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The Story of *Upjohn Co. v. United States*: One Man's Journey to Extend Lawyer-Client Confidentiality, and the Social Forces that Affected it

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The Story of Upjohn Co. v. United States: One Man's Journey to Extend Lawyer-Client Confidentiality, and the Social Forces That Affected It

Paul Rothstein*

The attorney-client privilege protects information a client provides an attorney in confidence for the purpose of securing legal advice. But suppose the client is not a person but a corporation and can only speak through its agents and employees. What then are the contours of the privilege? If the corporation's attorney asks an employee for information relating to pending litigation or other legal matters, is the conversation privileged? Some courts said that no communications to a corporate attorney were privileged unless they came from members of the corporate control group, loosely those people who had authority to direct the attorney's activities in connection with legal matters. Other courts said that the identity of the communicator was less important than the subject matter of the communication, and that even the communications of a lower level employee to corporate counsel would be protected, if they pertained to the employee's duties, if they were relevant to the corporation's need for legal advice, and if the employee had been directed by appropriate corporate authority to speak to counsel on the matter.

Suppose that you were counsel to a major corporation, and you wanted to investigate a matter that might have serious legal ramifications for your company, where many of the facts were in the possession of lower-echelon field employees. How would you proceed? What communications would you expect to be protected? Would you fight the matter all the way to the Supreme Court if the lower courts ordered you to

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share with the Internal Revenue Service (IRS) your notes of confidential communications between you and these employees? Gerard Thomas proceeded with great care to build the strongest case possible for claiming the privilege, and when two lower courts refused that claim, he appealed—successfully—to the United States Supreme Court, forever changing what corporate communications are privileged and the way corporate law is practiced. The case was *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

**THE CASE AND ITS DRAMATIS PERSONAE**

Gerard Thomas today is just over 80 years old. At 6 ft. 2 inches, he still cuts a handsome figure, topped with an impressive mane of white hair.\(^1\) Officially retired less than five years ago from his private law firm in Kalamazoo, Michigan, Thomas is still found at meetings there on a fairly regular basis. He remains married to the same woman, after all these years. She, like his friends at the office, calls him “Gerry”. He dotes on his two grown daughters and a son—none of whom are lawyers—and eight grandchildren, two of whom just graduated from college.

There is something Clark Kent-ish about Thomas. A true gentleman, he is polite, soft spoken, and courtly. It is hard to believe that twenty-odd years ago he doggedly faced down the IRS, winning such a dramatic expansion of attorney-client privilege in the process, that even today he is deemed a hero by the legal community.

Indeed, the IRS probably thought from his demeanor that Thomas would be a push-over. They were wrong. If you listen closely when he talks, there are glimpses of the man of steel within. This veteran WWII infantry corporal didn’t win two battle stars and a purple heart for nothing.

At the time of the fight with the IRS, Thomas was General Counsel, Vice President, and Secretary of the great American pharmaceutical firm, the Upjohn Company. He was also on the boards of several of its subsidiaries. Headquartered in Kalamazoo, where Thomas still lives, Upjohn had world-spanning operations in over 150 countries, requiring Thomas to travel from time-to-time to consult with overseas employees. The attorney-client victory he won in the Upjohn case involved his communications with some of these overseas employees—communic-\(^1\) My descriptions of Gerard Thomas, his involvement in the case, and other matters related to the case, are based on my personal interviews with Thomas and others connected with the case, and on court records, press accounts, corporate documents, and information from government filings, some obtained through the Freedom of Information Act, as well as more traditional legal and internet sources. David Sinkman, my student research assistant, aided me in various ways, and I am grateful for his help.
tions the IRS badly wanted to discover in order to determine Upjohn's tax liability.

The precise issue in the case was whether the company's attorney-client privilege covered written and oral exchanges between Thomas and lower-echelon Upjohn employees—field employees in various parts of the world who, unlike certain officers and directors, were not part of the company's "control group". It was undisputed, owing to previous cases, that an attorney's communications with members of the control group itself, being most like an individual client's communications with her attorney in the non-corporate context, were privileged, assuming other privilege requirements were met.

Thomas prevailed in the Supreme Court. The lower-echelon communications were held sacrosanct, ushering in an era of increased confidentiality and reliance on attorneys by the business community. Whether a lawyer was an "in-house" lawyer, like Thomas, or one hired externally by the corporation made no difference.

The Upjohn decision has particular resonance today, when corporate fraud and the role of lawyers in facilitating or preventing it, is so much on the front burner. Recent abuses by executives in charge of such leviathons as Enron Corp., Tyco, MCI-Worldcom, and Health-South, have resulted in massive corporate bankruptcies and huge financial losses to employees, shareholders, and investors. Individual, institutional, and governmental retirement funds have been decimated. The entire national economy has suffered. Enron alone is estimated to have cost investors over 63 billion dollars. Does an expansive corporate attorney-client privilege impede discovery of fraud and enable lawyers to help engineer legal circumventions? Or does it encourage companies and their employees to lay the facts fully before the attorney so she can advise them to stay within the law? The Supreme Court in Upjohn believed the latter to be a more significant effect, saying:

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem, but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter. [For just one example,] the behavior proscribed by [the antitrust laws] is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct.²

² Upjohn, 449 U.S. at 392 (internal quotation marks and citations omitted).
Government enforcers and regulators have a less charitable view of lawyers and recently have taken some counter-measures. We shall return to this later.

Thomas’ involvement with the events giving rise to *Upjohn* began in 1976. Independent accountants conducting a routine audit had alerted Upjohn that some of Upjohn’s subsidiaries abroad or their employees may have made payments to foreign officials or governments in order to secure or facilitate business for Upjohn. Since Upjohn’s foreign subsidiaries were in many respects independent entities, Upjohn’s International Division first looked into the matter without Thomas’ direct participation. But that inquiry did not come up with much. Since there were some aspects that might affect Upjohn on a broader basis, Thomas got more intimately involved.

He does not remember precisely how it first came to his personal attention that Upjohn’s subsidiaries might be involved in questionable payments, or how he initially felt. It is likely he was notified by the company’s chief financial officer, who may have approached him at the water cooler, in the hall, or over lunch in the executive dining room. A more formal memo would have followed. Several things undoubtedly flashed through Thomas’s mind. That American companies and their subsidiaries were making such payments was not news. The practice was beginning to be discussed in business circles and, very disparagingly, by the press. Congress was considering legislation to curb the payments, and something called the Foreign Corrupt Practices Act was eventually passed, but too late to affect this case. However, there already were laws on the books that made such payments potentially illegal at home and abroad.

Thomas obviously knew the realities. Foreign governmental entities often purchased American products, including pharmaceuticals, for their populations, or required that official permission be obtained to sell through other channels. Formal or informal fees, legally authorized or not, were frequently exacted as a prerequisite to doing such business. International competition for these lucrative marketing opportunities was intense. Many companies or their employees believed that paying informal “fees” was necessary for American firms to stay competitive. In some instances it was not clear whether the payments were illegal bribes, or a form of “customary law”—that is, an informal license fee that was an accepted part of doing business in the country. Just as formally prescribed license fees could be properly paid, so could these, the argument went—particularly in a country where there was little formal law or where the line between formal law and customary practice was blurry. Some of these informal payments might appear to be part of the understood “salary” for otherwise low-paid or unpaid officials, much like the theoretically optional but universally expected tip one gives to
waiters in a restaurant. There were other ambiguities as well: Was treating an official to dinner at a fine restaurant, or giving him or his family a small gift, improper? Would it be considered impolite not to do so? How large or lavish must a dinner or gift be to be improper? But not everything was in the gray area. Clearly, there were circumstances where everyone should realize that a payment because of its size, expected benefit, or recipient, was flat out wrong.

