ATTORNEY-CLIENT PRIVILEGE—UNDER THE NEWLY ADOPTED WEINSTEIN SUBJECT MATTER TEST, INTERVIEWS OF NON-MANAGEMENT EMPLOYEES TAKEN BY A LAW FIRM HIRED BY A CORPORATION FOR THE PURPOSE OF SECURING LEGAL ADVICE, AT THE DIRECTION OF CORPORATE SUPERIORS, HELD PRIVILEGED WHEN THE SUBJECT MATTER OF THE COMMUNICATION IS WITHIN THE SCOPE OF THE EMPLOYEES' CORPORATE DUTIES AND THE INFORMATION IS NOT DISSEMINATED BEYOND THOSE PERSONS WHO, BECAUSE OF THE CORPORATE STRUCTURE, NEED TO KNOW ITS CONTENTS.—*Diversified Industries, Inc. v. Meredith* (8th Cir. 1978).

Information which was revealed during earlier litigation[1] suggested petitioner Diversified, a manufacturer and processor of non-ferrous metals, may have maintained a corporate "slush" fund used to improperly influence purchasing agents of other companies. The Board of Directors of Diversified employed a law firm to conduct an investigation into possible corporate wrongdoing and to report its findings to the Board. In its investigation, the law firm interviewed several employees of Diversified, including some who had no decision-making responsibility. Petitioner Diversified, which was the defendant in a case pending in district court, sought a writ of mandamus ordering the district judge to protect from discovery the contents of written reports which summarized those interviews.[2] The circuit court, with three judges dissenting,[3] *held* writ granted.[4] Under the newly adopted Weinstein subject matter test, the interviews are shielded from discovery by the attorney-client privilege. The attorney-client privilege is available for corporate communications made for the purpose of securing legal advice, at the direction of corporate superiors, when the subject matter of the communication is within the scope of the employee's corporate duties and is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (*en banc*).

Courts have long assumed that the attorney-client privilege applies to corporations.[5] However, the proper scope of the privilege has been the subject

1. In 1974 and 1975, Diversified was involved in proxy fight litigation not directly related to these facts. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 607 (8th Cir. 1978) (*en banc*).

2. The district court overruled Diversified's objections to plaintiff Weatherhead Company's pretrial interrogatories and motion for production of documents, and declined to reconsider its ruling or to certify an interlocutory appeal under 28 U.S.C. § 1292(b) (1977). 572 F.2d at 599. On appeal, the circuit court held that, where a claim of attorney-client privilege is rejected by a district court, mandamus is available as a means of immediate appellate review. *Id.* *See* Pfizer, Inc. v. Lord, 456 F.2d 545, 547-48 (8th Cir. 1972). *See also* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348, *rehearing denied*, 401 U.S. 950 (1971).

3. *See* note 47 *infra*.

4. In addition to the report of the investigation, Diversified also sought to protect from discovery certain corporate minutes and a letter written by the President of Diversified which contained portions of the report. 572 F.2d at 611. The circuit court ordered that relevant portions of these documents be protected from discovery. *Id.* *But see* note 47 *infra*.

5. *See, e.g.*, United States v. Louisville & Nashville R.R., 236 U.S. 318 (1915); Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954); United States v. United

of debate.[5] In attempting to define the proper scope of the attorney-client privilege when applied to corporations, courts have generally adopted one of three approaches: 1) the unlimited approach,[7] which makes all such communications "by an officer or employee" of the corporation privileged;[8] 2) the control group test,[9] which limits the privilege to communications made by employees who have a substantial part in the decision-making process concerning the subject of the advice of the attorney;[10] and 3) the test of *Harper & Row Publishers, Inc. v. Decker*,[11] a two-part test which focuses upon both the motivation and the subject matter of the communication in question.[12]

The simplicity of the unlimited approach to corporate attorney-client privilege has at least two advantages. First, by protecting all communications between a company attorney and any corporate employee, the unlimited approach is in accord with the basic policy reason underlying the concept of the attorney-client privilege, *i.e.*, encouraging the disclosure to the attorney of all relevant information.[13] Second, since all such employee-attorney communications are protected, the unlimited approach is easily and predictably applied.[14] However, this approach is incompatible with the modern trend allowing broad discovery[15] and a sweeping hearsay exception for entry of business records into evidence.[16] Further, such an unlimited approach ap-

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Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950). A single district court decision, reversed on appeal, has held that the privilege is not available to corporations. *See* Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771, *aff'd on reconsideration*, 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir.) (*en banc*), *cert. denied*, 375 U.S. 929 (1963).

