications themselves and does not protect underlying facts from disclosure. The Court wanted to ensure corporations could not use the privilege to frustrate discovery and hide information simply by communicating it to its attorneys. The Court ultimately decided that the control group test was inconsistent with the principles of Federal Rule of Evidence (FRE) 501 and could not be properly applied here. Nevertheless, the Court declined to set a rigid rule and stated that it was only deciding the case before it. The Court pointed out that taking

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76. *See Upjohn*, 449 U.S. at 393-95 (criticizing limitations of control group test and extending protections in analyzing *Upjohn* facts); see also Hamilton, *supra* note 13 at 629-30 (noting *Upjohn* decision protects “wider range of employees” than control group test); Mulroy & Muñoz, *supra* note 34, at 53 (describing *Upjohn* decision as providing “broad protection” to confidential employee communications).


78. *Upjohn*, 449 U.S. at 394-95 (discussing relevant factors concerning communications at issue in case).

79. *Id.* at 395 (describing *Upjohn*’s notifications to employees and confidentiality of questionnaires and interviews).

80. *Id.* (responding to criticism that broader protection creates “zone of silence”).


82. *See Upjohn*, 449 U.S. at 397 (noting control group test contrary to principles of common law interpreted under FRE 501). The Court held that attorney-client privilege protected Upjohn’s questionnaires from disclosure. *Id.* at 395.

83. *See id.* at 396.
any other approach would violate the “spirit” of FRE 501, which requires federal courts to interpret privilege law in light of their reason and experience.84

The Supreme Court’s decision in Upjohn is not binding on state courts.85 Whether or not individual states follow Upjohn depends on how much deference they afford to the Supreme Court’s reasoning and decision.86 Despite the Supreme Court’s emphasis on the importance of certainty in the area of attorney-client privilege, the Court’s refusal to create a rigid rule governing its application in the corporate context has resulted in conflicting approaches among the fifty states.87

E. To Follow or Not to Follow Upjohn? Some States Decide

Less than half of the states have adopted a definitive approach with regard to corporate attorney-client privilege.88 Fifteen states have adopted Upjohn or a modified version of the subject matter test.89 Seven states have adopted the

84. Id. at 397; see also supra notes 29-30 and accompanying text (discussing FRE 501 and federal privilege law principles).

85. See Hamilton, supra note 13, at 630 (explaining non-binding nature of Upjohn at state level and in federal diversity cases governed by state law). Upjohn applies in federal question cases, in which federal courts apply federal common law. Id. at 654. In diversity cases removed from state to federal court—if state law controls—federal circuit courts will apply individual state privilege law. Id.; see also United States v. Zolin, 491 U.S. 554, 562 (1989) (citing Federal Rules of Evidence and noting questions of privilege governed by federal common law); supra notes 29-30 and accompanying text (discussing FRE 501 and federal privilege law principles).

86. See Heckmann, supra note 29, at 371 (clarifying application of Upjohn to cases governed by state law). Upjohn’s narrow holding is now part of federal common law that federal courts will use to interpret issues of corporate attorney-client privilege. See id.


88. See Hamilton, supra note 13, at 633-46 (surveying state decisions regarding privilege law following Upjohn). The control group jurisdictions include: Alaska, Hawaii, Illinois, Maine, New Hampshire, Oklahoma, and South Dakota. Id. States that have adopted an Upjohn or similar subject matter approach include: Alabama, Arizona, Arkansas, California, Colorado, Florida, Kentucky, Louisiana, Mississippi, Nevada, North Dakota, Oregon, Texas, Utah, and Vermont. Id.; see also infra note 90 (noting North Dakota—control group state as of Hamilton’s survey—now subject matter state). The rest of the states remain undecided, including Massachusetts. Hamilton, supra note 13, at 633-46.

89. Hamilton, supra note 13, at 633-46; see also ARIZ. REV. STAT. ANN. § 12-2234 (1994) (as amended) (applying privilege to communication between counsel and employee made for purpose of providing legal advice); Hamilton, supra note 13, at 652 (calling Arizona judicial approach most consistent with purposes of privilege and model for undecided states). In 1993, before the Arizona legislature amended its privilege statute, the Arizona Supreme Court rejected the control group test as inadequate to deal with the complex nature of corporate attorney-client privilege. Samaritan Found. v. Goodfarb, 862 P.2d 870, 881 (Ariz. 1993) (en banc). While the court expanded its test beyond the control group, it did so sparingly, to avoid what it saw as problems with overbroad subject matter tests. Id. at 872-73. The court confined protected communications to those made when an employee directly seeks legal advice from counsel in confidence. Id. at 872. When the corporation itself initiates the communication, the communication is privileged on the corporation’s behalf only when it is within the scope of the employee’s duties and the employee makes the communication to assist counsel in legal action. Id. at 872-73. The Arizona legislature amended the statute in 1994, in order to clarify the Goodfarb decision. See W. Todd Coleman, Review, Arizona’s Attorney-Client Communication Privilege
control group test. The rest of the states remain undecided, including Massachusetts. Some lower courts in undecided states have utilized the Upjohn approach, although neither the states’ legislatures nor the states’ highest courts have formally adopted the test.

