PRESERVING THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE ENVIRONMENT

I. INTRODUCTION

The attorney-client privilege serves to protect confidential communications made between an attorney and a client. The application of the attorney-client privilege to corporations as clients is more complex than its application to individual clients. This Comment examines the scope of the corporate attorney-client privilege and the development of the various tests that are currently used to determine its application. Part II explores the justifications for the privilege and the special problems that arise in the corporate context. Part III discusses the two primary tests of the corporate attorney-client privilege. After examining the basic factors considered by courts in administering the corporate attorney-client privilege, Parts IV and V highlight two of the principal cases addressing the attorney-client privilege in the corporate context. Part VI discusses Alabama courts' application of the corporate attorney-client privilege. Finally, Part VII provides recommendations for preserving the privileged classification of confidential communications in the corporate environment.

II. THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

A. The Attorney-Client Privilege Generally

No federal privileges are expressly codified in any form. Rather, they are allowed to develop at common law.[1] Professor Wigmore com-

1. Jaffee v. Redmond, 518 U.S. 1, 8-9 (1996). The Federal Rules of Evidence state that: 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. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege

posed a commonly-quoted definition of the 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 instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[2]

The purpose of the attorney-client privilege is to encourage full and frank communications between attorneys and their clients.[3] In order to encourage the client to disclose all pertinent information to the attorney, the client must be reasonably assured that the information revealed to the attorney in confidence will not be disclosed without the client's consent.[4] In that way, the attorney can better serve the client by providing fully informed legal advice.[5] Simultaneously, society benefits from the assurance that attorneys are meeting their professional responsibilities and are contributing to the efficient administration of justice.[6]

Although the attorney-client privilege benefits society to some extent, by protecting certain information from discovery, the privilege also acts contrary to the general principle that society is entitled to every man's evidence.[7] For this reason, the attorney-client privilege should be strictly construed.[8] One typical limitation on the privilege is that it is deemed waived if the client reveals the content of the communication to a third party, whether purposefully or inadvertently in some cases.[9] Courts have limited the privilege by requiring the party claiming the privilege to establish its application and to refute an allegation of waiver.[10]

> of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

2. Jack P. Friedman, *Is the* Garner *Qualification of the Corporate Attorney-Client Privilege Viable After* Jaffee v. Redmond*?*, 55 BUS. LAW. 243, 244 n.11 (1999) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (McNaughton 1961 & Supp. 1991)).

3. Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970).

4. *Garner*, 430 F.2d at 1101 (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291, at 545 (McNaughton 1961 & Supp. 1991)).

5. *See* Upjohn Co. v. United States, 449 U.S. 383, 390-91 (1981).

6. *Upjohn*, 449 U.S. at 391 (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1980)).

7. *Garner*, 430 F.2d at 1100.

8. *In re* Grand Jury Proceedings, 78 F.3d 251, 254 (6th Cir. 1996); *see* Friedman, *supra* note 2, at 245.

9. *Grand Jury Proceedings*, 78 F.3d at 254; Brian M. Smith, Note, *Be Careful How You Use It or You May Lose It: A Modern Look at Corporate Attorney-Client Privilege and the Ease of Waiver in Various Circuits*, 75 U. DET. MERCY L. REV. 389, 399 (1998).

10. Smith, *supra* note 9, at 399.

B. The Attorney-Client Privilege in the Corporate Context

There is no question that a corporation is a client with the same right to invoke the attorney-client privilege as an individual client.[11] However, the application of the attorney-client privilege in the corporate setting is more complex.[12] Corporations are inanimate entities created by law. A representative must act on a corporation's behalf in order for the corporation to invoke the privilege it holds as a client.[13] Thus arises the question: who holds the corporation's privilege? Generally, those occupying upper-management positions in the corporation hold its privilege.[14] Identifying the individuals capable of asserting a corporation's privilege is just one of the complications relating to the corporate attorney-client privilege.