6. *See* Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 955 (1956) (suggesting that a common law privilege would create too large a "zone of silence" to insulate corporate affairs); Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 40 U. DET. L.J. 299, 354 (1963) (boundary between legal advice and business advice may be too uncertain for privilege to apply). For a general discussion of the corporate attorney-client privilege, *see generally* Annot., 9 A.L.R. FED. 685 (1971).

7. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950).

8. *Id.*

9. This test was first enunciated in City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom.* General Elec. Corp. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

10. *Id.* at 485.

11. 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971).

12. *Id.* at 491-92.

13. 2 J. WEINSTEIN ¶ 503(b)[04] at 41 (1975). For examples of the unlimited approach, *see, e.g.*, United States v. Louisville & Nashville R.R., 236 U.S. at 318; Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. at 792; United States v. United Shoe Mach. Corp., 89 F. Supp. at 357.

14. WEINSTEIN, *supra* note 13, ¶ 503(b)[04] at 41.

15. *See* FED. R. CIV. P. 26(b) (scope of discovery); FED. R. CIV. P. 34 (permitting discovery as to designated documents and things); Morales v. Turman, 59 F.R.D. 157, 158 (E.D. Tex. 1972); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & CIVIL PROCEDURE § 2206 at 607 (1970). *But see,* ABA Litigation Section proposed revisions of Rules 26(b)(1), 26(c) and 26(f), which provide for major limitations on discovery.

16. *See* United States v. De Georgia, 420 F.2d 889, 893 (9th Cir. 1969) (regularly maintained business records admitted into evidence under an exception to the hearsay rule because, as regularly compiled for frequent business use, their accuracy is not likely to be enhanced by introduction into evidence of original documents upon which the records are based).

pears to be contrary to the Supreme Court's dictum in *Hickman v. Taylor*,[17] which suggests that mere witnesses' statements be excluded from the scope of the attorney-client privilege.[18] Because the attorney-client privilege poses an absolute bar to discovery, the application of a narrower test of attorney-client privilege, coupled with the work product rule,[19] seems to be both necessary and appropriate in order to allow for the advantage of additional pretrial discovery of relevant material.

The second and most widely accepted approach[20] is the control group test.[21] In this test, statements of employees are not considered within the attorney-client privilege unless the employee "is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority . . . ."[22] Since it limits the extent of privilege to communications involving the corporate control group, this approach removes many communications from the attorney-client privilege, and reduces the risk of possible conflict with the principles enunciated in *Hickman v. Taylor*.[23]

The Eighth Circuit, in rejecting the control group test in *Diversified*, criticized this approach[24] for failing to consider the realities of corporate life by protecting only the communications of top executives.[25] Since other employees, such as middle management personnel, often hold relevant informa-

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17. 329 U.S. 495 (1947).

18. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. at 485 (a statement given by a witness to a lawyer preparing for litigation against the lawyer's client is not privileged, although it may be within the ambit of the work product rule).

19. FED. R. CIV. P. 26(b)(3) (codifying Hickman v. Taylor, 329 U.S. 495 (1947) and subsequent decisions interpreting the work product rule, provides a qualified immunity to the lawyer's work product and makes such material discoverable only upon a substantial showing of necessity or justification).

20. Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975).

21. This test was first suggested in City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. at 483. Several courts have adopted this approach. *See, e.g.*, United States v. Int'l Business Mach. Corp., 66 F.R.D. 154, 178 (S.D.N.Y. 1974); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 35 (D. Md. 1974); Congoleum Indus. Inc. v. G.A.F. Corp., 49 F.R.D. 82, 85 (E.D. Pa. 1969); Hogan v. Zletz, 43 F.R.D. 308, 315 (N.D. Okla. 1967), *aff'd sub nom.* Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968); Garrison v. General Motors Corp., 213 F. Supp. 515, 518 (S.D. Cal. 1963).

22. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. at 485.