Thomas also knew that this was the immediate post-Watergate era. A candidate for U.S. President named Jimmy Carter was running on a platform calling for a “return to ethics,” and it was all but certain he would win. American politicians and corporate executives were facing public anger over secret political contributions and corporate bribery at home and abroad. The press, public, and government investigators were keen to discover more Watergate-like scandals. “Bananagate”, for example, revealed that the United Fruit Company, the world’s predominant supplier of bananas, was bribing officials in tropical countries where bananas were grown. United Fruit and other companies were found to have maintained unaccounted-for “slush” funds—likened to President Nixon’s famous slush fund that had financed the Watergate break-in. These corporate slush funds were used to bribe and make under-the-table political contributions to domestic and foreign politicians. Companies were getting into trouble with the IRS and the Securities and Exchange Commission (SEC), for not properly disclosing the payments or their true nature to regulators, for deducting them from income, and for failing to report or identify them (or the foreign and domestic civil and criminal liabilities they potentially entailed) to investors, as required by American law. Currency regulations and foreign laws were also being violated. If Upjohn were making payments to foreign officials, it would be viewed very much askance, to say the least.

Thomas called a meeting with Ray (“Ted”) Parfet, Jr., Upjohn’s Chairman of the Board, and others in the company. In a move to fend off possible legal trouble as well as a public relations nightmare, they launched an internal investigation into these questionable payments. It would cover the preceding several years through to the present. Thomas was in charge. He was assisted by an in-house staff of three or four lawyers, a secretary, and a couple of part-time paralegals. Because foreign payments could affect Upjohn’s federal securities and tax obligations, Thomas called upon the old-line patrician Washington D.C. law firm of Covington & Burling, specialists who over the years had assisted Upjohn’s legal department in federal matters. They could now help structure the investigation and help prepare oral and written questions to ask the foreign employees.

Thomas says these questions were structured not as much to preserve a possible future attorney-client privilege claim, as to get the facts
so that Upjohn and their subsidiaries could comply with domestic and foreign legal requirements.

The investigation included written questionnaires and letters sent to "All Foreign General and Area Managers". They were signed by Parfet. These questionnaires addressed "possibly illegal payments to foreign government officials" and solicited all information relating to any such payments. The letters informed the managers of Thomas' leading role in conducting the investigation and instructed that all responses should be sent directly to him. Because the inquiry was "highly confidential" the managers were told to restrict the information to as few Upjohn employees as necessary. By thus underlining the role of Thomas, his status as exclusive recipient of responses, the legal purposes of the investigation, the restricted confidential nature of the communications, and the employees' authorization by the corporation to speak to its counsel, Thomas and Covington enhanced the likelihood that the communications would be held privileged in any future challenge, as well as the likelihood employees would make significant disclosures.

Another part of the investigation included live interviews, mostly conducted by Thomas personally, of the foreign managers and thirty-three other employees. He traveled to approximately fifteen or twenty different developed and underdeveloped countries—places in Mexico, Central and South America, Europe, Asia, and Africa—to speak with employees who made or knew of payments. The trips, often arduous, lasted for weeks or even months. Once, in Egypt, Thomas was jailed overnight for not having the right medical inoculations. Coming from a company that manufactured them, he should have been more savvy. But he had overlooked the fact that, because he stopped to do interviews in Kenya before going on to Egypt, he needed more shots than if he had come straight from the U.S. He was told he was being taken to a Holiday Inn, but it turned out to be a jail. The only resemblance to a Holiday Inn was the guards' green blazers, Thomas says. He was more than a little frightened by their machine guns and the fact that an Ethiopian in his cell said he had been there for days for a similar infraction.

Thomas wanted to do most of the oral interviews personally. This certainly would increase the credibility of any future claim of attorney-client privilege, but he says that was not his only purpose. As in the written questionnaires, he wanted to assure the employees that they could be forthright with him, despite any self-damaging revelations, because the company would do all it could to protect them. His subsequent fight for confidentiality, all the way to the Supreme Court, suggests his promise was not empty.

Thomas's approach in the interviews emphasized that the company valued its employees, had always treated them fairly, regarded them in
many respects as family, and would be loyal. He told them he knew they had been trying to help the company, but that now the company needed their assistance in the investigation. He says today that for the most part, employees trusted the company. It had been founded near the turn of the century by an honorable pillar of the Kalamazoo community, Dr. William Erastus Upjohn, who had achieved wealth by inventing the friable pill, the key to modern pharmaceuticals. Dr. Upjohn, himself the son of a respected local doctor, went on to become one of the country’s great philanthropists. The Upjohn family remained involved in the ownership and management of the company, and continued and expanded the great philanthropic tradition of Dr. Upjohn. The company, Thomas says, always put a high value on integrity, and the employees knew that. So they cooperated. No doubt, “Gerry” Thomas’s extremely personable nature had a lot to do with it.

Many of the employees abroad told him that, if you were doing business in their country, you must pay somebody, especially in the social services and health field. They said often there was no real government to deal with. Doing business was prevented by somebody unless “palms were greased”. In many instances, he was told, it was hard to tell whether someone seeking payments and in a position to impede business was a governmental agent or a private party. Yet the legality of the payment under both foreign and U.S. law might hinge on that.

Some of the payments he was told about seemed relatively insignificant. In Mexico, for example, “government” drivers of company employees would get lost or delayed unless an amount, ranging from $2 to $20 was added to the charge under the table. In some countries, he was told, one had to be careful not to “tip” too much, or “you would look ignorant”. Frequently, the amount had to be big enough for the recipient to divide with others. Sometimes payments were “in kind”. For example, company employees may have had to see that someone in a key position got a telephone installed in their home.

But many of the stories he heard undoubtedly involved more significant payments, to people as low on the chain as purchasing agents, or as high as the head of a major governmental department, or even higher, in more questionable circumstances. Thomas does not feel free to talk about those. But he says he told the employees that the questionable payments must stop.

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3A friable pill is dissolvable, made of compacted powder. Previously, pills were unyieldingly hard, passing through the bodily system undissolved. Medicines had to be administered in liquid form. Dr. Upjohn’s marketing to doctors involved sending a hammer and two pills on a board—one friable, one not—and inviting the doctor to hammer them both. One would smash into powder, one would dent the board. The logo of the Upjohn Company for many years was a tiny depiction of this hammer-and-board experiment.
Some of the employees Thomas interviewed had felt that they shouldn’t bother their employer about the payments made to grease the wheels of business. They felt they were protecting Upjohn. If told, the company might have to halt the practice, costing it business and putting it at a competitive disadvantage. But many of these same employees seemed relieved that the company had now found out and wanted to know more.

There was a feeling on the part of some of those Thomas interviewed that “everybody does it—it is a part of the culture of this country—penalties against it are not enforced—you cannot practicably apply U.S. standards here.” It may also be supposed that at least some employees themselves benefited, as employees, from the increased sales, in terms of commissions, promotion, or the like. There was little suggestion, though, that any employees got direct kickbacks.

Upon their return to the United States, Thomas and his staff put together provisional materials about the payments based on his notes of the interviews and the answers to the written interrogatories. (It is the privileged status of these notes and answers that subsequently became the main subject of the Upjohn case. But we are getting ahead of the story.)

The SEC was investigating foreign payments generally, and may have gotten wind of the fact that Upjohn might be involved. Under SEC disclosure regulations, such payments, and potential legal liabilities connected with them, had to be clearly reported and identified in shareholder and other material. Few companies, including Upjohn, had done so, often being ignorant of the payments or their true nature. Some companies, however, were purposely covering up.