Corporations today especially need the assistance of attorneys to help them comply with the numerous government regulations applicable to corporations.[15] This corporate need for more attorneys and the resulting increased interaction between corporations and attorneys is one factor contributing to the complexity of the corporate attorney-client privilege. For example, attorneys employed to help corporations comply with government regulations could inadvertently waive privileged material by discussing clients' positions with government regulators.[16] While society benefits from corporations complying with laws and regulations, the ease of waiver in such situations may result in corporations refraining from working with regulators.[17]

Attorneys employed by corporations as in-house counsel face additional barriers to the application of the privilege. Because in-house attorneys often act in many roles within a corporation—from legal advisor to manager to financial consultant—many courts use a more heightened scrutiny when determining whether communications made to them are in fact confidential and deserving of privileged classification.[18] Only those communications relating to legal advice are protected by the privilege; no business communications receive protection.[19] Because of

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11. *Garner*, 430 F.2d at 1097 n.10.

12. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389-91 (1981).

13. *Upjohn*, 449 U.S. at 390.

14. Friedman, *supra* note 2, at 273-74 (citing Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985)).

15. Smith, *supra* note 9, at 389-90.

16. *Id.* at 391; *In re* Grand Jury Proceeding, 78 F.3d 251, 254-55 (6th Cir. 1996) (holding that the privilege was waived by a corporate agent who revealed to government regulators that the corporate attorney had approved certain points of a marketing plan).

17. Smith, *supra* note 9, at 391.

18. Carol A. Needham, *When Is an Attorney Acting as an Attorney: The Scope of the Attorney-Client Privilege as Applied in Corporate Negotiations*, 38 S. TEX. L. REV. 681, 690-91 (1997).

19. John J. Tigue, Jr. & Linda A. Lacewell, *Protecting Corporate Privileges: Attor-*

an in-house attorney's familiarity with and participation in the day-to-day operations of the corporation, this higher scrutiny is needed to insure that corporations do not attempt to award merely business communications the privileged status by allowing the in-house attorney to participate in them.[20] Since in-house attorneys face heightened scrutiny, they must take more precautions to preserve the attorney-client privilege than outside counsel must take.[21]

Another concern of the attorney-client privilege particular to corporations pertains to internal investigations conducted either by in-house counsel or outside counsel. The main issue is determining when the materials gathered for, and the reports generated from, internal investigations are protected from discovery by the attorney-client privilege. Society benefits when corporations recognize potential problems within their organizations, investigate them, and attempt to correct them.[22] Allowing the information gathered in these investigations to be privileged would encourage corporations to act on their own initiative.[23] However, in some instances, when corporations have released reports generated from internal investigations, even if solely to a governmental regulation agency, courts have determined that the privilege is waived as to both the reports and the materials on which they are based.[24] The status of the attorney-client privilege relating to the materials underlying a released internal investigation report is as of yet unsettled.[25]

The above-mentioned difficulties, while important, do not compromise the primary problem related to the corporate attorney-client privilege. The main concern is determining to which employees the privilege extends.[26] Some cases have established particular agents to whom the privilege extends;[27] however, to a large extent the application of the corporate attorney-client privilege to employees of a corporation is determined by tests applied on a case-by-case basis.[28] It is to these tests that we now turn.

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ney/Client & Work Product, 3 BUS. CRIMES BULL.: COMPLIANCE & LITIG. 4-5 (1996).

20. *Id.*

21. Tigue & Lacewell, *supra* note 19, at 4.

22. Anne C. Flannery & Jennifer S. Milano, *The Confusion Continues: Protection of Internal Corporate Investigation Materials Under the Attorney-Client Privilege and Work Product Doctrine, Revisited*, 1023 PRACTICING L. INST. ANN INST. ON SEC. REG. 519, 521 (1997).

23. *Id.*

24. *Id.* at 524-25.

25. *Id.* at 538.

26. Upjohn Co. v. United States, 449 U.S. 383, 390-97 (1981).

27. *See, e.g.*, United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) (extending the privilege to an accountant working for a law firm); *see also* Tigue & Lacewell, *supra* note 19, at 5 (noting that the privilege has been extended to experts, such as underwriters and patent agents, employed by lawyers).

28. *Upjohn*, 449 U.S. at 396-97.