F. Massachusetts and Privileged Corporate Communications Thus Far

Neither the Massachusetts legislature nor the Massachusetts Supreme Judicial Court (SJC) has specifically addressed the issue of how far down the corporate ladder attorney-client privilege travels. The SJC recently addressed
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the purpose of privilege and its general application in *Suffolk Construction Co. v. Division of Capital Asset Management*.94 The SJC noted that an obvious role served by the attorney-client privilege is to enable clients to make full disclosure to legal counsel of all relevant facts, no matter how embarrassing or damaging these facts might be, so that counsel may render fully informed legal advice. In a society that covets the rule of law, this is an essential function.95

The court also indicated that the applicability of the privilege is a question of fact for the judge based on the circumstances of the communication.96


94. 870 N.E.2d 33 (Mass. 2007); *see also Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law, Massachusetts Guide to Evidence § 502 (2008), available at www.mass.gov/courts/sjc/guide-to-evidence [hereinafter Massachusetts Guide to Evidence] (setting forth general rule of attorney-client privilege in Massachusetts). The Massachusetts rule defines a “client” as “a person, public officer, or corporation, association, or other entity, either public or private, who is rendered professional legal services by an attorney, or who consults an attorney with a view to obtaining professional legal services.” Massachusetts Guide to Evidence § 502. In addition, “communication is ‘confidential’ if it is not intended to be disclosed to third persons other than those to whom disclosure is made to obtain or provide professional legal services to the client, and those reasonably necessary for the transmission of the communication.” Id. Communications made for the purpose of obtaining legal services are protected between “the client or the client’s representative and the client’s attorney or the attorney’s representative.” Id.

95. *Suffolk Constr.*, 870 N.E.2d at 38.

96. *See id. at 46 (noting claimants must establish existence of privilege and judge may “test the sufficiency” of claim); id. at 38 (applying “normal rules” of attorney-client privilege to confidential communications involving government officials or entities). In explaining the “normal rules,” the SJC cited *In re Reorganization of Electric Mutual Liability Insurance Co. (Bermuda)*, which lays out the court’s guiding principles for analyzing questions of attorney-client privilege. See *Suffolk Constr.*, 870 N.E.2d at 39 n.9 (citing *In re Reorganization of Elec. Mut. Liab. Ins. Co. (Bermuda)*, 681 N.E.2d 838, 840-841 (Mass. 1997)) (utilizing *Electric Mutual* as source for “normal rules of attorney-client privilege”). In *Electric Mutual*, the SJC specifically stated that “[t]he existence of the privilege and the applicability of any exception to the privilege is a question of fact for the judge.” 681 N.E.2d at 840.

97. *See Patriarca v. Ctr. for Living & Working Inc.*, 778 N.E.2d 877, 882 (Mass. 2002) (dealing with privilege application of ex parte communications with former employees of organization); *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard Coll.*, 764 N.E.2d 825, 828 (Mass. 2002) (concerning privilege and ex parte communication with employees of organization); *see also Becker, supra note 24, at 33 (explaining ex parte communication and no-contact rule). According to Model Rule of Professional Conduct 4.2, adopted in 2002, a lawyer is not allowed to communicate about the subject matter of representation with a person the lawyer knows is represented by counsel, unless the lawyer receives authorization by consent of counsel, court order, or law. *Model Rules of Prof’l Conduct R. 4.2 (2002); see also Becker, supra note 24, at 33. The “no-contact” rule applies to members of corporations and other organizations, but there is no explicit standard regarding which specific employees the rule covers.* Becker, supra note 24, at 37. According to comment 7 of Model Rule 4.2, the no-contact rule protects those who supervise, direct, or regularly consult with the organization’s lawyer or who have authority to obligate the organization concerning
Weliky, P.C. v. President and Fellows of Harvard College, the SJC addressed which employees within an organization are protected from ex parte communication with opposing counsel. The SJC limited the protection to “those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.” The court explained the approaches of various jurisdictions, ranging from the narrowest—confining the ban on ex parte communication to the “control group” within an organization—to the broadest—forbidding ex parte contact with almost all employees. The SJC itself adopted a middle ground, interpreting the rule to forbid ex parte contact only with employees who have authority to “commit the organization to a position regarding the subject matter of the representation.”

Later, in Patriarca v. Center for Living & Working, Inc., the SJC clarified that being a mere “witness” to an event does not mean that the employee was involved in “supervising, planning, or directing” the event and thus may not fit into the definition of those protected from ex parte contact. The court sought to uphold the Model Rule of Professional Conduct’s essential purpose of maintaining the attorney-client relationship and protecting clients from revelation of detrimental information without advice of counsel, but recognized the need for limitations where the client is a corporation. The court held “that prohibiting ex parte contact with all employees of a represented organization went beyond the purpose of the rule, which was not to ‘protect a corporate party from the revelation of prejudicial facts.’”