Thomas and Covington & Burling consulted and decided that early disclosure to the SEC of what Upjohn’s investigation had found would mitigate whatever penalties the SEC might ultimately impose on them for violation of these reporting requirements over the last several years. Stanley Sporkin—subsequently General Counsel of the Central Intelligence Agency and later a Federal District Judge in Washington, D.C—was the head of enforcement at the SEC at the time. He had instituted a policy encouraging early cooperation and disclosure by a company, of possible law infractions, even in advance of any SEC investigation. He would reward such self-reporting with a reduction or elimination of any penalties the company might eventually face. He felt this would supplement his own resources, greatly expanding the number of potential violations the SEC could feasibly and economically investigate. In addition to generally publicizing his policy, he went so far as to send letters to companies he suspected of violations, urging them to investigate and report on themselves. Sporkin, known as a “Washington wunderkind,”
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is credited with the first large-scale program encouraging such self-investigation and self-reporting. It has since been widely copied and expanded by other agencies. Today, Sporkin—an enthusiastic and tirelessly energetic person—has retired from the bench and is practicing in a Washington, D.C. law firm that, perhaps ironically, is handling the bankruptcy of Enron.

After substantial input by Covington & Burling and others in Upjohn, a summary report of some of Thomas’s findings, based on some of his notes and some of the interrogatory answers, was produced and submitted to the SEC on the appropriate official forms, with a copy to the IRS. It included only summaries of those transactions the lawyers representing Upjohn felt were relevant. The company’s disclosures appeared to be motivated in part by Sporkin’s promise of more lenient treatment for voluntary compliance and Thomas’s own conviction that early disclosure is best.

The SEC ultimately seemed satisfied with this material, after some supplemental disclosures.

The IRS, however, took a firmer stance and soon began investigating the tax consequences of the questionable payments. For example, were payments deducted from Upjohn’s income when they should not have been? As part of its inquiry, the IRS demanded production of “all files relevant to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates.” The IRS also specifically asked for the answers to the written questionnaires and all memos or notes of all Thomas’s interviews. At first the requests were made only in letters and discussions with Thomas and Covington & Burling. Upjohn declined to produce the answers and interview materials, claiming that the attorney-client privilege protected them, but the company offered to make people they had interviewed available for interrogation about the facts that they knew (as opposed to what they told attorneys about them), not a large concession since such information is not protected by the attorney-client privilege anyway.

The IRS then turned up the heat, issuing a “summons” for the refused information. A special statute and accompanying regulations permit this IRS summons procedure. Only a few agencies can issue such summonses. They are supposed to be issued only in connection with civil investigations (which, so far, this was) but are not invalidated by the fact that, as here, the possibility of using the information summoned in subsequent criminal proceedings has not been ruled out. Tax infractions can lead to either civil or criminal proceedings, depending upon how aggravated and intentional they prove to be.
Technically, an IRS summons is issued and signed by the special agent in charge of the investigation. In this case, the special agent was David Nowak, a tough, uncompromising, no-nonsense enforcer of fearsome reputation who was not satisfied with the voluntary disclosures that had been made by Upjohn. His summons was addressed to Thomas and Upjohn by name. They refused to comply with it. Under the statute, the special agent can then go to the Federal District Court to get the summons enforced with a court order that, if violated, results in punishment.

On August 31, 1977, Agent Nowak requested the United States District Court for the Western District of Michigan to enforce the summons and compel production of the documents. As customary, the caption of the case prominently bore Agent Nowak’s name as the party seeking enforcement, and the names of Gerard Thomas and Upjohn as the parties resisting enforcement. This is the case that ultimately went to the Supreme Court.

In the District Court in cases of this kind, a Magistrate—an assistant to the District Judge—normally hears the case first. The Magistrate listens to witnesses, examines documentary evidence, and considers points of law raised by both sides, and then makes a recommendation to the District Judge, supported by detailed reasoning, concerning whether or not to enforce the summons. The District Judge can adopt, reject, or modify the recommendation. Sometimes the Judge takes additional evidence, or sends the case back to the Magistrate to hear more evidence or make additional findings or clarifications. After the District Judge finally rules, a dissatisfied party can appeal to the Court of Appeals, and thereafter to the Supreme Court, if the Supreme Court thinks the issue is important enough.

Upjohn and Thomas were represented before the Magistrate by local Michigan counsel and Covington & Burling, since Upjohn’s in-house lawyers did not try cases. However, some in-house lawyers on Thomas’s staff who had participated in strategy sessions were at counsel table and on the papers. The lawyers argued attorney-client privilege, work-product, and some minor points of statutory and regulatory authority. The privilege against self-incrimination was not invoked because corporations and corporate officials have no such privilege covering corporate documents.

Agent Nowak explained in testimony before the Magistrate why he was not satisfied with only the disclosures Upjohn had voluntarily made to the IRS (basically the summaries of some of the transactions Upjohn’s investigation had discovered that had been given to the SEC). Like any tough law enforcer, Nowak did not want to take Upjohn’s word for which transactions and details were relevant and what their import was:
Q. [By Government Attorney]: Why do you feel that you should have these documents...rather than take the Upjohn Company's assurance as to what the relevance of those documents [is]?

A. [By Nowak]: Well, I feel that those files may contain evidence that would indicate that there is in fact a tax implication involved in payments which the company has alleged have no U.S. tax implication. These files may contain leads or other evidence that would have a relationship to those payments that the company does admit have a U.S. tax implication. I believe that it would—if it served no other purpose—it would help me corroborate the company's position that there is no tax impact, if that is what the facts would show upon my investigation of the files.

Thomas himself appeared as the other principal witness. He testified regarding the physical events of the investigation, including his trips and the sending of the questionnaires. He characterized his interview notes as follows:

My notes would contain what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask, or things that I needed to find elsewhere. They were more than just a verbatim report of my conversation with the—a report of my conversation in the interviews.

He reiterated that Upjohn would voluntarily make current employees available to the IRS for questioning except for those Upjohn deemed totally irrelevant. But Upjohn declined to absorb travel expenses the IRS might incur in such interviews. Moreover, some of the people involved were former employees that Upjohn could no longer produce. But none of this would necessarily prevent the IRS from using its own resources and auspices to obtain interviews. Interviewing witnesses would of course be more difficult and expensive than examining the documents, and the IRS could not be sure the witnesses would be as frank as they had been in Thomas' inquiry.

The Magistrate ruled in the government's favor, giving several grounds: the privilege applies only to communications of the control group, and anyway the limited disclosures to the SEC and IRS had the effect of waiving the privilege as to almost everything that had been communicated, whether that was intended or not.4 The District Judge

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4 The Magistrate also ruled that the work-product doctrine did not apply to material requested in an IRS summons, but if it did, it was overcome by the IRS's need for the information.
summarily adopted the Magistrate's opinion in all respects and ordered production of the allegedly protected material.

On Thomas's and Covington's recommendation, Upjohn appealed to the Court of Appeals for the Sixth Circuit, which rejected the lower court's finding of waiver, holding that waiver only occurred as to information actually given to the IRS and SEC—a very narrow waiver that sounds like it should have been good news for Upjohn.

But the Court of Appeals agreed with the lower court that the privilege did not apply "to the extent the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice"—virtually all the communications at issue here—because these communications, being made by people not in the corporate "control group," were not made as part of any attorney-client relationship. The Court of Appeals was worried that extending the privilege further, as some Courts of Appeals had done, would encourage upper-echelon management to ignore unpleasant facts and would create a broad "zone of silence." So, although Upjohn may not have waived its privilege, as to most of the material there was no privilege to be waived to begin with. This was a crushing loss.

Upjohn had been roundly defeated twice: in the trial court, and in the appeals court. A lesser man than Thomas might have caved. But he knew there was one last chance to preserve the confidentiality of the information he had collected, and he convinced the company to take it. That last chance was to persuade the United States Supreme Court, first, to take the case, and second, to address the merits of the case and reverse the Court of Appeals' decision.

Upjohn's strongest argument for taking the case was that a conflict of authority existed among lower courts on the question of who in a corporation may make privileged communications to the corporation's attorney. In advancing this argument, Upjohn stressed the legal profession's urgent need to know precisely the scope of the attorney-client privilege in the corporate context.

