WHO SHOULD DEFINE ARIZONA'S CORPORATE ATTORNEY–CLIENT PRIVILEGE?: ASSERTING JUDICIAL INDEPENDENCE THROUGH THE POWER TO REGULATE THE PRACTICE OF LAW

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INTRODUCTION

Many observers have become alarmed by what they view as widespread threats to judicial independence. The president of the American Bar Association has warned, for example, that even as American lawyers are "helping to build independent judicial systems in emerging democracies around the world, our own courts are under unprecedented attack" and the "American doctrine" of separation of powers is at stake.[1] Here in Arizona, a recent editorial chastised state legislators for trying to "usurp judicial authority" by proposing a package of state constitutional amendments that, among other things, would give the legislature rather than the state supreme court the last word on the rules of evidence and judicial procedure.[2]

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1. Michael S. Greco, President, Am. Bar Ass'n, Address to the American Bar Association House of Delegates (Aug. 8, 2005), *available at* http://www.abanet.org/op/greco/speeches/hod_annual.pdf. Among the threats Mr. Greco cited are "the attempt to strip away the jurisdiction and discretion of our courts, the demand to impeach judges for doing what they are supposed to do . . . , and threats of budget cuts for the judiciary by those who disagree with court rulings," as well as the intrusion of partisan politics into the judicial selection process. *Id.* To combat such threats, Mr. Greco formed the ABA Commission on Civic Education and the Separation of Powers, with former Justice Sandra Day O'Connor and former U.S. Senator Bill Bradley as honorary co-chairs. *Id.*

2. Editorial, *Save Judiciary from Legislative Meddling*, ARIZ. DAILY STAR, Feb. 4, 2006, at B6. Other amendments in the package would end merit selection of judges in Maricopa and Pima counties in favor of elections, and allow the legislature to determine the jurisdiction of justice of the peace courts and to name the presiding judge in county trial courts. *Id.* As of September 2006, none of the proposed amendments had passed. Similar

Because evidence and procedural law are central to the judicial process, this effort to gain sweeping final-word authority for the Arizona Legislature seems misplaced. In the past, when the two bodies adopted divergent rules of evidence or procedure, Arizona Supreme Court decisions reviewing the validity of the statutory rules wove together separation of powers principles with thoughtful policy analysis to craft a shared-power regime that often defers to the legislature.[3] But with legislators now pressing for a greater say, more rule divergence can be expected, even without a constitutional amendment. And these are not the only lawmaking domains in which the court and the legislature clash. The same is true of the regulation of law practice, but there the court has sometimes insisted on final-word authority for itself on the basis of little more than tradition, at least when power to define the unauthorized practice of law ("UPL") is at stake.[4]

The legitimacy of Arizona Supreme Court decisions allocating the final word in these areas of overlapping authority is *always* suspect, because the court becomes the arbiter of its own power vis-à-vis the legislature. But in today's political climate, marked by a paucity of lawyers serving in state legislatures,[5] the court may be especially vulnerable to legislative challenge. It is therefore vital to ensure that the court's separation of powers jurisprudence is up to the task of

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amendments were proposed in 2003, including one that would have required the governor to submit the names of supreme court nominees to the state senate for approval. H.R. Con. Res. 2007, 46th Leg., 1st Reg. Sess. (Ariz. 2003).

The recently introduced bill regarding evidentiary and procedural rulemaking, H.R. Con. Res. 2011, 47th Leg., 2d Reg. Sess. (Ariz. 2006), would amend article VI, section 5 of the Arizona Constitution, which identifies the express powers of the Arizona Supreme Court. *Id.* As amended, subsection 5A.5 would continue to authorize the court to promulgate rules of evidence and procedure but would make those rules "subject to amendment or repeal by the legislature." *Id.* And a new subsection, 5C, would provide that authority to enact evidence and procedural law "is not a power inherent in the judiciary but is a legislative power inherent in the legislature and the people." *Id.* Such amendments would confer what I will call "final-word authority" on the legislature.

3. *See* discussion *infra* Part III–III.A.

4. *See infra* notes 281–82 and accompanying text; *see also* Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem That Won't Go Away*, 34 ARIZ. ST. L.J. 585, 587–90, 595–602 (2002) (criticizing decisions asserting the supreme court's final-word authority to declare what constitutes law practice and UPL). UPL decisions by state supreme courts in general have drawn similar criticism. As one scholar puts it, "the gross ambiguity of most state constitutional texts on judicial power" calls for thoughtful policy analysis when state supreme courts delineate their constitutional authority vis-à-vis state legislatures regarding UPL issues, yet their reasoning often amounts to "no more than 'we have the superior power because we have the superior power.'" Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 847 (2003).