While the SJC has seemingly adopted a subject matter test in applying the “no-contact” rule to corporations, it has not specifically defined whose communications enjoy protection under evidentiary law within Massachusetts corporations. The court has grappled with issues that affect the application of the litigation.

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99. Id. at 833 (limiting contact ban to only those employees authorized to bind organization regarding subject matter at hand).
100. Id.
101. Id. at 832.
103. 778 N.E.2d 877 (Mass. 2002).
104. Id. at 882; see also Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard Coll., 764 N.E.2d 825, 833 (Mass. 2002) (deciding which employees within Massachusetts organizations are protected from ex parte contact).
105. See Patriarca, 778 N.E.2d at 881.
106. Id. (quoting Messing, 764 N.E.2d at 833).
107. See supra notes 99-102 and accompanying text (discussing SJC’s Messing decision and use of term “subject matter” in decision); see also Laredo, supra note 2, at 147 (noting SJC has not yet defined what constitutes “organization” for attorney-client privilege purposes).
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of attorney-client privilege to corporations in Suffolk Construction, Messing, and Patriarca, seeking to strike a balance between sufficiently protecting corporate communications and limiting corporations’ ability to improperly thwart discovery.108 Nevertheless, the Massachusetts Superior Court made a telling observation in National Employment Industries v. Liberty Mutual Insurance Co.,109 when it described the SJC’s citation of Upjohn as indicating a “willingness to follow federal precedent concerning the nature of the attorney-client privilege by approving its reliance upon . . . the leading United States Supreme Court case in the area of corporate attorney-client privilege.”110

In Commissioner of Revenue v. Comcast Corp., amicus curiae briefs argued for and against application of privilege to accounting reports prepared at the behest of corporate counsel.111 While the SJC did not specifically address to whom within the corporate structure the privilege applies, it considered arguments for stretching the privilege to cover work corporate counsel solicited from third-party consultants in connection with legal representation.112 The

108. See supra notes 99-104 and accompanying text (discussing issues in SJC cases pertinent to attorney-client privilege and its application to corporations).


110. Id. at *1 (citing Commonwealth v. Goldman, 480 N.E.2d 1023, 1028-29, cert. denied, 474 U.S. 906 (1985)).


112. See supra notes 80-81 and accompanying text (discussing concern privilege overly broadened to encompass all communications through mere contact with counsel). See generally, Comm’t of Revenue v. Comcast Corp., 901 N.E.2d 1185 (2009). In Comcast, the SJC addressed the application of the Kovel doctrine—or derivative attorney-client privilege—which deals with the extension of the attorney-client privilege to third parties deemed “necessary” for “effective consultation” between attorney and client. Comcast, 901 N.E.2d at 1197-98. The Kovel doctrine is an exception to the rule that disclosure of confidential communications to third parties, including business consultants, generally undermines or waives the privilege. See id. at 1197; see also infra note 122 (discussing policy concerns arising from narrow or broad application of Kovel doctrine); supra note 31 and accompanying text (discussing waiver). See generally Beardslee, supra note 5 (discussing attorney-client privilege, analyzing Upjohn, and detailing different approaches to application of third-party privilege). In Comcast, the Commissioner of Revenue investigated whether Comcast, a cable television company, had Improperly failed to pay state corporate excise taxes in connection with forced liquidation of corporate stock. Comcast, 901 N.E.2d at 1189. Comcast was the successor company to other cable companies following multiple mergers. Id. at 1189 n.3. Antitrust law required one of the companies—U.S. West—to sell corporate shares after its own acquisition of another cable company. Id. at 1189. U.S. West’s in-house counsel in Colorado, Andrew E. Ottinger, Jr.—having been asked for advice on how to structure the stock sale, which would have considerable tax consequences—consulted with Massachusetts tax firm Arthur Andersen LLP. Id. at 1189-90. After receiving advice from partners at Arthur Andersen, U.S. West sold its stock, but paid no Massachusetts taxes on the capital gain it realized from the sale. Id. at 1190; see also Hoffman & Baltay, supra note 21, at 21 (setting forth Comcast facts). At trial, Comcast sought to exclude from discovery the memoranda the Anderson partners—including one lawyer prohibited from legal practice while employed at the accounting firm—had prepared, claiming attorney-client privilege. Comcast, 901 N.E.2d at 1191-92; see also Hoffman & Baltay, supra note 21, at 21 (discussing documents at issue in case). The memoranda analyzed different options for stock sales and potential litigation risks. Comcast, 901 N.E.2d at 1192. The Commissioner of Revenue sought to compel production of the documents, the
SJC narrowly construed the *Kovel* doctrine, applying the privilege only to confidential communications with third-party, non-lawyer consultants when the non-lawyer is truly necessary for the facilitation of “effective consultation” between the attorney and client.\textsuperscript{113} Before holding that attorney-client privilege does not protect memoranda prepared by non-lawyer tax consultants, the SJC outlined the privilege under Massachusetts law and addressed competing policy interests, indicating its overarching tendency to find in favor of the party claiming privilege, but constricting the privilege’s application by utilizing narrow construction in order to protect society’s interest in the investigative function of litigation.\textsuperscript{114}