23. *See* WEINSTEIN, *supra* note 13, ¶ 503(b)[04] at 43. *See also* notes 18 & 19 *supra*.

24. For criticism of the control group test, cited with approval by the Eighth Circuit in *Diversified*, *see* Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972); Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. IND. & COMM. L. REV. 873 (1970); Note, *The Application in the Federal Courts of the Attorney-Client Privilege to Corporations*, 39 FORDHAM L. REV. 281 (1970); Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759 (1971) (hereinafter cited as SYRACUSE Note). *But see* Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970) (hereinafter cited as HARVARD Note).

25. 572 F.2d at 608.

tion, the court suggested that an attorney is faced with the choice of either soliciting that information at the risk it will not be privileged, or limiting his inquiry to information known to corporate executives, thereby assuming the risk that relevant information may not be available.[26] Viewed in this light, the control group test is a barrier to the free flow of information, discouraging communications to lawyers which may be necessary to promote compliance with complex laws.[27] Such a result is contrary to the purpose of the attorney-client privilege.[28]

The third approach is the test of *Harper & Row Publishers, Inc. v. Decker.*[29] In creating this test, the Seventh Circuit expressly rejected the control group test, finding it too narrow by its failure to protect the communications of some corporate agents outside the control group whose communications should properly be protected in certain situations.[30] Taking a new approach, the Seventh Circuit proposed that the attorney-client privilege be allowed if 1) the employee, though outside the corporate control group, "makes the communication at the direction of his superiors in the corporation,"[31] and 2) the subject matter dealt with in the communication relates to "the performance by the employee of the duties of his employment."[32] Although more restrictive than the unlimited approach, this test, in contrast to the control group test, encourages the free flow of information to corporate counsel. The *Harper & Row* test focuses upon why an attorney was consulted rather than upon with whom the attorney communicated.[33]

Like the unlimited approach to the corporate privilege, the *Harper & Row* test has been criticized as offering too large a shield from the discovery process.[34] A corporation might direct its employees to channel all business reports through the corporate attorneys in order to make all such information privileged.[35] This tactic could allow a corporation to expand the area of its protected communications at the expense of the individual litigant, who is often at a great disadvantage because of a lack of funds and other resources.[36] Because of the possibility of such abuse, the only information which is clearly not privileged under the *Harper & Row* test is information which the corpo-

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26. *Id.* at 609.

27. *Id. See* Report of the Committee on Federal Courts of the Association of the Bar of the City of New York 43-45 (May, 1970) (quoted in WEINSTEIN, *supra* note 13, ¶ 503[01] at 503-12 n.1).

28. 572 F.2d at 609.

29. 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court,* 400 U.S. 348, *rehearing denied,* 401 U.S. 950 (1971).

30. *Id.* at 491.

31. *Id.*

32. *Id.* at 492.

33. 572 F.2d at 609.

34. *See* HARVARD Note, *supra* note 24, at 432; SYRACUSE Note, *supra* note 24, at 766.

35. 572 F.2d at 609. This fear is also expressed in Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area,* 22 SYRACUSE L. REV. 759, 766 (1971).

36. *See* Note, *Evidence: Federal Rules of Civil Procedure: Attorney-Client Privilege as Applied to Corporations,* 48 CORNELL L.Q. 551, 563 (1963).

rate employee obtains fortuitously.[37] In response to these criticisms of the *Harper & Row* test, the Eighth Circuit embraced the suggestions of Judge Weinstein[38] and adopted a modified version of the *Harper & Row* test.[39] This new test may be called the Weinstein subject matter test.

Under the newly adopted Weinstein test, the attorney-client privilege will apply to a corporate employee's communication if:

> (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[40]

As the court noted, the Weinstein test, while faithful to the purpose underlying the attorney-client privilege,[41] will not extend privilege to the mere receipt of routine reports by corporate counsel.[42] Generally such routine reports will either have been made available to individuals beyond the group within the company who need to know or will not have been made for the purpose of securing legal advice.[43] In either case, the reports will fall outside the protective limits of the Weinstein test, and will not be protected by the attorney-client privilege.