III. THE TWO PRIMARY TESTS FOR THE CORPORATE ATTORNEY CLIENT PRIVILEGE

A. The Control Group Test

The control group test was first applied in 1962.[29] In determining the scope of the corporate attorney-client privilege, this test extends the status of "client" to "any employee who is 'in a position of control or even take[s] a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority.'"[30] An employee's title alone is not determinative of whether the employee meets the requirements of the test.[31]

The control group test ultimately restricts the scope of the corporate attorney-client privilege to upper-level employees who may act on the advice of an attorney.[32] The benefit of this test is that its limited scope provides a narrow "zone of silence" of materials that are not discoverable, thus providing a broad range of information in the search for truth.[33] The test does not reach lower-level employees and some mid-level managers, even though they may have information necessary for an attorney to give fully informed legal advice.[34] In this way, the control group test possibly dissuades lower-level employees from revealing relevant information to corporate attorneys and thereby counters the privilege's purpose of full disclosure from clients to attorneys.[35]

B. The Subject Matter Test

The Seventh Circuit propounded the subject matter test in *Harper & Row Publishers, Inc. v. Decker*.[36] In determining whether the attorney-client privilege protected from discovery memoranda prepared by defense attorneys concerning the federal grand jury testimony of current and former employees of the defendant, the court rejected the control

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29. RALPH C. FERRARA ET AL., SHAREHOLDER DERIVATIVE LITIGATION: BESIEGING THE BOARD § 10.03(2)(a) & n.18 (2000) (citing Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962)).

30. *Id.* § 10.03(2)(a) (quoting Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962)).

31. *Id.*

32. *Id.*

33. *Id.*

34. FERRARA ET AL., *supra* note 29, § 10.03(2)(a).

35. Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 1997 ANN. SURV. AM. L. 629, 650 (1997).

36. 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided Court*, 400 U.S. 348 (1971).

group test[37] and instead took into account other factors. The court considered: "(1) the employee must be an employee of the corporation; (2) the communication must have been made by the employee at the direction of his superior; and (3) the subject matter of the communication must be within the employee's scope of employment."[38] Additionally, the communication must have been made for legal purposes and must have remained confidential.[39]

In its decision the court criticized the control group test as being "not wholly adequate, [because] . . . the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group."[40] This statement demonstrates the difference between the control group and the subject matter tests. The subject matter test calls for a more broad application of the privilege that is not determined by an employee's ability to act on the legal advice of the attorney.[41] Rather, it bases the privilege on the content of the communication and how the employee became aware of the information.

IV. THE *GARNER* DOCTRINE—THE CORPORATE ATTORNEY-CLIENT PRIVILEGE IN DERIVATIVE SUITS

A. Case Analysis

In *Garner v. Wolfinbarger*,[42] the Fifth Circuit addressed the corporate attorney-client privilege in the context of a shareholder derivative suit in which the shareholders were seeking discovery of materials from the corporation's attorney.[43] This type of circumstance is unique to corporations, and the court made a special holding in this instance creating a balancing test to determine shareholders' rights to privileged corporate information.[44]

The shareholders of First American Life Insurance Company of Alabama ("FAL") brought a class action against FAL alleging violations of both federal and state laws.[45] Additionally, they brought a shareholder derivative suit alleging that the corporation itself was injured by the fraudulent purchase and sale of securities.[46] Richard

37. *Harper & Row Publishers, Inc.*, 423 F.2d at 491.
38. FERRARA ET AL., *supra* note 29, § 10.03(2)(b).
39. Thomas W. Hyland & Molly Hood Craig, *Attorney-Client Privilege and Work Product Doctrine in the Corporate Setting*, 62 DEF. COUNS. J. 553, 555 (1995).
40. *Harper & Row Publishers, Inc.*, 423 F.2d at 491.
41. Hyland & Craig, *supra* note 39, at 555.
42. 430 F.2d 1093 (5th Cir. 1970).
43. *Garner*, 430 F.2d 1095-96.
44. *Id.* at 1103-04.
45. *Id.* at 1095.
46. *Id.*

Schweitzer acted as FAL's attorney in the sale of the stock at issue and later become president of FAL.[47] When Schweitzer was questioned at his deposition about discussions he had and advice he had given during the period when he served only as FAL's attorney, he claimed, on FAL's behalf, that the attorney-client privilege prevented him from answering the questions.[48] He also claimed the privilege as to documents that were requested by the plaintiffs.[49] The district court had held that a corporation could not assert the attorney-client privilege against its stockholders in a derivative action.[50]