Massachusetts Superior Court denied relief, holding that attorney-client privilege protected the memoranda because they “provided in-house counsel with legal information critical to his ability to effectively represent his client.” \textit{Id.} at 1193. The SJC, although noting it upholds discovery rulings barring abuse of discretion resulting in prejudicial error, disagreed with the lower court. \textit{Id.} Instead, the SJC—narrowly applying the *Kovel* doctrine—held that where a client hires a non-attorney to provide advice, like state tax advice, the privilege does not apply. \textit{Id.} at 1200. Rather, in order for third-party privilege to apply under the *Kovel* doctrine, the non-attorney’s role must be “necessary” for effective attorney-client communication and not simply substantially improve the attorney’s representation of the client. \textit{Id.} at 1197. Further, the doctrine only applies when the non-attorney’s role is to “clarify or facilitate” communication between the attorney and the client. \textit{Id.} at 1198; see also Hoffman & Baltay, supra note 21, at 21 (stating non-lawyer must “serv[e] essentially as ‘interpreter’ or ‘translator,’”). The SJC rejected the contention that its decision rendered attorney-client privilege “meaningless,” and stated that U.S. West’s in-house counsel “was free to seek advice on Massachusetts tax law from a Massachusetts attorney, where the privilege would apply.” \textit{Comcast}, 901 N.E.2d at 1200; see also Hoffman & Baltay, supra note 21, at 21 (explaining SJC’s holding in \textit{Comcast}).\textsuperscript{113} See supra note 113 (explaining SJC’s holding and construction of *Kovel* doctrine).

\textsuperscript{114} \textit{Comcast}, 901 N.E.2d at 1194-95 (outlining parameters of privilege and policy arguments for and against). The SJC, quoting itself, stated:

\begin{quote}
The attorney-client privilege is so highly valued that, while it may appear “to frustrate the investigative or fact-finding process . . . [and] create[s] an inherent tension with society’s need for full and complete disclosure of all relevant evidence during implementation of the judicial process” . . . it is acknowledged that the “social good derived from the proper performance of the functions of lawyers acting for their clients . . . outweigh[s] the harm that may come from the suppression of the evidence.”
\end{quote}


The court acknowledged that the “tension” between competing policy concerns is “unquestionably resolved” in favor of recognizing the privilege, but noted that it has consistently construed the privilege narrowly, partly to protect society’s interest in “full disclosure of relevant evidence.” \textit{Comcast}, 901 N.E.2d at 1195. Nevertheless, the court pointedly mentioned that narrow construction of the privilege was “particularly appropriate” under the circumstances, where Comcast was withholding information from the government in a tax enforcement proceeding. \textit{Id.} This indicates the SJC’s willingness to take factual circumstances into account when determining the scope of the privilege in particular cases. See supra Parts III.A, III.B (discussing fact-based approaches to corporate privilege utilized in subject matter and modified subject matter tests).
III. ANALYSIS