5 The Court of Appeals also agreed with the lower court that work-product protection did not apply. The decision did not directly address whether someone other than top executives in Upjohn might be considered in a control group of sorts—e.g., regional managers who might have authority to act on legal advice relating to their own regions. This possibility had been recognized by some decisions. Nor did the decision discuss whether investigating foreign payments was more a business function than a professional legal function, which would strip communications related thereto of attorney-client privilege. This possibility has been considered in other unrelated cases, particularly where the lawyer wears two hats, as Thomas did; that is, holds a legal position and a business position in the company. The investigation here had been constructed in a way that would maximize the claim that legal concerns were foremost.
Thomas and Covington were pleased but not really surprised when the Supreme Court "granted certiorari"—that is, agreed to hear the case—because it is well known that the Justices like to resolve important conflicts among the Federal Circuits. Resolving such conflicts is one of the most important functions of the Court and a primary reason the Court gives for reviewing lower court decisions.

UNDERCUTTING AN ANCIENT PRIVILEGE

To understand the Supreme Court's ultimate decision on the merits of the case, we first need to review a few basics about the privilege.

The attorney-client privilege provides that, with certain exceptions, confidential communications between an attorney and her client are not to be received as evidence in judicial and similar proceedings. Originally based on a notion of the lawyer's honor (a gentleman would not reveal the confidences of another), today the privilege is supported on other grounds. Combined with the roughly parallel ethical obligation of attorneys not to disclose client information in venues outside of those covered by privilege, the privilege is believed to encourage clients to truthfully reveal to the attorney everything the client knows that might bear on the legal advice sought by the client, regardless of whether the advice is sought to prepare for litigation or for other legal purposes. The lawyer's ability to provide sound legal advice is thought to provide a number of social benefits that more than compensate for any loss of evidence—not the least of which is that the lawyer may be able to avert illegal action by the client. It is also argued that courts and other public entities make better decisions if they are presented with fully informed legal arguments, and when clients tell their lawyers everything, sounder legal documents and transactions also result.

From at least the early 19th century on there have been scholars who have wanted to abolish or restrict the privilege, including the celebrated philosopher Jeremy Bentham, who, in *Rationale of Judicial Evidence* (1827), authored a particularly scathing critique. However, the privilege has withstood most assaults. Its roots are deep. They stretch back at least to the reign of Elizabeth I, and some scholars think the privilege may be traced as far back as the Roman Empire, where the notion that a lawyer could not be a witness against his client was an accepted principle.

Courts developed the attorney-client privilege for the individual client. The rise of the modern corporation has created enormous problems in identifying the client for purposes of the privilege. Unlike an individual person, a corporation is an artificial body lacking the human dignity and personal rights that the privilege seeks to protect. While attorneys generally rely on the individual client as the sole source of
information about their case, a corporation has many individual workers, from the factory worker to the door-to-door salesman to the chief executive, each with his or her own story to tell. As corporations grew in size and complexity during the 20th century, information and responsibility were dispersed across the globe. Thus questions arise in the corporate context that do not exist with individual clients. As a result, American courts have struggled, particularly since the 1960s, to define the scope of this privilege as it relates to corporations. While it is generally agreed that in most circumstances only those who run the corporation can claim (or waive) the privilege, there has been substantially less agreement on the range of protected communications. Before Upjohn, courts and commentators frequently asked, “Does the privilege protect communications between every employee and the corporation’s lawyers? Or does the privilege only protect communications between executives and corporate counsel? Or is the answer somewhere in-between?”

In a landmark 1962 utilities antitrust case known as Radiant Burners, Chief Judge Campbell of the United States District Court for the Northern District of Illinois ruled that letters from corporate officers and employees sent to the corporation’s lawyers were not privileged and must be produced during discovery. Judge Campbell reasoned that the attorney-client privilege was (1) historically and fundamentally personal in nature and (2) the lack of confidentiality inherent in a corporate hierarchy diminishes the force of the privilege. As a result, he ruled against extending the privilege to corporations. Prior to Judge Campbell’s decision, courts made no distinction between individuals and corporations in applying this privilege. All that was required for the privilege was that the information furnished to the attorney by any officer or employee must be given in confidence and without the presence of a third person.

The legal backlash to Judge Campbell’s decision was swift. The Court of Appeals for the Seventh Circuit reversed the ruling. Radiant Burners, Inc. v. American Gas Assn., 320 F.2d 314 (1963). Citing a number of early U.S. and English cases, this court, sitting en banc, held that a corporation is entitled to the same treatment as any other client. The court stressed the need to encourage full disclosure by clients to their lawyers, reasoning that such communication is essential for a lawyer to be effective as counsel. Although Judge Campbell’s decision was overturned and most courts and legislatures showed little inclination to embrace his decision, his opinion struck a cord with many commentators and sparked a fierce legal debate.

Challenged by Judge Campbell’s reasoning, courts were forced to fall back on a utilitarian rationale for the privilege, as articulated by the Seventh Circuit in Radiant Burners, to support their extension of the
privilege to corporations. But Judge Campbell had alerted them that there are serious arguments against a corporate privilege. The response of some was a compromise of sorts: the control group test, first developed in *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), only months after Judge Campbell’s decision. As put forth in *City of Philadelphia*, the control group test enabled courts to extend the privilege to corporations, but in a sharply limited form. Under this test, a communication is protected if the person speaking or writing 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.” This control group test was quickly accepted around the country. In fact, the drafters of the Federal Rules of Evidence recommended the control group test in their original proposal for the Rules.

The development of the control group test was driven by several concerns. First, extending the privilege to statements made by all witnesses seemed contrary to the Supreme Court’s decision in *Hickman v. Taylor*, 329 U.S. 495 (1947). Under *Hickman*, an attorney’s mental impressions and free exchanges between clients and lawyers are protected but the knowledge of witnesses to disputed events is not protected, and they must provide all relevant information. Given the structure of the modern corporation, many employees with relevant or incriminating information are not corporate executives and thus are arguably more like witnesses than clients. The control group test was intended to limit the privilege to only those who were most like “clients,” i.e., those who could act on the attorney’s advice—the senior executives—rather than to protect all workers who knew damaging information (arguably more like “witnesses”).

A second concern that the control group test took into account was a corporation’s ability to manipulate an expansive attorney-client privilege so as to protect embarrassing or incriminating documents. Unlike an individual, a corporate client could structure its procedures so as to privilege much of its documentation relating to routine transactions by addressing it to counsel. Thus, the control group test was intended to remove routine intra-corporate communications from the privilege’s protection. Commentators noted, however, that there were other features of the attorney-client privilege that could partially mitigate this problem. For example, communications and documents, to be privileged, must have been created in connection with the rendition of legal services rather than for business or criminal purposes. Nevertheless, a broad attorney-client privilege for corporations is of legitimate concern, in that it can deprive courts of vast amounts of information.

Third, the control group test took into account the need for a bright-line rule. Uncertainty about the exact limits of the privilege would erode
full communication between clients and their lawyers because of fears that the conversation would eventually be disclosed. By limiting the privilege to the small group of senior managers who control decision-making, the control group test was intended to allow corporations to identify easily those whose communications were protected by the privilege. Some commentators noted, however, that uncertainty about who is within the control group was inevitable. A broader test embracing all employees might be more certain. Leaving the matter open without any test is what produced the uncertainty.

The control group test was greeted with widespread acceptance and was applied in all federal courts until 1970 when the Court of Appeals for the Seventh Circuit challenged this approach in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487. The Seventh Circuit, apparently again indulging its inclination in favor of a corporate attorney-client privilege that it had manifested in Radiant Burners, adopted a broader test for determining the scope of the corporate attorney-client privilege. It focused on the subject matter of the employee’s communications rather than on the position of the employee who was communicating the information. Under the subject matter test, an employee’s communication with the corporation’s lawyer is privileged when made at the direction of a superior and when the subject matter upon which the attorney’s advice is sought concerns the worker’s employment.