In the appeal to the Fifth Circuit, the shareholders argued that the district court's decision was correct and that the privilege was not available to a corporation being sued by its shareholders in a derivative action.[51] The corporation argued that the information requested would otherwise be privileged and that there was no exception for derivative actions.[52] The court stated that it did "not consider the privilege to be so inflexibly absolute as contended by the corporation, nor to be so totally unavailable against the stockholders as thought by the District Court. We conclude that the correct rule is between these two extreme positions."[53]

Noting that the management of a corporation owes a fiduciary duty to the shareholders of the corporation,[54] the court held:

> The attorney-client privilege still has viability for the corporate client. The corporation is not barred from asserting it merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.[55]

This holding in effect calls for a balancing test of the interests of the shareholders and the interests of the corporation in order to determine if the stockholders have demonstrated "good cause" to disregard the attorney-client privilege.[56]

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47. *Id.* at 1095-96.
48. *Garner*, 430 F.2d at 1096.
49. *Id.*
50. Garner v. Wolfinbarger, 280 F. Supp. 1018, 1019 (N.D. Ala. 1968).
51. *Garner*, 430 F.2d at 1097.
52. *Id.*
53. *Id.*
54. *See id.* at 1101.
55. *Id.* at 1103-04.
56. The court enumerated the factors that were to be considered in establishing good cause:

B. *Criticism of* Garner

The holding in *Garner* has received much criticism.[57] The balancing test it promotes is the most commonly attacked aspect of the decision. Most critics of *Garner* argue that this test makes the application of the corporate attorney-client privilege too unpredictable and thereby counters the purpose of the privilege.[58] If employees are uncertain as to whether the privilege will attach to their communications to corporate counsel, they possibly may withhold information necessary for the attorney to give fully informed legal advice.[59] The Supreme Court argued against unpredictability in administering the attorney-client privilege for just this reason.[60] Critics also accuse *Garner* of not expressly limiting its application. By basing its holding on the fiduciary privilege owed by managers of a corporation to its shareholders, the court leaves open the possibility of extending this qualification of the attorney-client privilege to other situations involving fiduciary duties.[61]

V. THE *UPJOHN* DECISION

A. *Case Analysis*

The Supreme Court addressed the corporate attorney-client privilege in *Upjohn Co. v. United States*.[62] *Upjohn* is the controlling federal case concerning the extent to which the corporate attorney-client privilege protects communications made by employees to corporate counsel.

> [T]he number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Garner, 430 F.2d at 1104.

57. *See, e.g.*, Jack P. Friedman, *Is the* Garner *Qualification of the Corporate Attorney-Client Privilege Viable After* Jaffee v. Redmond*?*, 55 BUS. LAW. 243 (1999).

58. *See, e.g., id.* at 244.

59. *Id.*

60. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) (stating that "[a]n uncertain privilege, or one which . . . results in widely varying applications by the courts, is little better than no privilege at all").

61. *See* Friedman, *supra* note 57, at 253-55 (discussing the fiduciary relationship in cases addressing the questions of attorney-client privilege involving unions and workers, shareholders in nonderivative suits and non-corporate contexts).

62. 449 U.S. 383 (1981).

The case began when an audit made by Upjohn Co., an international manufacturer and distributor of pharmaceuticals, revealed potentially inappropriate payments made to foreign government officials by one of its foreign subsidiaries.[63] Upjohn's General Counsel, Mr. Thomas, and Chairman of the Board, Mr. Parfet, decided to initiate an internal investigation in response to these "questionable payments."[64] The investigation consisted of several parts. The first was a letter and questionnaire sent to "All Foreign General and Area Managers" signed by Parfet.[65] This letter addressed "'possibly illegal' payments to foreign government officials" and solicited all information relating to any such payment.[66] The letter informed the managers of Thomas's role in conducting the investigation and instructed them to send all responses directly to him.[67] It instructed the managers to restrict their communications concerning the investigation to Upjohn employees necessary in gathering the required information because the investigation was "highly confidential."[68] Another part of the investigation included interviews, conducted by Thomas and outside counsel, of the managers and thirty-three other employees.[69]