A. Control Group or Subject Matter: Whose Conversations Should Matter Most?

Although each test has its benefits, each seemingly protects only one of the essential functions of the privilege at the expense of the other, rather than effectively balancing competing policy interests.\footnote{115. See infra text accompanying notes 116-131 (discussing benefits and detriments of each test); see also supra notes 25-28 and accompanying text (explaining competing policies of truth-seeking in litigation and protecting confidential attorney-client relationship).} Given the complexities of the corporate structure, the control group test more effectively regulates the privilege than the subject matter test because it narrowly defines who constitutes a “client” within a corporation.\footnote{116. See supra notes 48-50 and accompanying text (explaining control group test’s parameters). But see King, supra note 21, at 630 (calling control group test unpredictable absent definite limits to its extension). King, discussing Brian E. Hamilton’s criticism of \textit{Upjohn}, indicates that the Court’s case-by-case, subject matter-like approach “may be just as unpredictable as the control group test.” King, supra note 21, at 623. See generally Hamilton, supra note 13, at 646-49.} As the client is the holder of the privilege and the privilege is absolute—barring consent, waiver, or disclosure required by law—the broader the definition of “client,” the more information can be excluded from discovery.\footnote{117. See supra notes 31-32 (discussing aspects of privilege law); supra notes 36-37 and accompanying text (describing individualized aspects of attorney-client privilege and noting problems arising from application to corporations).} The control group test effectively limits the central concern about the application of privilege to a corporate entity—the ability of corporate management to shuttle otherwise unprotected information through attorneys, thereby making it undiscoverable.\footnote{118. See supra note 51 and accompanying text (classifying control group test as bright-line rule); see also \textit{In re Grand Jury Investigation}, 599 F.2d 1224, 1235 (1979) (noting Third Circuit’s opinion control group test prevents obstruction of truth-seeking but still protects corporation).} Unfortunately, confining the protections of attorney-client privilege to upper echelon management limits the ability of attorneys to provide adequate representation to corporations.\footnote{119. See supra notes 73-75 and accompanying text (discussing Supreme Court’s reasoning for extending protections beyond control group); see also Smith, supra note 26, at 394 (discussing courts’ concerns regarding limited protection control group test afforded corporations).} Middle and lower-level employees often have confidential information that is both relevant to litigation and necessary for the provision of competent representation.\footnote{120. See supra notes 73-75 and accompanying text (describing attorney difficulty in providing adequate representation when privilege not extended beyond control group).} As a result, courts should employ a test that allows them to protect such communications while preventing abuse by corporations that would seek to extend the privilege beyond its purposes in order to hide information.\footnote{121. See supra notes 73-75, 81 and accompanying text (discussing need to broaden corporate privilege beyond control group but limit potential for discovery abuse); see also Beardslee, supra note 5, at 759-801 (recommending modified approach to applying third-party attorney-client privilege in corporate context). Professor Beardslee’s article analyzes the scope of the \textit{Kovel} doctrine, at issue in \textit{Comcast}, and the struggle to}
The subject matter test or a modified version—as adopted in Diversified Industries and Upjohn—upholds the valued function of the attorney-client privilege of promoting full, confidential communication between attorney and client, without putting an arbitrary limit on who constitutes a “client” within the corporation. The subject matter approach acknowledges that corporate employees at any level, not just upper management, can possess information relevant to litigation and have the ability to bind the corporation with their actions. Unlike the control group test, the subject matter test allows courts to employ a more fact-based analysis of the communication and the corporation’s intentions with regard to its content. A fact-based approach allows the court to delve deeper into the content of the communication, the identity of the communicator, and the circumstances surrounding the communication. Subject matter tests, however, can stretch the privilege so as to allow abuse.

The original subject matter test developed in Harper & Row fits the speaker within the privilege by focusing on whether the communication is relevant to the litigation and concerns the employee’s duties. This approach highlights an important aspect of corporate attorney-client privilege—the idea that the privilege belongs to the corporation itself and not to individual employees, even

balance the evolving confidentiality concerns of complex modern corporations with the idea that broader privilege brings broader inhibitions on the truth-seeking functions of discovery and an increased “zone of secrecy” with regard to corporate communications. See generally Beardslee, supra note 5, at 759-85 (analyzing risks and benefits of broad versus narrow application of privilege to third-party corporate consultants). Professor Beardslee argues that both an overly broad or overly narrow approach to third-party privilege are incompatible with the spirit of the attorney-client privilege doctrine. See id. Although a narrow approach to third-party privilege is too restrictive on corporations that increasingly rely on outside consultants to conduct business, an approach that is too broad may allow for abuse of the privilege and sweep too much information under the protective guise of privilege. See id.

122. See supra Part II.A (discussing function and importance of attorney-client privilege); see also supra note 28 (describing conflict between competing policies surrounding privilege and need for narrow construction to achieve balance); supra note 54 (noting Harper & Row court held control group test inadequately protects corporate communications). A modified subject matter test better serves the generally accepted principle that courts should narrowly construe the privilege based on the circumstances at hand in order to balance the competing policies. See supra notes 26-28, 57-60, 62 and accompanying text (discussing competing policies underlying privilege, and protections afforded by modified subject matter test).

123. See supra text accompanying note 73 (stating employees beyond control group can bind corporation by their actions).

124. See supra notes 77-79 and accompanying text (discussing Supreme Court’s fact-based application of subject matter-like test in Upjohn).

125. See supra part II.C (discussing subject matter test’s application); see also Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 600-09 (8th Cir. 1977) (modifying subject matter test and using five criteria to analyze circumstances under which communication made); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 490-92 (7th Cir. 1970) (analyzing corporate privilege under subject matter test looking at communicator and content of communication).


though the corporation can only act through its human agents.\textsuperscript{128} By focusing on whether the employee fit within the parameters of the test, rather than analyzing the corporation’s intentions regarding the subject matter communicated, the court opened the door to overly broad application of privilege to lower-level employees.\textsuperscript{129} Without further limitation, corporations could improperly shuttle routine information relating to employee duties, but unrelated to legal issues, through their attorneys, thereby protecting it from discovery.\textsuperscript{130} This would protect attorney-client privilege at the expense of an important competing policy—the truth-seeking function of litigation.\textsuperscript{131}