The reasoning behind this broader interpretation was clear. Opponents of the control group test argued that only by extending the privilege to low-level employees could attorneys adequately advise their corporate clients. To restrict the privilege only to communications by top-level executives was to ignore the realities of corporate life because executives often lack the information needed by attorneys to formulate sound legal advice.

The subject matter test’s emphasis on ensuring effective legal advice won many adherents, and when the Supreme Court granted certiorari in Harper & Row it was thought that the choice between the control group and subject matter tests would soon be made. However, the Court, being shy one member, divided four to four on the issue, resulting in a summary affirmation without opinion, of the Seventh Circuit’s decision. Decker v. Harper & Row Publishers, Inc., 400 U.S. 955 (1971), rehearing denied 401 U.S. 950 (1971). In law, a split decision furnishes no guiding precedent. It did, however, lead the drafters of the Federal Rules of Evidence to drop their proposal to add the control group test to the Rules, leaving the matter open. Congress thereafter decided not to include specific rules of privilege in the Federal Rules, with the result that further elucidation of the scope of the federal corporate attorney-client privilege was relegated (along with federal privileges generally) to case-by-case development by the courts.
Federal courts in the 1970s usually adopted either the control group or the subject matter test, though some courts applied variations or even a synthesis of the two. The best-known elaboration of the subject matter test was *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (1978), where the Court of Appeals for the Eighth Circuit required that for a lower level corporate employee’s communications to be privileged, they must be made at the direction of the employee’s superiors and must cover information within the employee’s duties. In addition, the court required that the communication be made for the purpose of getting legal services for the corporation and be kept confidential within the corporation. The court reasoned that these requirements would limit the privilege to legitimate attorney-client communications as opposed to regular business dealings, thus taking care of some of the concerns that had led courts to adopt the control-group approach.

This brings us to the Court of Appeals for the Sixth Circuit’s decision in *Upjohn*, which was a classic application of the control group test. The court spoke about the difficulties of extending the attorney-client privilege to Upjohn’s lower-echelon employees because the privilege’s protections were based on the “intimate relationship” between an individual and his lawyer. The court also questioned the effectiveness of the subject matter test, voicing concern that corporate counsel would become the dumping ground for incriminating facts and that corporate executives would be able to shield themselves from information about possibly illegal transactions. In the specific context of *Upjohn*, the court also noted the severe burden that the questioning of large numbers of foreign citizens would place on the IRS. Concluding that the subject matter test would create the potential for a broad “zone of silence,” the court applied the narrower control group test and held that the bulk of the questionnaire answers, letters, and interviews in *Upjohn* did not meet it.

The court’s “shielding” or “dumping” point deserves a closer look, because it is a mainstay in cases that rejected the subject matter test. The worry is that if communications with field employees are privileged, corporations will be encouraged to structure things in such a way that illegal conduct could be planned or perpetrated by lower echelon employees and discussed by them with corporate lawyers—who might aid the effort or at least keep quiet about it. The information would be funneled to the lawyer and stop there, or be routed through counsel to other lower level employees needed for the scheme, without informing, and hence shielding, upper management. People outside the business would have trouble discovering it. Nor could they discover whether the lawyer told upper management about it. Senior executives could thereby insulate themselves from the wrongdoing and would have “plausible deniability”.
They could turn a blind eye with impunity. They would have little incentive to take corrective measures.

But, it may be asked, wouldn’t the crime-fraud exception to attorney-client privilege curtail privilege in this nefarious scenario? Wouldn’t a requirement that a lower-level employee must be authorized by someone in authority, to communicate with the lawyer tend to mitigate the problem of management deniability? Isn’t such a requirement an integral part of the subject-matter test? For example, in *Upjohn* itself, the Chairman of the Board authorized Thomas’s inquiry and directed the employees to communicate with Thomas on the matter. Surely Thomas would have to report back to executives on the results. Thus, it is hard to see how the executives could have shielded themselves. Nevertheless, there is something to the court’s concern. How major a problem it is, and how determinative it should be, was part of the debate that was the backdrop for the next stage in *Upjohn*: the Supreme Court decision.

**THE SUPREME COURT DECISION IN *UPJOHN***

Thomas sat in the audience during the argument in the Supreme Court. He liked it that no one in the audience knew who he was or that he was the central character behind the arguments they were witnessing. What he and the audience saw were two of the nation’s top Supreme Court advocates squaring off against each other. Both were well known to the Justices as fine lawyers, having appeared before them many times. The two therefore had a certain caché with the Court.

Arguing for the government was Lawrence Wallace, a senior career attorney with the U.S. Solicitor General’s Office. That office, known as “the Government’s Law Firm,” handles virtually all the federal government’s work before the Supreme Court, and many other important government appellate cases. The Solicitor General has been called the “Tenth Justice” because of the extra credibility that office has in the eyes of the Court. Wallace had worked, ironically, for Covington & Burling immediately following law school. A few years later, he joined the Solicitor General’s Office, intending to stay two or three years, but wound up staying 35 years, as deputy to ten Solicitors General, through the administrations of eight presidents beginning with President Lyndon Johnson. He had a steady diet of Supreme Court cases. At six feet tall and 200 pounds, with a machine-gun-like, slightly pedantic, extraordinarily confident delivery, Wallace was truly formidable.

On Upjohn’s and Thomas’s side was Covington & Burling’s Dan Gribbon. Slim, wirey, distinguished, of moderate height, with sparse hair, Gribbon is described by Wallace as “having a style of argument that was at once friendly, warm, personable, and supremely competent”, and by Thomas as “physically looking exactly the way a Washington
lawyer and partner at Covington & Burling should look”. Thomas was struck by the fact that Gribbon, during his oral argument, seemed to welcome—indeed, enthusiastically embraced—the toughest, potentially most damaging and difficult questions from the Justices—especially ones that revealed the Achilles heels of his case. Thomas would cringe at such a question, thinking all is lost. “I am very glad you asked me that question,” Gribbon would say, and genuinely seem to mean it. He would go on to painstakingly and thoroughly answer the question. He knew that any question represents a problem in the mind of the Justice who asks it, and could well be a deciding factor. Thus he viewed questions as golden opportunities to get inside the minds of the Justices and resolve their problems favorably. His advance preparation, including mooting before other lawyers in the firm, always seemed to have anticipated the question and supplied him with the best answer possible. Thomas reports that Gribbon’s performance was stunning. Thomas knew that Gribbon’s daughter, a law student, was in the audience and must have felt very proud of her dad. Today she is a federal judge.

The Supreme Court reversed the Court of Appeals’ decision, holding that the “control group” test applied by the Court of Appeals was too narrow and overlooked the needs of the lawyer to gather information from whomever within the corporation has the information necessary to enable the lawyer to render fully-informed and therefore sound legal advice—which sound advice serves the public interest in a number of ways. Justice (later Chief Justice) Rehnquist who wrote the opinion for the Court mentioned the need for predictability and certainty as an important reason for discarding the control group test. Nevertheless, to the disappointment of many lawyers and scholars the decision in its concluding passages declined to (in its own words) “lay down a broad rule or series of rules to govern all conceivable future questions in this area” and instead said courts should determine the issue on a case-by-case basis.

Although the Upjohn case presented legal questions almost identical to those that had divided the Court in Harper & Row a decade earlier, this time the Supreme Court had little trouble with the issue, unanimously rejecting the control group test as applied by the Court of Appeals below. Wallace (the advocate from the Solicitor General’s Office) reports that he did not think the case was that open-and-shut, and was surprised not to garner even a single vote among the Justices.