5. *See* James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 97 & n.159 (2006) (noting the decrease in lawyer–legislators); Larry Doyle, *Attorneys Are Termed Out in Sacramento*, CAL. B.J., Oct. 2005, http://www.calbar.ca.gov/state/calbar/calbar_home.jsp (follow "California Bar Journal" hyperlink; then follow "Archived Issues" hyperlink) (lamenting the dwindling number of lawyers in the California legislature).

protecting judicial independence while giving the legislature its due, avoiding needless confrontation, and garnering public respect.[6]

To that end, this Article suggests how the court might best address an issue that has smoldered in Arizona for some time,[7] namely, whether the court or the legislature is entitled to the last word on the scope of Arizona's corporate attorney–client privilege.[8] This issue, while narrow, has theoretical bite because it implicates final-word authority over evidence law as well as the regulation of law practice. Considering how the court should analyze the validity of the relevant privilege statute in a future case could bolster the court's separation of powers jurisprudence in both areas.

The issue arose in 1994, when the legislature passed a bill[9] designed to broaden, at least for civil cases, the scope of the corporate privilege as the supreme court had formulated it only six months earlier in *Samaritan Foundation v. Goodfarb*,[10] a case of first impression. The case arose out of a malpractice suit against a hospital to recover for brain injuries a child sustained during an operation. Soon after the mishap, at the hospital lawyer's request, a paralegal interviewed the hospital employees who had been present. The question before the court was whether the attorney–client privilege applied to statements by four employees, as incorporated in the paralegal's interview summaries. The employees, three nurses and a scrub technician, had witnessed the incident, but the

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6. The public has a potential role to play in resolving inter-branch policy disputes raising separation of powers issues, and it played that role in a famous dispute in the 1960s. After the supreme court held that the real estate broker's customary practice of completing forms for real estate transactions constituted the practice of law and would be unlawful *even if approved by the legislature*, State Bar of Ariz. v. Ariz. Land Title & Trust Co., 366 P.2d 1, 13–14 (Ariz. 1961), voters approved a constitutional amendment granting brokers the right to prepare such documents. *See* Rose, *supra* note 4, at 588. If the legislature approved the constitutional amendments discussed above in note 2, they would still have to be ratified by Arizona voters.

7. While this Article focuses on an Arizona issue, it may also be of interest in other states whose vague constitutional allocations of lawmaking authority between the judiciary and the legislature generate skirmishes. *See* Johnstone, *supra* note 4, at 796 (calling state constitutions "typically very vague" on the point). Scholars often assume that state constitutional doctrine is wholly bound up with a state's distinctive traditions or legal culture. Yet common issues of institutional design and competence are important in the field and deserve attention. *See* Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 300–02 (1998) (calling for more "trans-state" constitutional scholarship).

8. More precisely, the issue is how the privilege should apply to any organization or entity client, not just business corporations. Because the issue typically arises in cases involving corporate clients, the privilege in this context is often called "the corporate attorney–client privilege" or simply "the corporate privilege," and this Article uses that terminology.

9. Act of Apr. 26, 1994, ch. 334, 1994 Ariz. Sess. Laws 2018 (amending ARIZ. REV. STAT. § 12-2234).

10. 862 P.2d 870 (Ariz. 1993). The statute was passed, in other words, in an effort to "nullify" the supreme court's decision in *Samaritan*. W. Todd Coleman, Legislative Review, *Arizona's Attorney–Client Communication Privilege for Corporations*, 27 ARIZ. ST. L.J. 335, 337 (1995).

plaintiffs' claim was not based on their acts or omissions and their statements were important only because they described actions the employees had observed on the part of others. The supreme court devised a test for deciding which communications between employees and corporate counsel are protected by the corporate privilege and held that, under that test, the employee–witness statements were not protected.[11] The 1994 legislation established a broader test to ensure that such statements would be privileged in the future.[12]

Although commentators soon noted that the conflicting tests raised a separation of powers issue,[13] Arizona courts have yet to review the validity of the statute. The importance of resolving the issue was highlighted in 2003, however, when the Arizona Court of Appeals ruled in *Roman Catholic Diocese v. Superior Court* on the scope of the corporate privilege in *criminal* matters.[14] The court of appeals observed that the constitutionality of the 1994 statute had been questioned and remained unsettled, but it did not address the issue, which had not been raised in the trial court. Instead, the court held that, even if the statute is valid for civil litigation, *Samaritan* controls in criminal cases.[15] The incongruity of having the privileged status of lawyer–client communications turn on whether they later turn out to be relevant in a civil or a criminal matter is obvious. But it would also be desirable to have the separation of powers issue resolved because an unsettled privilege makes it harder for lawyers and their corporate clients to anticipate which of the lawyers' communications with employees will be privileged in the future.