\textbf{B. Balance is Best: The Modified Subject Matter Test}

Modified subject matter tests that require satisfaction of additional criteria before applying the privilege are a better option.\textsuperscript{132} They provide balance between the public’s right to truthful evidence and the protection of the oldest of the privileges.\textsuperscript{133} In \textit{Diversified Industries}, the Eighth Circuit went beyond simply requiring that the communication relate to the employee’s duties and be made at the request of a superior.\textsuperscript{134} The additional criteria linked the communication and the superior’s request to the resolution of a particular legal dispute, and focused on the level of confidentiality employed within the corporate structure.\textsuperscript{135} By doing so, the court addressed major concerns that the subject matter test ignored: whether the corporation initially intended the information to be confidential and whether application of the privilege would protect information unrelated to legal issues.\textsuperscript{136}

In addressing corporate privilege, the Supreme Court’s reasoning in \textit{Upjohn} highlighted the benefits of the fact-based analysis allowed by the subject matter test.\textsuperscript{137} The Court affirmatively rejected the control group test because of its

\begin{itemize}
\item \textsuperscript{128} See supra notes 43, 45 and accompanying text (identifying corporation itself as holder of privilege even though corporation acts only through agents).
\item \textsuperscript{129} See supra note 56-59 and accompanying text (indicating problems with original subject matter test).
\item \textsuperscript{130} See \textit{Upjohn Co. v. United States}, 449 U.S. 383, 396 (1981); Heckmann, supra note 29, at 363; Saunders, supra note 40, at 881 (discussing restrictions on subject matter test to prevent abuse of privilege).
\item \textsuperscript{131} See supra notes 57-62 (discussing limits \textit{Diversified Industries} placed on subject matter test); see also supra note 81 and accompanying text (noting Supreme Court’s desire to limit corporate privilege to prevent frustration of discovery process).
\item \textsuperscript{132} See supra note 89 (identifying modified subject matter approaches and benefits thereof); see also supra notes 60-62 and accompanying text (discussing \textit{Diversified Industries’} modified subject matter test and court’s reasoning for employing further restrictions).
\item \textsuperscript{133} See \textit{Upjohn}, 449 U.S. at 389 (stating attorney-client privilege oldest communicative privilege); see also supra note 26 and accompanying text (discussing privilege’s hindrance on the public’s right to evidence).
\item \textsuperscript{134} See supra notes 60-61 and accompanying text (laying out Eighth Circuit’s modifications to subject matter test).
\item \textsuperscript{135} See supra notes 60-61 and accompanying text.
\item \textsuperscript{136} See supra notes 58, 62 and accompanying text (noting concerns about broad original subject matter test in \textit{Harper & Row}).
\item \textsuperscript{137} See supra part II.D (outlining \textit{Upjohn} decision and reasoning under Supreme Court’s subject matter test).
\end{itemize}
detrimental limitations on the ability of corporate attorneys to provide adequate representation.\footnote[138]{Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) (reasoning control group test undermines purpose of attorney-client privilege).} In deeming the control group test incompatible with FRE 501, the Court recognized the need for judicial evaluation of the particular situation in each individual case.\footnote[139]{See id. at 396-97 (discussing “spirit” of application of privilege in federal courts under FRE 501); see also supra notes 29-30 and accompanying text (discussing FRE 501 and federal privilege law principles).} Simply limiting the privilege to upper-echelon management does not allow for such evaluation.\footnote[140]{See supra notes 72-75 and accompanying text (setting forth Court’s criticism of inflexible control group test).} The Court’s choice to decide the case before it and to allow judges to apply the privilege in light of their reason and experience demonstrates the need for a fact-based approach.\footnote[141]{See supra text accompanying note 83 (noting Court’s choice to decide only case before it and not set rigid rule); see also supra note 46 (discussing complexities of corporate structure and application of privilege thereto); supra text accompanying note 73 (noting potential involvement of below-management employees in corporate legal matters).}

The Court’s refusal to set a rigid rule, and its highly situation-based approach, may cause over-broad application of the privilege.\footnote[142]{See Upjohn, 449 U.S. at 396-97 (declining to set bright-line rule); see also Hamilton, supra note 13, at 643-44 (discussing Florida’s adoption of more limited version of Upjohn approach); supra note 87 (noting uncertainty in various courts’ application of corporate privilege following Upjohn).} A few states that have considered this issue have narrowed the Upjohn test to one more in line with the modified subject matter test outlined in Diversified Industries.\footnote[143]{Compare Diversified Indus. v. Meredith, 423 F.2d 596, 609 (8th Cir. 1977), with supra note 89 (discussing original Arizona approach extending beyond control group but applying limited subject matter test), and supra note 89 (describing Florida approach narrowing Upjohn).} This approach enables a narrower, more practical application by listing criteria that must be met while still allowing for a situation-based approach.\footnote[144]{See supra note 89 (describing Florida approach narrowing Upjohn).}