In the first part of the opinion, Justice Rehnquist established that the purpose of the attorney-client privilege was to encourage complete and honest communication between attorneys and their clients. He cited cases dating as far back as the 1880s, concluding that this purpose applied equally well regardless of whether the client was an individual or a corporation.
He then turned his attention to flaws in the control group test. First, he criticized the control group test for failing to further the original aims of the attorney-client privilege. The control group test’s emphasis on the employee’s ability to act on legal advice from counsel did not provide enough protection to encourage a sufficient flow of important information to the attorney. Rather, it inhibited it by restricting the privilege to a small group within the corporation. The Court reasoned that without vital facts possessed by non-control group employees, the corporation would be left without effective legal counsel. Second, the Supreme Court faulted the control group test’s “Hobson’s choice”: the lawyer could either interview non-control group employees without the protection of the attorney-client privilege or refrain from interviewing them, leaving the company with only a partial understanding of the facts of the case. Even if a lawyer could formulate a legal opinion without talking to low-level employees, “the control group test made it more difficult to convey full and frank legal advice” to the lower level employees who would put the policy into effect. Third, the decision criticized the control group test for its unpredictability, pointing out that contrary decisions in cases applying the control group test showed the test’s inherent arbitrariness concerning who is in the control group. The Court reasoned that some degree of certainty is essential to encourage the free flow of information and that without this knowledge the privilege would be ineffectual.

The final part of the Court’s analysis applied these principles to the facts in the case. The Court restated what it considered to be the key facts: the communications were made by Upjohn employees to counsel at the direction of corporate superiors; Upjohn needed the communications as a basis for legal advice; the employees were sufficiently aware that they were being questioned so that the corporation could receive legal advice; the communications concerned matters within the scope of the employees’ duties; and Upjohn kept the communications highly confidential. The Court concluded that protecting the communications was consistent with the underlying purposes of the attorney-client privilege.

On the other side of the scales, Rehnquist gave relatively short shrift to the notion that a broad privilege hinders the discovery of truth by making evidence unavailable. He noted that all it renders unavailable is the communications themselves, which would probably not be made if privilege did not cover them. So there would be little net loss. This is because the privilege does not prevent discovery of the underlying facts, even though they may have been recounted in the communications. The IRS could still summon or subpoena the employees themselves to get the facts; it could just not learn what they said to the lawyer about the facts. While independently questioning the witnesses might be relatively difficult or expensive, it is no more so than if the communications had never
been made. Indeed, Rehnquist seemed hostile to the notion that difficulty and expense to the government are valid considerations at all when discussing the privilege.

Some commentators have since wondered whether Rehnquist was too facile in this whole argument that extending the privilege entails little loss to discovering truth. The fact is, communications sometimes are—and perhaps were in this case—made for other reasons than privilege. And questioning witnesses independently is not entirely satisfactory. They may not be as truthful with investigators as with the lawyer, and it might be useful both substantively and for impeachment purposes for the government to have the statements made to the lawyer.

At any rate, based on his reasoning, Justice Rehnquist held, for the Court, that the privilege extended to communications of the lower echelon employees here. But he strictly limited the decision to *Upjohn’s* facts. This was meant to prevent lower courts from thinking that the Court implicitly embraced the subject matter test as elaborated in *Diversified Industries*. The Court also did not make any attempt to set forth rules or guidelines for determining the scope of the corporate attorney-client privilege. This was striking given the growing acceptance of the subject matter test in the federal courts and the fact that Chief Justice Burger, behind the scenes, was pushing for the Court to adopt a modified subject matter test as indicated in his concurring opinion. The opinion of the Court, however, was confined to a narrow holding that the control group test did not govern the development of the law of the attorney-corporate client privilege, and left future development to the lower courts.6

Some have faulted Rehnquist’s opinion on the grounds that, in failing to adopt a concrete test, and in mentioning a number of pivotal features of the communication that might not always be ascertainable at the time of the communication, Rehnquist promotes the very uncertainty he decried—uncertainty of application of the privilege, that will discourage full and frank communication. But others felt these same things constitute strengths: The pivotal features that the communications should have if they are to be privileged, gives clear indication to communicators of what will likely be and not be privileged. Refusing to adopt a definitive test leaves desirable flexibility to determine, in an extraordinary case, that the privilege is being used to provide too great a zone of silence or for other improper purposes.

6 The decision also held that work-product protection applies to IRS summonses, and that the lower court had applied the wrong standard for overcoming such protection. The Supreme Court said mental impressions of the attorney may never be discoverable or may be discoverable only on a significantly heightened standard of need. The Court felt that it need not be more specific because its ruling on attorney-client privilege was largely dispositive of the case.
SUBSEQUENT EVENTS AND EFFECTS OF UPJOHN.

Subsequent Developments in the Case.

Rehnquist's decision technically remanded the case to the lower courts for proceedings consistent with the decision. No one remembers precisely what happened on remand, since they all felt the ball game was over after the Supreme Court decision. There are no records of any subsequent judicial proceedings in any lower court concerning the case. To the best anyone can recollect, the IRS saw the handwriting on the wall after the *Upjohn* decision, and got together with Upjohn to settle the case. The available evidence suggests that, since the Supreme Court's decision effectively privileged most of the communications at issue, the settlement was based on the portions of material voluntarily disclosed by Upjohn for which no privilege had been claimed, and on IRS interviews with some witnesses on their personal knowledge that was not covered by privilege. The IRS and Upjohn agreed that a relatively modest payment would be made by the company with essentially no adverse impact on the company or any of its employees. They agreed, as Upjohn had done with the SEC, that policies would be adopted by Upjohn (which had already substantially been done) to prevent similar problems in the future. Henceforth foreign payments would have to meet certain legal parameters and be handled in a certain way on tax returns. Thomas recalls that much of this mirrored what the IRS by this time had worked out with other companies regarding foreign payments.

Subsequent Developments in the Law of Corporate Attorney-Client Privilege.

Despite Rehnquist's care in *Upjohn* only to negate a test centering on the control group and not to set forth any alternative test, lower federal courts (and those state courts that choose to follow *Upjohn*) have tended nevertheless to read the opinion as establishing something very akin to the *Diversified Industries* version of the subject matter test for all cases in which a claim of federal corporate attorney-client privilege is raised. The Supreme Court should not be surprised. Rehnquist's enumeration in *Upjohn*, of the significant features of the privileged Upjohn communications—corresponding almost identically to the features deemed controlling under the subject matter test in *Diversified Industries*—could have been expected to be elevated to the status of a "test" by lower courts, who are, as a rule, eager for guidance, generally timid,

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7 A dwindling number of state courts still apply a control group test. The Uniform Rules of Evidence, recommended to the states by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association, incorporated the subject-matter test into its attorney-client privilege provision, after the *Upjohn* decision by means of an amendment, upon which I was advisor.
and anxious to stay well within any parameters set by the Supreme Court.

Effect of Upjohn on Corporations and Corporate Law Practice.

Corporate lawyers generally agree that after Upjohn there was more confiding in corporate attorneys (both in-house and outside counsel), which enhanced their ability to obtain information and render good legal advice, sometimes enabling them to spot and stop illegal conduct more easily, as Justice Rehnquist hoped. Indeed, the Thomas saga proves this can and does happen. The degree to which it does is an open question.