This Article argues that the supreme court possesses and (if presented with the issue) should exercise the authority to strike down the relevant portions of the 1994 statute on separation of powers grounds and confirm that the *Samaritan* test controls in civil as well as criminal proceedings. Of course, even if the court is constitutionally entitled to the final word on the subject, it is not bound to strike down the statute. If it concludes, contrary to my argument, that the statutory test is preferable on the merits, or that the legislature is the more competent institution to

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11. Samaritan Found. v. Goodfarb, 862 P.2d at 880.

12. Arizona Revised Statutes section 12-2234(B), as amended, privileges employee communications with corporate counsel for the purpose of assisting counsel to provide legal advice whether those communications concern the employee's conduct or *other* "information." ARIZ. REV. STAT. § 12-2234(B) (2003).

13. *See infra* notes 250, 266 and accompanying text.

14. 62 P.3d 970 (Ariz. Ct. App. 2003).

15. *Id.* at 974–75. Because of the narrow ambit of corporate criminal liability in Arizona, *see* ARIZ. REV. STAT. § 13-305 (2001), corporate privilege issues are much more likely to arise in civil cases. But a possible implication of the court's holding is that, if a company is compelled to produce documents in a criminal case that would have been privileged under the 1994 statute in a civil suit, the documents might be discoverable in a later civil suit on the ground that production in the criminal matter waived the privilege for all legal proceedings. Most courts reject the doctrine of "selective waiver." *See, e.g., In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 297–98 (6th Cir. 2002) (noting that most courts have rejected the doctrine); Lonnie T. Brown Jr., *Reconsidering the Corporate Attorney–Client Privilege: A Response to the Compelled–Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 947–51 (2006) (same). Documents produced in an Arizona grand jury proceeding, however, are generally unavailable to third parties under a grand jury secrecy statute. ARIZ. REV. STAT. § 13-2812 (2001).

make policy on the issue, the court could uphold the statute as a matter of inter-branch comity.[16]

Part I of this Article provides the necessary background for the argument that follows. Part I.A reviews the federal and state corporate-privilege law as it stood when *Samaritan* was litigated. Part I.B offers an account of the *Samaritan* decision, the 1994 statute, and the judicial and legislative processes from which they emerged.

Parts II and III present the argument in two stages. Part II compares the policy merits of the *Samaritan* and statutory tests as they bear on employee-witness statements, as well as the quality of the policymaking processes from which they emerged. It identifies appropriate criteria for making these comparisons and argues both that the *Samaritan* test is superior and that the judicial process was better suited to address the issue. If the court agrees, it should invalidate the relevant portion of the statute and reaffirm *Samaritan—provided* the court is constitutionally entitled to the final word.[17]

Part III considers whether the court is so entitled. Part III.A argues, contrary to some commentary, that the court should *not* invalidate the statute as an infringement on its power to make rules of evidence and judicial procedure, because doing so would be inconsistent with the sound shared-power regime the court has fashioned in reviewing statutes that diverge from its rules in these fields. But Part III.B makes the more novel argument that, because the attorney–client privilege plays a vital role in the provision of legal services, the court may strike down the statute for encroaching on its authority to regulate the practice of law. Because the court may regulate law practice through rulemaking *or* case law, Part III.B also suggests that the wiser course would be to allow Arizona's privilege to evolve though adjudication, as the federal privilege does.

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16. "Comity" means bowing to the legislature when court and legislature have made conflicting law on a subject which is within the regulatory ambit of both and on which the state constitution would permit the court to insist on the final word if it chose. For discussion of the concept and references to its use by state supreme courts to uphold legislation governing the practice of law without conceding that they have no alternative, see CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 28 (1986). The Arizona Supreme Court has upheld some statutes governing law practice or judicial procedure on the basis of comity. *See, e.g.*, Hunt v. Maricopa County Employees Merit Sys. Comm'n, 619 P.2d 1036, 1041 (Ariz. 1980) (upholding statute allowing non-lawyers to represent employees in certain administrative hearings, but placing restrictions on such engagements and warning that "permission" would be withdrawn if the practice proved to be "against the public interest").