Under the Weinstein test, the first consideration is whether the purpose of a communication was to secure legal advice. In theory, this requirement will exclude routine reports from the attorney-client privilege. In applying the Weinstein test to *Diversified,* the Eighth Circuit had little difficulty in finding that the first criterion of the Weinstein test had been met. The court accepted, as a basic presumption, that the act of consulting a law firm is *prima facie* committed for the purpose of securing legal advice.[44] A party seeking disclosure of disputed material has the burden of overcoming this presumption by a clear showing to the contrary.[45] After accepting this principle, the court took but a single paragraph to hold that all of the remaining requirements of the Weinstein test had been met in the present case.[46]

In dissent, Judge Henley challenged the court's acceptance of the presumption that consultations with a law firm are for the purpose of obtaining

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37. *See generally* D.I. Chadborne, Inc. v. Superior Court, 60 Cal. 2d 723, ____, 388 P.2d 700, 709, 36 Cal. Rptr. 468, 477-78 (1964).

38. *See* WEINSTEIN, *supra* note 13, ¶ 503(b)[04].

39. 572 F.2d at 609.

40. *Id. See* WEINSTEIN, *supra* note 13, ¶ 503(b)[04].

41. *See* text accompanying note 12 *supra.*

42. 572 F.2d at 609.

43. *Id.*

44. *Id.* at 610. The court quotes Dean Wigmore: "[A] matter committed to a professional legal advisor *is prima facia so committed for the sake of the legal advice* . . . ." 8 WIGMORE, EVIDENCE § 2296 (McNaughton rev. 1961) (emphasis in original).

45. 572 F.2d at 610.

46. *Id.*

legal advice.[47] Because the party seeking disclosure generally has no way of knowing why the matter in question was turned over to a law firm, it is unlikely that the burden of making a clear showing that such consultations were not for the purpose of securing legal advice can be met.[48] Looking beyond the question of what evidentiary showing is appropriate, Judge Henley suggested that there were ample facts in *Diversified* to suggest that the law firm was hired as an investigator, rather than as a provider of legal services.[49] Further, the recommendations which the law firm ultimately made were suggestions which could well have come from a firm of private investigators, accountants or bankers.[50] Thus, this dissent suggested that under the newly adopted Weinstein test, the majority improperly extended the attorney-client privilege, considering the facts of the case.

In challenging the application of the Weinstein test, Judge Henley's dissent raises by inference the question of whether the majority's willingness to presume that law firms are contacted for legal advice has emasculated a significant portion of the Weinstein test. Judge Weinstein, in suggesting his new approach to corporate attorney-client privilege, writes that it is the corporation who should have the burden of showing that the purpose of a communication was to secure legal advice.[51] When this burden is placed upon the corporation, the test seems to accord more fully with the goal of a corporate privilege more limited than that provided by the original *Harper & Row* test. In contrast, the Eighth Circuit's departure from Judge Weinstein's suggested test seems to expand the availability of privilege beyond the contemplation of Judge Weinstein.[52] Of course, the test as applied by the Eighth Circuit will still limit the application of the privilege concept to communications which were not disseminated beyond those individuals within the corporate structure who needed to know its contents.[53] This element, missing from the *Harper & Row* test, will serve to limit the availability of the privilege defense and presumably exclude many routine communications.[54] However, the court's willingness to presume that law firms are consulted for legal advice significantly compromises the actual limiting effect on corporate privilege that the Weinstein test, as applied by the Eighth Circuit, will have.

Despite these questions regarding its application of the Weinstein test, the Eighth Circuit has made significant new law in the area of corporate attorney-client privilege. As the first United States circuit court to adopt the

47. *Id.* at 611 (Henley, J., dissenting). Three separate dissents were filed. In addition to Judge Henley's dissent, referred to in text, Chief Judge Gibson filed a dissent in which he challenged the availability of privilege to a portion of the corporate minutes. *Id.* at 616 (Gibson, C.J., dissenting). Judge Bright, in a separate dissent, suggested that subsequent events had made the case moot. *Id.* at 617 (Bright, J., dissenting).

48. *Id.* at 614 (Henley, J., dissenting).

49. *Id.*

50. *Id.* at 614-15.

51. WEINSTEIN, *supra* note 13, ¶ 503(b)[04] at 45.

52. *See id.*

53. *See* text accompanying note 40 *supra*.

54. *See* text accompanying note 42 *supra*.