Although Upjohn remains intact today, some lawyers believe that recent and accelerating trends among legislators, regulators, other enforcement authorities, and corporations themselves, threaten to undermine the decision’s intended effectiveness in encouraging the flow of information to corporate lawyers. These trends—many of them expressly designed to penalize or circumvent claims of attorney-client privilege—became intensified after Upjohn and seem at least in part to be a reaction to the broad scope Upjohn gave the privilege. Enforcement agencies and some politicians felt that something must be done about the way the privilege impedes the discovery and investigation of corporate wrongdoing—particularly after the 2001 Enron scandal fueled voters’ thirst for punishing corporate miscreants. The public believed—with some justification—that lawyers had contributed to the problem or at least had kept quiet out of allegiance to their clients. Regarding as difficult any direct attempts to overturn Upjohn or the attorney-client privilege generally, Congress, regulators, and law enforcement agencies instead began increasingly to adopt measures to get around them. These measures and some corporate trends exacerbating them fall into four categories:

1. The Sarbanes–Oxley Act. In 2002, in direct response to Enron and associated debacles, Congress enacted the Sarbanes–Oxley Act, named after the primary legislators who sponsored it. Among other provisions, the Act empowers the SEC to adopt rules regulating lawyers who handle SEC matters for publicly traded companies or companies registered or filing with the SEC. This covers most major American companies and any lawyers who advise on or handle matters that might potentially involve the SEC—a wide range of matters indeed, because of broad SEC disclosure requirements. Almost any matter of substance a lawyer might handle for such a company probably has potential disclosure implications, and thus subjects the lawyer to the SEC regulations.

The SEC has now adopted regulations pursuant to this statutory authorization. Some of these permit or require a lawyer to do certain things if she becomes aware of credible evidence of a material past, future, or ongoing illegal act by or within the corporation that would
constitute fraud or a securities, fiduciary, or similar violation. She *must* report it “up the ladder” within the corporation—that is, to the Chief Legal Officer or even the Chief Executive Officer or the Board of Directors⁸ if necessary—and request a response. This mandatory “up the ladder” disclosure is designed to overcome the problem of isolating top executives from wrongdoing that decisions adopting the “control group” view thought was endemic to the broader “subject matter” view ultimately embraced by *Upjohn*. The “up the ladder” reporting would not violate the privilege or customary legal ethics notions of confidentiality, because it is reporting within the client, not to the outside, but it could worry employees speaking to lawyers.

If the response from the top of the ladder is unsatisfactory, the lawyer *is allowed if she wishes* to report the wrongdoing and the unsatisfactory response to the SEC. This provision is intended to relieve her of customary malpractice liability for breaching confidentiality. Such reporting to someone *outside the client* would seem to violate both the privilege and the confidentiality requirements contained in the ethics rules of many jurisdictions—at least if the wrongdoing is past rather than current, continuing, or proposed, which might be within the crime-fraud exception to the privilege. Since lawyers are licensed to practice in a particular jurisdiction, that jurisdiction’s local ethics rules would normally govern counsel. But the new SEC regulations supersede state ethics rules, at least until there is a successful challenge to such superseding on constitutional grounds. Some state ethics rules, rules recommended by the American Bar Association, and the Restatement’s Law of Lawyers, have also recently been amended to allow, or even sometimes require, reporting by lawyers to outside persons or entities, of serious wrongdoing by clients. Some of these provisions apply only where the wrongdoing may involve death or bodily injury, but some go beyond this to substantial financial or property harm, or, specifically, business fraud or securities violations (in the wake of Enron).

How do all these new disclosure provisions—and particularly those under Sarbanes–Oxley—affect the premise of *Upjohn* that employees will frankly communicate with the corporate attorney if they are covered by the corporation’s privilege? Would the employees talking to Gerry Thomas have been less forthcoming if they thought Thomas might reveal what they said to corporate superiors or to law enforcers under these new provisions?

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⁸ The trend in the post-Enron era, sparked by legal reforms and by heightened public and business sensitivities, has been for boards of directors to be comprised of more people who are independent of management, and who are much less protective of employees implicated in possible wrongdoing, than was the case in the *Upjohn* era. They are more prone to terminate such employees or turn them in. This is one of the purposes of the “up the ladder” reporting requirement: to produce “transparency” and “house cleaning”, as it is called.
provisions? \(^9\) Unlikely, since they would have expected top management to learn of their reports, and they spoke in an environment where it was unclear whether they, as lower-echelon employees, were covered by the privilege at all. But there were special circumstances of trust between Thomas and the employees, and most of them did not think they were doing anything wrong. \(^10\) It seems likely that at least in some circumstances today, some employees might be more hesitant to disclose self-damaging material they thought might expose them to civil or criminal liability, or to embarrassment or job reprisals, if they thought material could be revealed under these new provisions. \(^11\) The objective of *Upjohn*, to encourage disclosure by employees, to the corporation’s lawyer, is undermined to that extent.

(2) *The Spread and Enhancement of Sporkin’s Voluntary Co-operation Policy*. The program of leniency started by SEC enforcement head Stanley Sporkin, that treats more leniently those who come forward and cooperate with an investigation, is now increasingly found in a wide array of regulatory and law enforcement agencies and the Department of Justice. In addition, the U.S. Sentencing Guidelines for crimes, including corporate crimes, now give credit that lowers the sentence for co-operation with the prosecuting authority.

Under most of these programs, there is an accelerating tendency today, which did not exist then, to treat those persons and entities who will not waive their attorney-client privilege or work-product protection, as failing to co-operate and therefore disentitled to leniency. \(^12\) Many lawyers believe this is a “gun to the head” requiring waiver. The greater the potential penalty, the greater the incentive to waive and get leniency. With today’s corporations, the penalties can be huge. What makes things worse for the waiving party, is the fact that a waiver as to one agency waives as to the whole world, regarding the same (and sometimes related) material, unless a court subscribes to the “selective waiver” doctrine, which few do. \(^13\)

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\(^9\) Thomas would probably have had an ethical duty to warn them of this, but they might have been aware anyway.

\(^10\) They might have thought twice about revealing to a post-Enron board of directors, though. See note 8, *supra*.

\(^11\) Since under the majority view in courts today, there is no notion of “selective waiver” of privilege, it may well be that the disclosure, once made to the SEC, could not be confined to the SEC. This would make the risks of talking even greater for the employees. A lawyer probably should warn of this too. With all these warnings, a frank discussion is exceedingly unlikely.

\(^12\) The Justice Department’s policy regarding waiver expressly emphasizes the desirability of waiver of a business entity’s attorney-client and work-product protections, clearly evidencing an impatience with the *Upjohn* decision.

\(^13\) The failure of most courts to recognize selective waiver, limiting the waiver to the agency receiving the disclosure, can, on occasion, reduce the incentive to waive by increasing the prospect of civil liability asserted by private plaintiffs.
The Upjohn employees knew when they were speaking with Thomas that he was not their personal attorney, and therefore the privilege was not theirs, but rather the corporation's, to raise or waive.\textsuperscript{14} Again we may ask, would they have confided so readily to Thomas if they thought there might later be these incentives on the part of the company itself to broadly waive its privilege? Maybe they would have because of the special circumstances of trust and their belief they were doing nothing wrong. But today it seems likely that some corporate employees would be reluctant to confide potentially self-damaging or self-incriminating information, in view of the waiver incentives operating on the company.\textsuperscript{15} Would employees necessarily know about these incentives when confiding in a corporate counsel? In view of the frequency of waiver today, probably yes. Anyway, a lawyer in today's regulatory environment probably would have an ethical duty to alert them to the potential for disclosure, especially if they risked bearing personally civil or criminal liability. To this extent, too, then, \textit{Upjohn} is weakened.\textsuperscript{16}

(3) \textit{The Changing Allegiances of Corporations Today}. Thomas got the information he needed in considerable measure because the employees knew and trusted the company and its management and felt they would be protected if push came to shove, as in fact happened. But a look

\textsuperscript{14} Thomas on the \textit{Upjohn} facts probably could not ethically have represented both, even if he wanted to because of the potential for severe (and probably unwaivable) conflicts of interest.