17. Putting the issue this starkly provides an element of drama but is a bit artificial in two respects. If the issue arises in future litigation, it will presumably do so in a trial court and might not reach the supreme court, though its importance suggests that it would. And, if the matter does come before the court, the court might wish to consider still other approaches. For one thoughtful alternative, see Stacey A. Dowdell, Note, *The Extent of the Attorney–Client Privilege in Arizona*, 36 ARIZ. L. REV. 725, 753–56 (1994).

I. ESSENTIAL BACKGROUND

A. *Pre-*Samaritan *Case Law on the Scope of the Corporate Attorney–Client Privilege*

Long experience has produced a consensus as to which communications between lawyers and individual clients the attorney–client privilege protects from compelled disclosure in legal proceedings.[18] But so far, no consensus has emerged about the scope of the corporate attorney–client privilege,[19] presumably because courts only began to grapple in earnest with the issue in the 1950s[20] as corporate litigation rates began to climb[21] and because the issue has proven to be complicated indeed. An individual's communications with her lawyer, even if made through an agent, are client communications by definition. But business entities *must* communicate with their counsel through officers and employees who are neither clients in their own right, nor necessarily acting in their capacity as agents when communicating with corporate counsel.[22] The puzzle, as articulated in *Samaritan*, is how to decide which communications by corporate employees to

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18. Dean Wigmore traces the common law attorney–client privilege to 17th-century England. 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2290 (McNaughton revision 1961). Exceptions aside, the privilege protects communications between lawyer and client (or their authorized agents) that are made in confidence in order for the lawyer to provide the client with legal advice or legal services. For the elements of the individual-client privilege, see *id.* § 2292.

19. Indeed, as late as 1962, a federal court held that corporations have no attorney–client privilege, in part because they lack the privacy and dignitary interests of individuals, which is also why they have no constitutional privilege against self-incrimination. Radiant Burners, Inc. v. Am. Gas Ass'n, 207 F. Supp. 771, 773 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir. 1963). Although the decision was reversed, the courts have recognized ever since that the existence and scope of the corporate privilege must rest on the balance between the costs the privilege imposes by suppressing relevant evidence in legal proceedings and the benefits it affords by fostering candid lawyer–client communications and, thus, better-informed legal advice. *See* John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney–Client Privilege*, 57 N.Y.U. L. REV. 443, 473–78 (1982).

20. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950), was the first federal case to discuss in depth how the privilege should be applied to corporations. Sexton, *supra* note 19, at 449.

21. *See* Marc Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 942–45 (showing that corporate litigation accounts for much of the growth in federal caseloads since the 1950s); *cf.* Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1375 n.22 (reporting that from 1950 to 2001 active U.S. corporations jumped in number from 629,314 to 5,136,000, counting so-called "S" corporations).

22. Under the Arizona Rules of Professional Conduct, as elsewhere, a lawyer who is retained to represent an organization is deemed to represent the entity, acting through its "duly authorized constituents," but not the constituents themselves. ARIZ. RULES OF PROF'L CONDUCT ER 1.13(a) (codified at ARIZ. SUP. CT. R. 42). The lawyer may also represent a constituent in the matter only when ethics rules governing conflicts of interest permit and the clients understand the privilege and confidentiality implications of co-representation. *Id.*

regard as those of the corporation and "not merely those of the individual speaker."[23]

This section identifies the main tests that federal and state courts had devised for making such decisions by the time *Samaritan* was litigated. Further, the section discusses how cases like *Samaritan*—cases concerning corporate counsel's communications with employees who were only involved in the underlying events as witnesses—would come out under the tests identified. But the tests themselves are important because they provided options for the Arizona Supreme Court and legislature to consider in formulating their own tests. Both bodies acknowledged the value of aligning Arizona's test with the law elsewhere so that the many corporations operating across jurisdictions could expect similar rulings on the scope of their privilege wherever the issue arose.[24] Comparing the *Samaritan* and statutory tests on the merits, Part II will consider which was more consistent with existing law.

1. Federal Law Before Upjohn

Federal courts decided most of the pre-*Samaritan* cases.[25] They generally agreed that their task was to encourage the candid communications necessary for corporations to obtain sound legal advice, without unduly constraining the search for truth in legal proceedings.[26] Nevertheless, until the Supreme Court addressed the issue in 1981 in *Upjohn Co. v. United States*,[27] the federal courts disagreed sharply over the appropriate test.[28] Two sorts of tests predominated.