Upjohn submitted a preliminary report of these investigations to both the Securities and Exchange Commission ("SEC") and the Internal Revenue Service ("IRS").[70] The IRS demanded production of:

> [a]ll files relative 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 records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.[71]

Upjohn refused to produce the requested documents, arguing that they were protected by the attorney-client privilege and work product doctrine.[72] The Sixth Circuit did not affirm the lower court's determination of waiver of the privilege; it remanded for the lower court to apply

63. *Id.* at 386.
64. *Id.*
65. *Id.*
66. *Id.* at 386-87.
67. *Upjohn*, 449 U.S. at 387.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 387-88.
72. *Upjohn*, 449 U.S. at 388.

the control group test.[73] The Supreme Court granted certiorari and noted the legal profession's anticipation of this case finally establishing the superiority of either the control group or the subject matter test.[74] However, the Court declined to "lay down a broad rule or series of rules to govern all conceivable future questions in this area"[75] and instead opted to determine the question in a case-by-case manner.[76]

In its analysis of the Sixth Circuit's decision, the Supreme Court criticized the control group test as being too narrow and not encompassing all information possibly needed by a lawyer to provide a client sound legal advice.[77] The Court noted that in a corporate environment employees who fall outside of the control group will often have information vital to an attorney's fully understanding a particular situation.[78] The opinion continued by describing the control group test as one that "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[79] Additionally, for fear of their communications not being protected, corporate employees may hesitate in conveying to corporate attorneys information that could help the corporation to better comply with laws and regulations.[80] Corporations today must adhere to volumes of regulations and often need the assistance of lawyers to do so.[81] Without complete and open communications, this role of the corporate attorney could not be fulfilled.[82] The Court also attacked the control group test's unpredictability.[83] Considering the test's absence of definite limits and the diverse holdings of the lower courts, an employee cannot be certain exactly where the control group ends within a corporation.[84] This uncertainty of which communications are protected will minimize an employee's likelihood of conveying vital information to a corporate attor-

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73. *Id.* at 388-89.
74. *Id.* at 386.
75. *Id.*
76. *See id.* at 396-97.
77. *Upjohn*, 449 U.S. at 390-93.
78. The Court noted that:

> Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Id. at 391.
79. *Id.* at 392.
80. *Id.*
81. *Id.*
82. *See Upjohn*, 449 U.S. at 392-93.
83. *Id.* at 393.
84. *See id.*

ney.[85]

Instead of applying the control group test, the Court considered the particular circumstances involved in the case at hand to determine which employee communications were protected by the corporate attorney-client privilege. It noted that Mr. Thomas, in his position as corporate counsel and after consultation with the Board and with outside counsel, initiated an investigation into the questionable payments.[86] This investigation required Thomas to gather information held by employees other than top management. The employees with whom he communicated possessed the information as a consequence of their employment and they understood the questions were to help Mr. Thomas provide legal advice to Upjohn.[87] The Chairman of the Board classified the communications as "highly confidential," and the information had been treated as such within the company.[88] Based on these facts, the Court concluded that the communications at issue were in fact confidential and protected from disclosure by the attorney-client privilege.[89] The court refrained from allowing this decision to establish uniform rules to determine the application of the corporate attorney-client privilege, noting that such a result would violate Federal Rule of Evidence 501, which calls for the development of privileges on a "case-by-case" basis.[90]

B. Case Commentary

While the *Upjohn* court expressly rejected the control group test, it did not adopt the subject matter test. Rather, the factors that the court considered merely coincided with some of the factors considered by the subject matter test.[91] The opinion noted that the information provided by the employees was known to them because of their employment.[92] This corresponds to two of the three subject matter test requirements: that the information be provided by an employee of the corporation and that the subject matter be within the employee's scope of employment.[93] Thus, the Court's decision calls for a subject matter test type analysis applied on a case-by-case basis taking into account all the facts and circumstances of the particular situation.