\textsuperscript{15} Additional waiver incentives for the corporation arise because, in this post-Enron era, independent auditors and audit committees, having been burned by liability for Enron-type derelictions, will often refuse to certify the accuracy of a company's financials, as required for the company to do business, unless the company allows full examination by the auditors even of attorney-client privileged or work-product protected material which, as indicated herein, usually means there is a waiver of privilege or protection regarding anyone who thereafter seeks this or related information. Worse still, from the corporation's and employees' standpoint, merely furnishing a report of an internal investigation to auditors or government agencies, has been held by some courts today to waive attorney-client and work-product protections covering underlying materials and conversations, especially if the furnishing was to obtain a certification or leniency. In part, this represents a post-Enron extension of the older principle that a party can use a privilege as a "shield but not a sword"—that is, if one affirmatively uses material, one cannot prevent the exploration of its bone-fides by asserting privilege.

Additional far-reaching waiver incentives to the corporation, are presented by the fact that, post-Enron, the stock exchanges (NYSE and NASDAQ) conduct vigorous investigations and have adopted policies requiring co-operation and (sometimes) waiver similar to those described here for government agencies.

\textsuperscript{16} Further deterring employees from making statements to the corporate lawyer, is the fact that there have been cases in which the Justice Department has regarded statements made by employees to corporate lawyers in a corporation's own internal investigation as obstruction-of-justice, which is a crime if the Department feels the statements are purposefully inaccurate. The theory is that corporate internal investigations now play a role in law enforcement under the new cooperation policies.
at the business section of newspapers today reveals a much higher rate of corporate turnover. Companies are bought, sold, merged, or taken over, and new management comes in that doesn’t have the same stake in defending against wrongdoing that occurred under a previous management or predecessor corporation. Sometimes the public image and legal posture of the new management or entity is better served by taking their lumps and confessing that the old crowd were miscreants, but “we are different”. In fact, recently, many years after Upjohn, the Upjohn Company itself was taken over by the Pharmacia Company, which in turn was taken over by the Pfizer Company, its current incarnation. Dr. William Erastus Upjohn’s family company no longer exists. Corporations also go bankrupt more frequently these days, and are taken over and managed by a trustee in bankruptcy who may have no special allegiance to the old employees.

Because the privilege belongs to the company and not to the employee who confides information, the privilege can be waived by the company, by a successor corporation or by a trustee in bankruptcy. This means that even a company’s CEO cannot count on his confidential communications to the corporation’s attorneys remaining forever private. Given an environment of changing companies and management, where personal trust and loyalty are muted, no employee can be sure that he will not be “hung out to dry” by existing or new management. Employees at all levels may therefore be reluctant to talk candidly to corporate attorneys.

(4) Expansion of the Privilege’s Crime-Fraud Exception and Related Doctrines. If the crime-fraud exception to the attorney-client privilege is determined by a court to apply, a privileged conversation can be stripped of its privilege. There is a marked modern tendency to expand the crime-fraud exception. For example, traditionally the crime-fraud exception applied only where legal advice was sought or obtained by the client for the purpose of committing or facilitating an on-going or future crime or fraud, as opposed to seeking legal advice concerning past crimes. The latter kind of advice, e.g., advice directed at preparing defenses for a crime one has already committed, has been considered squarely within the professional functioning of a lawyer and is privileged.

17 There is something sadly nostalgic about the passing of the company (Upjohn) that was responsible for such important drugs (whose names became household words) as Cheracol, Kaopectate, Methylprednisalone (the most commonly used low dose steroid for inflammation), and Orinase (the most widely used diabetes drug and the first capable of oral administration).

18 Or the existing or new board of directors. See note 8.

19 Some lawyers report a corresponding upsurge in instances where regulators and law enforcement authorities are formally charging lawyers with participation in their client’s crime.
There is, however, an increasing tendency today for regulators, enforcement authorities, and courts, to blur the line between these temporal categories. They take the position that legal efforts related to past crimes are often really efforts to keep past crimes from coming to light, and therefore they amount to a conspiracy to cover-up or further deceive. This makes them a continuing crime, within the crime-fraud exception. The tendency is particularly marked in the corporate context, where there is an obligation to report to the SEC and investors any events (even past crimes and frauds) that may result in liabilities of the company. The failure to report is a continuing crime or fraud for as long as the initial wrongdoing is not reported or is reported incorrectly or insufficiently. The problem is escalated by the fact that in today’s highly regulated business environment, things that did not seem to be crimes at the time of a communication may be regarded as crimes later by a court.

To the extent there are increased chances that the crime-fraud exception might apply, employees confiding to the corporate attorney will think twice about what they reveal, because a court may subsequently find that their revelations are not privileged, even if the company tries to protect the employee and asserts the privilege.

Further fueling the modern trends that increase the risk of the crime-fraud exception applying, is a progressive erosion of the quantum of proof required to show that the exception applies. Few courts require that it be proved by even a preponderance of evidence. Most require only a “prima facie case”—often defined in this area as a showing that would justify a reasonable person in thinking that a crime or fraud may be involved, without receiving counter-evidence or hearing, cross examination or impeachment of the witnesses who make out the prima facie case or any other appraisal of their credibility. Furthermore, the Supreme Court has held that a judge may hear or inspect in camera the allegedly privileged communication, on a lesser showing than needed to establish the crime-fraud exception, in order to determine the applicability of the crime-fraud exception, and may consider the contents of the communication in deciding whether the crime-fraud exception applies to the communication. The courts, while applying fairly constant word formulas describing these various burdens of proof, have been requiring less and less to satisfy them.

If this is not enough to erode the privilege, some courts are expanding the crime-fraud exception to include more wrongdoing than just crimes and fraud—for example, other torts. There is also a tendency for courts, when they find a crime or fraud, to broadly strip all communications between the client and lawyer of the privilege, even those communications that had nothing to do with the crime or fraud.
In view of these enlargements of the crime-fraud exception, employees communicating with corporate counsel today cannot have the confidence they once had that attorney-client privilege will be sacrosanct.\(^{20}\) It is likely that some of their communications will be chilled.

Whether these four numbered "inroads" on the encouragement to communicate envisioned in *Upjohn* prove to be well-advised or ill-advised, most of them seem to stem from a somewhat more jaundiced view of the benefits of lawyer-client confidentiality than *Upjohn* expressed. While *Upjohn* did recognize that there must be qualifications on an unadulterated policy of confidentiality, and clearly allowed for the development of such qualifications, nevertheless, to most lawyers, *Upjohn* is a soaring endorsement of the lawyer-client privilege and the work lawyers do.

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In listening to Thomas talk about *Upjohn* today, you get a strong sense that he is most proud of the fact that he kept the faith with the employees. He is also very pleased that in the process he secured a decision that vindicates the role he always tried to play as corporate counsel, and that he believes most corporate counsel play—the role of helping the modern corporation do its work, which he believes generally is in the public interest. He believes corporate lawyers need to get information from employees at every level, in order to perform their role effectively. He is of the conviction that most corporations—by no means all—are good citizens and try to comply with the complex laws and regulations to which they are subject, and that fully informed corporate counsel play an indispensable part in that compliance. Next to his family, and perhaps his war experiences, you get the feeling that he regards *Upjohn* as a defining event in his life and the capstone of his career. He clearly enjoyed almost every minute of it, except perhaps when he was jailed in Egypt.

\(^{20}\)There are also other attorney-client privilege doctrines that are being used to defeat a company's effort to assert attorney-client privilege to protect their employees communications. These include penetrating the privilege by dissident shareholders in certain instances; and the doctrine that the function the attorney was performing for the company when he garnered the communication was not a professional legal function but rather a business function—i.e., one that was predominantly motivated by business rather than legal concerns—and therefore it could have been done by someone who is not a lawyer. The risk of this last doctrine being used is highest when the attorney wears several "hats" in the company—that is, he is not only the company's lawyer, but is also on the board of or is an executive officer (other than legal officer) of the company, as Thomas was.