(A) The "Control Group" Test

The most widely accepted federal test, prior to its rejection in *Upjohn*, was the control group test, devised in *City of Philadelphia v. Westinghouse Electric Corp.*[29] The control group test turns on *whose* communications with corporate counsel are at issue. It privileges counsel's communications with individuals who "personify" the corporation,[30] and limits that class to those with

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23. Samaritan Found. v. Goodfarb, 862 P.2d 870, 875 (Ariz. 1993).

24. *See infra* notes 137–38, 181–83 and accompanying text.

25. Under the Federal Rules of Evidence, state law governs privilege issues that arise in the federal courts in connection with "a [civil] claim or defense as to which State law supplies the rule of decision." FED. R. EVID. 501. Otherwise, privilege issues must be resolved "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.* State and federal privilege law often diverge. *See* JOHN WILLIAM GERGACZ, ATTORNEY–CORPORATE CLIENT PRIVILEGE § 3.06, at 3-8 (3rd ed. 2001). The federal cases discussed here concern the corporate attorney–client privilege under federal law.

26. GERGACZ, *supra* note 25, § 3.68, at 3-131.

27. 449 U.S. 383 (1981).

28. GERGACZ, *supra* note 25, § 3.68, at 3-131 to -132. Although *Upjohn* has made federal law more uniform, its well-known ambiguity has led to some differences in interpretation. *See id.* § 3.102, at 3-185.

29. 210 F. Supp. 483 (E.D. Pa. 1962). Prior to *Upjohn*, the control group test seemed to be the wave of the future because "most courts and the most recent cases [had] adopted it." GERGACZ, *supra* note 25, § 3.69, at 3-133.

30. *Westinghouse*, 210 F. Supp. at 485.

authority to control or participate substantially in deciding on the company's response to legal advice.[31]

The control group test seems to assume that only communications between control group members and corporate counsel are analogous to communications between individual clients and their lawyers. Yet individuals communicate with their lawyers not only when deciding how to *respond* to advice but also when supplying the information counsel needs in order to *formulate* advice, and many corporate employees who have that information are not in the control group.[32] On the other hand, the control group test has often been defended on the grounds that it minimally constrains truth-seeking in litigation, that it dovetails with modern views favoring liberal discovery, and that it may deter corporations from funneling information to counsel solely to protect it from discovery.[33] Under this test, the communications at issue in *Samaritan* would not be privileged.

(B) The "Subject Matter" Tests

Before *Upjohn*, two federal circuits rejected the control group test in favor of tests that focus on the "subject matter" of the communications at issue. In *Harper & Row Publishers, Inc. v. Decker*,[34] the Seventh Circuit rejected the control group test on the ground that lower-level employees are often the only ones who possess the information counsel needs in order to render sound advice.[35] This criticism assumes, of course, that the narrowness of the control group test hinders counsel from eliciting vital information from employees outside the group, either because counsel would be wary of eliciting unprivileged statements adverse to company interests or because employees would fail to disclose information unprotected by their employer's privilege or any privilege of their own.

The *Harper & Row* test is satisfied where: (1) an employee communicated with counsel at the direction of a corporate superior; (2) the subject matter of the issue on which advice was to be rendered concerned the employee's *performance* of his corporate duties; and (3) the subject of the employee's communications was his or her *performance* of those duties.[36] As applied to witness testimony, few employees' "corporate duties" include observing others, except, perhaps, for watchmen or supervisors. The Seventh Circuit qualified its holding accordingly:

> [W]e are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part

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31. *Id.*

32. *See* Sexton, *supra* note 19, at 479 (declaring "fruitless any attempt to base doctrines of corporate attorney–client privilege on a simplistic identification of who in the corporation most resembles an individual client").

33. GERGACZ, *supra* note 25, § 3.69, at 3-134 n.5.

34. 423 F.2d 487 (7th Cir. 1970) (en banc), *aff'd by an equally divided court*, 400 U.S. 348 (1971).

35. *Id.* at 491.

36. *Id.* at 491–92.