Even though *Upjohn* did provide guidance for applying the corpo-

85. *See id.* at 392-93.
86. *Id.* at 394.
87. *Upjohn*, 449 U.S. at 394-95.
88. *Id.* at 395.
89. *Id.*
90. *See id.* at 396-97.
91. *See supra* Part III.B.
92. *See Upjohn*, 449 U.S. at 394-95.
93. *See supra* Part III.B.

rate attorney-client privilege, it nonetheless has received some criticism. One critic, Brian E. Hamilton, identified two principle goals of the *Upjohn* decision and questioned whether these goals were met.[94] The Court's goals were (1) to encourage full communication to corporate council in order to facilitate sound legal advice and (2) to encourage corporate compliance with laws and regulations.[95] Hamilton questions how these goals can be met when the corporation retains the right to waive the privilege without consulting employees who have divulged information, especially if the information could result in negative consequences to the employee.[96] If an employee is not confident that the communication will be protected in all circumstances, the employee will be hesitant in providing information and, thus, the purposes of the privilege are not met. The *Upjohn* decision also receives criticism for being too broad in some circumstances and thereby hindering the search for truth and encouraging secrecy.[97] This broad protection could limit investigations of illegal activity and thereby not contribute to increased compliance with laws and regulations, which was one of the Court's goals.[98] Hamilton also questions whether the Court's approach is any more predictable than the control group test attacked by the court.[99] By calling for case-by-case analysis and not providing specific guidelines, the *Upjohn* analysis may be just as unpredictable as the control group test.

VI. THE CORPORATE ATTORNEY-CLIENT PRIVILEGE IN ALABAMA

A. Alabama Rules of Evidence

Unlike the federal attorney-client privilege, Alabama's privilege is expressly stated in its Rules of Evidence.[100] The term "client" in the rule includes corporations and associations; therefore, the privilege is

94. Hamilton, *supra* note 35, at 646.
95. *Id.*
96. *Id.* at 646-47.
97. *Id.* at 647-48.
98. *Id.* at 649.
99. Hamilton, *supra* note 35, at 649.
100. Alabama Rule of Evidence 502(b) states that:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or a representative of the client and the client's attorney or a representative of the attorney, . . . (4) between representatives of the client and between the client and a representative of the client resulting from the specific request of, or at the express direction of, an attorney. . . .

ALA. R. EVID. 502(b).

applicable to corporations in Alabama.[101] However, a corporation must act through a representative in order to invoke the privilege. Alabama considers a "[r]epresentative of the client" to be:

> (i) a person having authority to obtain professional legal services or to act on legal advice rendered on behalf of the client or (ii) any other person who, for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.[102]

In order for the privilege to attach, the communication must involve either the client seeking or the attorney providing legal advice.[103]

The notes to Alabama Rule of Evidence 502 expressly address the question of which test to apply when determining whether an employee's communications are protected by the corporate attorney-client privilege. The notes state as follows:

> The privilege also applies to vicarious communications made in behalf of a corporate client. While Alabama has had few appellate cases dealing with corporations claiming the privilege, Rule 502 was drafted in light of significant federal case law in this area. Historically, the federal position was that the privilege applied only to corporate employees who possessed authority to obtain professional legal services or to act on advice given by the attorney. This so-called "control group test" was rejected in *Upjohn Co.* v. *United States*. Rule 502 follows this decision in expanding the scope of the corporate attorney-client privilege beyond those employees within the control group, to include anyone who "for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client."[104]

The notes go on to address issues particular to the privilege in the corporate context.[105] They state that the party claiming the privilege bears the burden of proving its application.[106] Because of the risk of obstructing the search for truth by limiting the information available in discovery, the privilege should be strictly applied.[107] The judge must

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101. ALA. R. EVID. 502(a)(1).
102. ALA. R. EVID. 502(a)(2).
103. ALA. R. EVID. 502(a)(1) advisory committee's note.
104. ALA. R. EVID. 502(a)(2) advisory committee's note (citations omitted).
105. ALA. R. EVID. 502(b) advisory committee's note.
106. *Id.*
107. *Id.*

determine whether an employee's communication is privileged.[108] Additionally, the communication must have been made for legal, not business, advice and must have been treated within the corporation as confidential.[109]

Based upon Alabama Rule of Evidence 502 and its notes, Alabama appears to have broadened the control group test by adopting the *Upjohn* analysis. An employee's communication to an attorney will qualify for the privilege if the employee is:

> (i) a person having authority to obtain professional legal services or to act on legal advice rendered on behalf of the client or (ii) any other person who, for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.[110]

The first alternative resembles the control group test since it focuses on the employee's status and power. The second alternative employs the *Upjohn* analysis by emphasizing whether the information was obtained within the scope of employment. Thus, a communication meeting either of these two requirements would qualify in Alabama for protection by the corporate attorney-client privilege.