Weinstein test, the Eighth Circuit has established a middle ground between the control group test and the test of *Harper & Row*.[55] In addition to narrowing the application of the corporate attorney-client privilege to an extent consistent with its underlying policy,[56] the Eighth Circuit has adopted a test which seems reasonably predictable in its application.[57] The willingness of the Eighth Circuit to accept the Weinstein test suggests that such a test may be adopted in other jurisdictions.[58]

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55. For examples of suggested applications of the Weinstein test, *see* WEINSTEIN, *supra* note 13, ¶ 503(b)[04] at 47.

56. Regarding the strict construction of the privilege, *see* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.) (*en banc*), *cert. denied*, 375 U.S. 929 (1963); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 547-48 (D.D.C. 1970); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

57. *See* note 44 *supra*.

58. Although three judges filed dissenting opinions, none specifically challenged the use of the Weinstein test itself. *See* note 47 *supra*.

CRIMINAL LAW—USE OF ALLEGED COCONSPIRATOR DECLARATION AGAINST A DEFENDANT AT A CONSPIRACY TRIAL DOES NOT VIOLATE THE HEARSAY RULE WHERE THE JUDGE DETERMINES THAT A PREPONDERANCE OF INDEPENDENT EVIDENCE SHOWS THE DECLARATION WAS MADE DURING AND IN FURTHERANCE OF THE CONSPIRACY.—*United States v. Bell* (8th Cir. 1978).

Mario Burkhalter accompanied two federal undercover agents to the apartment of Michael Bell where the agents purchased illegal firearms from Bell. The transaction resulted in the joint indictment of Bell and Burkhalter for transferring such firearms in violation of a federal transfer of firearms tax statute, 26 U.S.C. § 5811,[1] and two related offenses, 26 U.S.C. § 5861[2] and 18 U.S.C. § 2.[3] Bell was tried alone and found guilty by a jury. At trial the agents recounted telephone conversations in which Burkhalter arranged for the agents to purchase two sawed-off shotguns from Bell.[4] On appeal, Bell contended that the agents' testimony relative to these telephone conversations was hearsay and therefore improperly admitted into evidence.[5] The government countered Bell's argument by contending that such statements were admissible as declarations of a coconspirator under Federal Rule of Evidence 801(d)(2)(E).[6]

Fashioning new guidelines for the use of alleged coconspirator declara-

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1. 26 U.S.C. § 5811 provides in pertinent part: "There shall be levied, collected, and paid on firearms transferred a tax at the rate of $200 for each firearm transferred. . . . The tax imposed . . . shall be paid by the transferor."

2. 26 U.S.C. § 5861 provides in pertinent part: "It shall be unlawful for any person— . . . (e) to transfer a firearm in violation of the provisions of this chapter; . . ."

3. 18 U.S.C. § 2(a) (1978) provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

4. One agent testified:

> [Burkhalter] inquired as to whether I would be interested in purchasing two sawed off shotguns and discussed the fee that he would receive for lining up the sale. . . . It was agreed that he would receive twenty dollars for each firearm if I were allowed—or if I were introduced to the party that had them for sale. . . . [Burkhalter] said that when he had finally lined the sale up he would contact me again or contact us, my partner and myself.

The other agent testified concerning a second phone conversation: "[Burkhalter] indicated to me that he was in contact with the person that had two sawed off shotguns for sale and wished to sell them to us." United States v. Bell, 573 F.2d 1040, 1045 n.5 (8th Cir. 1978).

5. Bell also contended on appeal that the trial court erred in refusing requested voir dire questions, commenting on the evidence, admitting testimony relative to the purpose of the 1968 Gun Control Act and in omitting instructions on specific intent. The Court of Appeals denied relief on these challenges, finding that there was no constitutional obligation to voir dire the jury on racism; that the testimony on the Gun Control Act was harmless error; that none of the comments by the trial judge affected the substantial rights of Bell; and that specific intent was not required for a violation of 26 U.S.C. § 5861(e). 573 F.2d 1040 (8th Cir. 1978).

6. FED. R. EVID. 801 provides in pertinent part:

> (d) **Statements which are not hearsay.** A statement is not hearsay if—
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> . . . .
>
> (2) **Admission by party opponent.** The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.