> of the corporation. We express no opinion with respect to communications by employees who fall in that class.[37]

The Eighth Circuit adopted a slightly narrower subject matter test in *Diversified Industries, Inc. v. Meredith*.[38] Under that test, drawn from a leading treatise, the privilege applies if: (1) an employee's communication was made in order to help secure legal advice for the company; (2) the employee made the communication at the direction of his superior; (3) the superior made the request so the company could secure legal advice; (4) the communication concerned *a subject within the scope of the employee's duties*; and (5) the communication was not disseminated beyond those within the corporate structure who needed to know its contents.[39]

An ambiguity in the fourth prong of the *Diversified Industries* test makes it unclear how the test would apply to the communications at issue in *Samaritan*. The issue, essentially the issue reserved in *Harper & Row*, is whether an employee's on-the-job observations of events, as opposed to her own acts or omissions, should be considered a "subject within the scope of her duties." Unlike *Harper & Row*, however, *Diversified Industries* resolved the ambiguity by elaborating on the meaning of that phrase. "By confining the subject matter of the communication to an employee's corporate duties," the court wrote, "we *remove from the scope of the privilege* any communication in which the employee functions merely as a fortuitous witness."[40]

2. The Supreme Court's Decision in Upjohn

With the lower courts in disarray, the United States Supreme Court finally addressed the scope of the federal corporate privilege in *Upjohn*,[41] which remains the controlling authority on the issue. *Upjohn* clearly rejects the control group test and extols the presumed advantages of a broader corporate privilege, but is otherwise quite ambiguous.[42]

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37. *Id.* at 491. Even with this qualification, the *Harper & Row* test has been criticized for being overly broad because it could encourage the strategic funneling of information to corporate counsel in hopes of shielding it from discovery. GERGACZ, *supra* note 25, § 3.70, at 3-137; *see also* Sexton, *supra* note 19, at 478. For example, several employees might give counsel the partial information they possess about a corporate transaction so that only counsel would have complete information about the deal. GERGACZ, *supra* note 25, § 3.70, at 3-137 to -138. In principle, discovery could be had of each employee in subsequent litigation, but reconstructing the transaction in that way could severely burden the discovering party, *id.* at 3-138, and some employees might have become unavailable or suffered a loss of memory in the interim.

38. 572 F.2d 596 (8th Cir. 1977).

39. *Id.* at 609 (citing 2 JACK B. WEINSTEIN, FEDERAL EVIDENCE § 503(b)(4) (1975)).

40. *Id.* (emphasis added). The court added, however, that the "work product rule" may apply to lawyers' written summaries of interviews with corporate employees in anticipation of litigation. *Id.* at 609 n.2.

41. Upjohn Co. v. United States, 449 U.S. 383 (1981).

42. GERGACZ, *supra* note 25, § 3.74, at 3-147 to -148.

Upjohn, a pharmaceutical company, operated world-wide.[43] When an audit showed that some personnel may have made "questionable" payments to foreign officials that were taken improperly as corporate tax deductions, the general counsel was asked to conduct an internal investigation. Counsel drafted a letter that was sent out over the chairman's signature to all foreign managers. The letter explained that the purpose of the investigation was to determine the nature and amounts of any payments made to foreign officials. An attached questionnaire sought details of any such payments. Managers were cautioned that the investigation was confidential and should only be discussed with employees who could provide relevant information. Responses were sent to the general counsel, who then interviewed the managers who had responded and certain other employees as well.[44]

In 1976, Upjohn filed reports with the SEC, with copies to the IRS. The reports provided details about payments that Upjohn conceded could affect its tax liabilities, but not about other payments. Upjohn also gave the IRS the names of those who had filled out questionnaires or been interviewed, but the IRS nonetheless issued a summons seeking all the documents counsel had gathered in the internal investigation.[45] Citing its attorney–client privilege, Upjohn refused to turn over the questionnaires or any interview notes recording responses to counsel's questions.[46] The IRS obtained a district court ruling that the summons was enforceable, and Upjohn appealed.[47] Adopting the control group test, the Sixth Circuit held that communications "by officers and agents not responsible for directing Upjohn's actions in response to legal advice" were unprivileged.[48]

The Supreme Court reversed, holding that the communications at issue were privileged.[49] In an opinion by Justice Rehnquist, the Court rejected the control group test for being too narrow to fulfill the functions of the privilege. The privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice,"[50] the Court declared, and "it will frequently be employees beyond the control group . . . who will possess the information needed."[51] Moreover, so narrow a test disserves a vital function of the corporate privilege by "threaten[ing] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[52] This threat was especially worrisome for corporate clients, given the "vast and complicated array of

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43. *Upjohn*, 449 U.S. at 386.
44. *Id.* at 386–87.
45. *Id.* at 387.
46. Upjohn also claimed that the documents had been prepared in anticipation of legal proceedings and were protected from disclosure by the work-product doctrine. *Id.* at 388.
47. *Id.*
48. United States v. Upjohn Co., 600 F.2d 1223, 1225 (6th Cir. 1979).
49. *Upjohn*, 449 U.S. at 395.
50. *Id.* at 390.
51. *Id.* at 391.
52. *Id.* at 392.