B. Alabama Cases

As stated in the notes to Alabama Rule of Evidence 501, there is very little Alabama case law on the issue of the scope of the corporate attorney-client privilege. However, a few cases do give some indication as to how Alabama courts would address the question.

Even before the *Upjohn* decision, Alabama courts recognized an extension of a corporation's attorney-client privilege to at least some of the corporation's employees. In *Jay v. Sears, Roebuck & Co.*,[111] the Alabama Court of Civil Appeals extended the corporation's privilege with respect to a sales manager of one of the corporation's stores.[112] The plaintiff sought to ask about conversations between the sales manager and the corporate attorney. The appellate court upheld the lower court's refusal of the plaintiff's request to question the sales manager as

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108. *Id.*

109. The rule defines confidential as a communication "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those to whom disclosure is reasonably necessary for the transmission of the communication." ALA. R. EVID. 502(a)(5).

110. ALA. R. EVID. 502(a)(2).

111. 340 So. 2d 456 (Ala. Civ. App. 1976).

112. *See Jay*, 340 So. 2d at 457.

to his communications to the corporate attorney on the grounds of privilege.[113]

Two Alabama Supreme Court cases have cited *Upjohn* as authority to apply the attorney-client privilege to a corporate client; however, the *Upjohn* decision binds only federal courts.[114] These decisions, in combination with the notes to Alabama Rule of Evidence 501 addressing *Upjohn*, seem to indicate that, in a case concerning employee communications to a corporation's attorney, Alabama courts will likely apply the *Upjohn* case-by-case analysis to determine whether the attorney-client privilege attaches.

VII. RECOMMENDATIONS TO PRESERVE THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

Corporate attorneys need to take the proper precautions to ensure that confidential communications they make with their clients and their clients' representatives will be protected by the attorney-client privilege. Even though the Alabama Rules of Evidence seems to adopt the *Upjohn* approach, attorneys may need to consider the possibility of other tests, possibly even the control group test, being applied to their situations. The *Upjohn* analysis has not been adopted by all states.[115] Some states have expressly adopted the control group test.[116] In fact, most states have not yet established which test applies to determine the application of the corporate attorney-client privilege to employees.[117] Since federal courts must apply state privilege rules in a diversity case based on state law, the corporate attorney may not know which test will be applied to the communication.[118] In light of this uncertainty, it may be advisable to only make communications that would be protected under both analyses.[119] The following recommendations should help a corporate attorney ensure that communications remain privileged.

The first group of recommendations applies to all situations involving communications between corporate employees and corporate attorneys. First, the corporate representative chosen to speak with the attorney should be a highly ranked management officer who has the power

113. *Id.*

114. *Ex parte* Alfa Mut. Ins. Co., 631 So. 2d 858, 860 (Ala. 1993) (citing *UpJohn* in describing the purpose of the attorney-client privilege); *cf. Ex parte* Great Am. Surplus Lines Ins. Co., 540 So. 2d 1357, 1358 (Ala. 1989) (citing *Upjohn* as a case that applied the attorney-client privilege to a confidential communication between an attorney and an employee of a corporate client).

115. Hamilton, *supra* note 35, at 630, 654 (stating that fourteen states have adopted *Upjohn*).

116. *Id.* at 654 (stating that eight states have adopted the control group test).

117. *Id.* at 630.

118. *See id.* at 654.