C. Whose Conversations with Corporate Counsel Should Massachusetts Protect?

In Suffolk Construction, the SJC emphasized the importance of full and fair disclosure between client and attorney as a function of the attorney-client privilege.\footnote[145]{See Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 870 N.E.2d 33, 38 (Mass. 2007) (stating privilege’s “obvious role” of enabling full disclosure, including embarrassing and damaging facts); supra notes 95-96 and accompanying text (discussing SJC’s view on privilege in Suffolk Construction).} The court, in noting the requirement that the party claiming the privilege establish the existence of the privilege, also noted the ability of judges and attorneys to challenge its existence in a particular case.\footnote[146]{See supra note 96 and accompanying text (noting SJC’s fact-based approach to privilege in Suffolk Construction).} Although the Federal Rules of Evidence are not binding on Massachusetts courts, the SJC’s opinion echoes the mode of interpretation under FRE 501.\footnote[147]{Compare Suffolk Constr., 870 N.E.2d at 38, 46 (Mass. 2007), and supra note 96, with FED. R. EVID. 501, and Upjohn Co. v. United States, 449 U.S. 383, 396-97 (1981) (calling for situation-based approach to...}
By adopting a subject matter test with regard to corporate evidentiary privilege, Massachusetts would join the majority of states that have specifically addressed the issue.\footnote{148} In Messing and Patriarca, the SJC seemed to reject outright the polar approaches of the original control group and subject matter tests in a similar context.\footnote{149} By allowing protection from ex parte contact to extend beyond managers, the SJC adopted a line of reasoning similar to that of the Supreme Court in \textit{Upjohn}, which noted that the actions of employees outside the control group could embroil the corporation in legal matters.\footnote{150}

In seeking a balance between the protection of attorney-client privilege and the truth-seeking function of discovery, the SJC’s adoption of a moderate approach in the ethical context lends itself to the conclusion that it may lean that way in the evidentiary context as well.\footnote{151} The SJC will likely adopt an approach that allows for flexibility in the corporate context but still effectively limits the scope of the privilege to avoid overly discovery.\footnote{152} A modified subject matter test, which imposes additional limitations on the scope of the content-based approach, most effectively balances the policies of privilege and truth-seeking, both of which the SJC has professed its desire to protect.\footnote{153}

\begin{footnotes}
\footnote{148. See Hamilton, \textit{supra} note 13 at 633-46 (describing fourteen states as subject matter states while only eight use control group test); see also \textit{supra} note 90 (noting North Dakota’s shift to subject matter approach, making 15 subject matter states).}
\footnote{150. Compare Messing, 764 N.E.2d at 833 (applying ban on contact to employees with authority to bind organization regarding pertinent subject matter), \textit{with Upjohn}, 449 U.S. at 391 (noting middle to lower-level employees could bind corporation by their actions).}
\footnote{151. See \textit{supra} notes 99-102 and accompanying text (discussing SJC’s use of subject matter test in professional ethics context); see also \textit{supra} notes 104-106 and accompanying text (indicating further limitations placed on no-contact rule to balance policy concerns).}
\footnote{152. See Patriarca, 778 N.E.2d at 881 (balancing fundamental purpose of maintaining attorney-client relationship with need to avoid over-protecting corporations). The SJC recognized the special circumstances surrounding corporations in Patriarca and Messing and balanced the same concerns that courts focused on when applying the attorney-client privilege to corporations. See \textit{id.}; see also Nat’l Employment Serv. Corp. v. Liberty Mut. Ins. Co., No. 93-2528-G, 1994 WL 878920, at *1 (Mass. Super. Ct. Dec. 12, 1994) (following Supreme Court precedent in privilege cases); \textit{infra} note 153 (arguing modified subject matter approach effectively addresses \textit{Upjohn}’s limited protection of certain policy concerns); \textit{supra} note 112 (outlining Comcast’s discussion of privilege and suggesting narrow interpretation does not exclude fact-based application).}
\footnote{153. See \textit{supra} text accompanying note 95 (describing SJC’s view on need to foster full disclosure by clients to attorneys); \textit{supra} text accompanying note 106 (noting need to limit protection of attorney-client relationship to avoid unduly impinging on discovery). But see Hamilton, \textit{supra} note 13, at 646-49 (criticizing \textit{Upjohn}’s subject matter-like approach). Hamilton argues that a broader test for privilege may not meet the Court’s goal of encouraging full communication to corporate counsel to facilitate sound legal advice while also promoting compliance with law. \textit{Id.} at 646-47. If the corporation, as the true “client,” retains the ability to waive the privilege, employees who may face negative consequences as a result of waiver will be less likely to come forward with information. \textit{Id.} Further, broader protection could enable corporations to hide information, thereby inhibiting investigations of illegal corporate activity rather than encouraging compliance with laws and}
In their arguments for and against extension of the privilege to accounting reports, amici curiae for Comcast addressed the major concern of an overbroad privilege that allows for protection of documents merely shuttled through corporate attorneys. In the Comcast opinion, the SJC reiterated its views regarding the importance of the privilege expressed in Suffolk Construction, but balanced the concern for protecting the privilege with important limitations to protect discovery as it did in Messing and Patriarca. Although the National Employment court predicted that the SJC would likely follow Upjohn, the SJC’s continued emphasis on the importance of the privilege, coupled with its insistence on narrowly construing the privilege to protect truth-seeking discovery, fall directly in line with the purpose and reasoning behind a modified subject matter approach to corporate attorney-client privilege.