regulatory legislation confronting the modern corporation"[53] and the fact that "compliance with the law in this area is hardly an instinctive matter."[54]

The Court also declared that the control group test is "difficult to apply in practice"[55] and, thus, disserves the function of the privilege by making it hard for lawyers and communicators to predict whether their communications will be protected.[56] "An uncertain privilege," the Court stated, "is little better than no privilege at all."[57]

This is true enough. Courts have had some difficulty applying the control group test, because reasonable people can differ about who within a company is in a position to play "a substantial role" in deciding and directing the company's response to counsel's advice on any given matter.[58] And predictability of application at the time communications are contemplated is clearly desirable. Yet, as the Court itself noted, no test for distinguishing between privileged and unprivileged employee communications will enable courts to decide all privilege disputes "with mathematical precision."[59] The real issue, then, is *relative* predictability and courts favoring the control group test over subject matter tests had cited as a reason the relative ease with which lawyers and judges alike can apply it.[60] *Upjohn* made no such comparison, never discussed the pros and cons of subject matter tests, and offered no clear test of its own. Declining to "lay down a broad rule or series of rules"[61] because that would "violate the spirit of Federal Rule of Evidence 501," which requires federal privilege issues to be decided on

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53. This point is entirely valid for cases such as *Upjohn*. Presumably, however, few malpractice suits against hospitals or personal injury claims against product manufacturers and transportation companies implicate the "vast and complicated array of regulatory legislation" to which the Court was referring. *Id.* at 392. And in litigation governed by state law, these cases, rather than regulatory-compliance cases, are the ones in which issues concerning the scope of the corporate privilege will typically arise.

54. *Id.* The Government had argued that the risk of civil or criminal liability ensures that corporations will seek legal advice even without the protection of the privilege, but the Court rejected that argument for two reasons. First, the privilege is valuable not only because it encourages clients to consult counsel, but also because it encourages them to inform counsel fully about their problem. *Id.* at 391. Second, the Government's argument "prove[d] too much" because individuals who consult lawyers about their legal problems also have a strong incentive to disclose relevant facts in order to get sound advice, yet the common law has long recognized the value of the privilege in that context. *Id.* at 393 n.2. This analogy may be inapt, however. A corporation can press an employee to cooperate fully with its counsel and can choose to waive *its* privilege and disclose the employee's statements, even if the employee will be adversely affected. At the same time, information an employee imparts to counsel will often have no repercussions for the employee personally, leaving him indifferent to any protection the corporate privilege affords.

55. *Id.* at 393.

56. *Id.*

57. *Id.*

58. *See id.* (citing examples of cases applying the control group test).

59. *Id.*

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

61. *Upjohn*, 449 U.S. at 386.

common law principles, the Court left the scope of the corporate privilege to case-by-case development.[62]

Even without laying down a rule or test, the Court could have been more explicit about how the lower courts should go about fleshing out the common law in future cases. Identifying the qualities of an "ideal" corporate privilege would have been helpful. An ideal privilege would maximize benefits by protecting communications that would not otherwise occur, and minimize costs by protecting only those disclosures.[63] It would not impair the truth-finding function of adjudication, because no protected information would have been disclosed to counsel in the absence of the privilege, and would provide all possible benefits because any unprotected information that was disclosed would have been disclosed in any event.[64]

No real-world formulation can even approximate this ideal, but policymakers can work toward it by carefully considering both sides of the equation and by not considering "false benefits" or "false costs."[65] The *Upjohn* Court was quick to imagine benefits that might flow from privileging the communications at issue, but not costs. Privileging the communications, the Court wrote, "puts [the Government] in no worse position than if the communications had never taken place," because the privilege protects communications but not the underlying facts[66] and the Government was free to interview the same employees in order to obtain those facts.[67] In other words, the Court did not see *Upjohn* as a

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62. *Id.* at 396. This was somewhat disingenuous; laying down some rule or standard would hardly have violated the principles of common law decision making and the Court conceded that its approach may "to some slight extent" forgo desirable certainty. *Id.* Although the Court refused to spell out a rule or test, its approach has more in common with subject matter tests than it has with the control group test and is sometimes regarded as a subject matter test.

63. *See* Sexton, *supra* note 19, at 480.