119. Hyland & Craig, *supra* note 39, at 558.

to act on any advice given by the attorney.[120] In order to be protected by the attorney-client privilege, the advice given must be legal and not business related, so characterizing the advice in a legal context is recommended.[121] When the attorney speaks to other employees, in order to make the communication privileged, the information disclosed by those employees should arise from their scope of employment.[122] In all situations, the attorney should demonstrate that the communication is intended to be confidential and should maintain its confidentiality.[123] The attorney may maintain this confidentiality by clearly marking documents as confidential and also by restricting their circulation to only necessary persons within the corporation.[124]

Documents marked as confidential should actually contain confidential information; it should not be a routine label given to all communications between attorney and client.[125] Labeling only the truly confidential documents as confidential better demonstrates the intent of keeping them separate and confidential.[126] When oral communications are involved, the attorney should only speak to those who are covered by the privilege.[127] In meetings involving several representatives from the client, minutes should be taken noting the date, who is present, the subject of the meeting and the confidentiality of the proceedings.[128] High ranking employees and lower-level employees with vital information should be the only corporate representatives in attendance.[129] Even if the attorney follows all of these recommendations, the risk of inadvertent waiver of the privilege by revealing the confidential information to a third party exists.[130] Unfortunately, to some extent, technological advances have increased the possibility of an accidental waiver. Attorneys should advise their corporate clients that the corporation may waive the privilege if a third party overhears a confidential conversation over a speaker phone.[131] Also, company emails might not be considered confidential since some courts have concluded that there is no expectation of privacy in these communications on the part of employees.[132]

In-house counsel must take even more precautions to protect confi-

120. *Id.*
121. Hamilton, *supra* note 35, at 656-57; Hyland & Craig, *supra* note 39, at 558.
122. *See* Hyland & Craig, *supra* note 39, at 558.
123. *Id.*
124. *Id.*
125. Hamilton *supra* note 35, at 657.
126. *Id.*
127. Hyland & Craig, *supra* note 39, at 561.
128. *Id.* at 562.
129. *See id.*
130. *See* Flannery & Milano, *supra* note 22, at 542.
131. *Id.* at 542-43.
132. *Id.*

dential legal advice since they often serve as both legal and business advisors to the corporation and are judged by a stricter standard.[133] In-house counsel should keep an independent filing system for confidential communications separate from other business communications.[134] A separate filing system further demonstrates the intent to keep the information confidential and decreases the risk of other employees accessing the information inadvertently.[135] Because of their dual role to the corporation, in-house counsel should meticulously label the content of communications as either legal or business.[136] Even if the communication contains both business and legal advice, some courts will allow the privilege to attach if the content is predominantly legal.[137]

Another situation that needs special consideration is when corporations initiate internal investigations. Typically, corporations would prefer that the information gathered in these investigations not be made public or be subject to discovery. Again, counsel should first follow the recommendations described above and additionally take the following measures. Because of the suspicion often fostered by courts against in-house counsel, it may be wise to employ outside counsel to conduct the investigation.[138] Only materials gathered through investigations with legal purposes are protected; thus, giving an outside attorney authority over the investigation better solidifies its classifications as confidential and for a legal purpose.[139] In addition to giving outside counsel control over the investigation, the outside attorney should also conduct or direct all of the inquiries.[140] Some jurisdictions do not extend the attorney-client privilege to any communication not directly involving the attorney.[141] Also, the employees questioned should be informed of the confidentiality of the investigation and the information gathered should be kept confidential.[142]

VIII. CONCLUSION

In the absence of a particular test specifying the employees to which the corporate attorney-client privilege extends, the corporate attorney must rely upon his or her individual evaluation of the situation. Though

133. Hyland & Craig, *supra* note 39, at 561; Tigue & Lacewell, *supra* note 19, at 4.
134. Hyland & Craig, *supra* note 39, at 562.
135. *See* Scott R. Flucke, *The Attorney-Client Privilege in the Corporate Setting: Counsel's Dual Role as Attorney and Executive*, 62 U. MO. KAN. CITY L. REV. 549, 580 (1994).
136. *See* Hyland & Craig, *supra* note 39, at 561.
137. *Id.*
138. Hamilton, *supra* note 35, at 658; Flannery & Milano, *supra* note 22, at 539.
139. *See* Flannery & Milano, *supra* note 22, at 539-40.
140. *See id.* at 539.
141. *Id.*
142. *Id.* at 541.

some states have adopted an express policy and *Upjohn* has settled the federal position, the attorney cannot know the identities of future adversaries or the jurisdiction in which the attorney-client privilege may be challenged. Thus, to maintain the privileged nature of confidential communications made by a corporate client's employees, the corporate attorney is best advised to take the precautions dictated by the strictest test.

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