IV. CONCLUSION

As one of the oldest and most frequently invoked privileges, attorney-client privilege is essential to the proper functioning of the legal system. By encouraging full and frank communication between attorney and client, the privilege helps ensure that attorneys are able to provide competent representation based on the facts pertinent to the issue at hand. In the corporate context, deciding who constitutes the client can be a difficult task for courts. The corporation is a complex entity whose employees, beyond upper-level management, can embroil it in conflict or at the very least have information relevant to legal matters it may face.

The modified subject matter test strikes the necessary delicate balance between the need to foster communication of corporate clients with their attorneys, and the protection of the truth-seeking function of the litigation regulations. Id. at 647-48. Nevertheless, the Eight Circuit addressed these concerns before Upjohn in Diversified Industries; when it adopted a modified subject matter test. Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977) (en banc). Unlike Upjohn, where the Supreme Court refused to adopt a rigid test and rather focused on the facts at hand on a more unpredictable “case-by-case” basis, the Diversified Industries court required satisfaction of explicit factors in order for corporate privilege to apply. Id. By requiring a showing of the corporation’s own intention to keep the communication confidential along with its explicit connection to legal advice, the court addressed the aforementioned concerns about waiver and improper concealment of information. See supra notes 57-62 and accompanying text (discussing Diversified Industries decision).

154. See supra note 111 and accompanying text (laying out arguments of amici curiae in Comcast); supra notes 112-114 and accompanying text (discussing Comcast and SJC’s interpretation of privilege under circumstances).

155. See supra notes 95-96, 145-147 and accompanying text (discussing Suffolk Construction); Part II.F (discussing SJC’s balanced approach in Messing and Patriarca); supra notes 112-112 and accompanying text (describing SJC’s interpretation of privilege in Comcast).

156. See supra note 110 and accompanying text (noting National Employment’s prediction of scope of corporate privilege in Massachusetts); supra notes 95-96 and accompanying text (noting SJC’s emphasis of value of privilege in Suffolk Construction); Part II.F (discussing balancing of policies in Messing and Patriarca); supra note 114 and accompanying text (emphasizing SJC’s regard for privilege but use of narrow construction to balance competing interests in Comcast).
process. Massachusetts has respected this balance in the area of professional ethics and should continue to do so when addressing the question of privilege law in the corporate context. Adopting a modified subject matter test best achieves this goal by allowing for a fact-based approach to the application of the privilege to a corporation while properly limiting its scope.

Massachusetts has yet to specifically address the scope of attorney-client privilege in the corporate context. Until it does, uncertainty remains regarding whether middle to lower-level employee communications with corporate counsel are protected from discovery. The SJC, however—in addressing the scope of attorney-client privilege in analogous contexts—has indicated that it may adopt a more fact-based, subject matter-like approach to determining the scope of corporate privilege. Although the SJC adopted a narrow approach to third-party privilege in the corporate context in Comcast, the court’s pointed—and notably “obvious”—reiteration that privilege is between attorneys and clients is revealing when considering how privilege is construed within a corporate entity. Although it is the corporation that holds the privilege, corporate entities, as legal fictions, can only speak through their employees. As such, unlike the third party consultants in Comcast, employees already have direct, internal ties to the corporation and may be more likely—depending on the context of their communications—to bind the corporation and thus be considered “the client.” Further, not only has the SJC indicated its preference for following federal precedent in the area of attorney-client privilege, its agreement with the majority of courts regarding the Kovel doctrine implies that it may also follow the majority of courts whose consideration of the competing policy interests implicated by corporate privilege led them to adopt a subject matter or modified subject matter test. The SJC’s discussion of privilege in Comcast may demonstrate a current wariness about the overextension of privilege, but its past decisions also denote an unwillingness to set a rigidly narrow rule. As such, a modified subject matter test, which mandates the meeting of specific circumstantial factors in order for the privilege to apply, effectively balances important competing policy interests in frank communication between attorney and client and truth-seeking in litigation, and also increases predictability. Nevertheless, until Massachusetts specifically decides how far down the corporate ladder the privilege applies, corporate attorneys should be cautious and assume that the most rigid rules apply.

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