64. *Id.*

65. *Id.* at 481–82. As an example of a false benefit, Professor Sexton imagines an employee who has relevant information that would likely result in his termination and/or personal liability if disclosed to corporate counsel. *Id.* at 481. The fact that disclosure would fall under the *employer's* privilege, over which the employee has no control, would be quite unlikely to loosen his tongue. *Id.* Another example would involve an employee who witnessed an accident for which her company could be liable, but who was not involved in any way that could be imputed to the company as a basis for liability. Privileging her statement would offer no real benefit if, as seems likely, she would have given the statement to corporate counsel in any event and counsel needed her statement in order to perform an adequate investigation. *Id.* at 496.

66. *Upjohn*, 449 U.S. at 395.

67. *Id.* at 396. Indeed, the Government had already begun to do so. *Id.* But whether the Government was free to interview, rather than subpoena, everyone on the list without the permission of Upjohn's counsel would depend on the applicable legal ethics rule governing the permissibility of contacting a represented person or party about the matter without the consent of the party's counsel. *See, e.g.*, Niesig v. Team I, 558 N.E.2d 1030 (1990) (holding that "anti-contact" rule in New York does not bar opposing counsel from conducting informal interviews of corporate-employee witnesses, but does bar such interviews of employees whose acts or omissions would be imputed to the corporation for purposes of its liability); MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (same); *see also*

case in which the privilege would bar the IRS from obtaining relevant information about foreign payments; the only downside it saw for the IRS was inconvenience and, apparently, the IRS made no effort to prove otherwise. But what if many of the communications would have been made even if they were not expected to be protected by Upjohn's privilege?[68] In that case, the inconvenience costs to the IRS might have outweighed any marginal benefit the privilege could have afforded to Upjohn in the form of better legal advice.

Despite its ambiguity, *Upjohn* does amount to more than a rejection of the control group test. From its characterization of the relevant facts and its focus on functional analysis, one can glean several "factors" that fidelity to *Upjohn* might require courts to consider when ruling on scope-of-the-privilege issues.[69] How would these factors apply to the facts in *Samaritan*? For this purpose, the key *Upjohn* factor lies in the Court's implication that, in order to be privileged, communications must concern "matters within the scope of the employees' corporate duties."[70] Post-*Upjohn* federal cases have not clarified whether pure witness statements concern such "matters," but the leading treatise on the corporate privilege takes the position that this "factor" is not satisfied when an employee communicates "personally acquired information (*i.e. as a witness to an accident*)."[71] On this reading, the witness statements at issue in *Samaritan* would not be privileged.

Unfortunately, one cannot be certain whether the *Upjohn* majority would have subscribed to this reading. The facts as reported in *Upjohn* do not clarify what the Court understood "matters within the scope of an employee's corporate duties" to include. The Court never indicates whether Upjohn's questionnaires and interview notes only contained employees' statements about their own payments to foreign officials, or also contained statements about payments they had observed

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Wright v. Group Health Hosp., 691 P.2d 564 (Wash. 1984) (finding "no reason to distinguish between employees who in fact witnessed an event and those whose act or omission caused the event leading to the action," because the anti-contact rule applies only to "those employees who have 'speaking authority' for the corporation"). For the rule in Arizona, see *infra* notes 154–55 and accompanying text.

68. One might also consider the possibility that managers withheld information about many questionable payments and would have done so even if the statements were known to fall within the scope of the company's privilege. This might be the case, for example, if managers failed to report payments they had made to foreign officials for fear that doing so would adversely affect their careers at Upjohn, a consequence from which Upjohn's privilege would not protect them.

69. GERGACZ, *supra* note 25, §§ 3.74 to 3.75, at 3-148. For a list and brief discussion of those factors, see *id.* §§ 3.76 to 3.81, at 3-149 to -152.

70. *Upjohn*, 449 U.S. at 394. This factor is ambiguous in the same way as the subject matter tests in *Harper & Row* and *Diversified Industries*. *See supra* text accompanying notes 34–40. But the Supreme Court did not refer to the comments in those decisions concerning the status of employee-witness statements.

71. GERGACZ, *supra* note 25, § 3.78, at 3-149 (emphasis added). Even observations of an accident while *on the job* would be "personally acquired" information because making such observations is not normally one of an employee's corporate duties.

others making.[72] Moreover, the status of *managers'* statements about payments they had seen or heard others make would be murky in any event. Such statements might bear on the adequacy of the managers' supervisory *conduct* and not constitute pure witness statements.[73]

There are hints in the Court's opinion that employees' witness statements do not concern "matters within the scope of their corporate duties,"[74] meaning that the communications in *Samaritan* would not be privileged. Explaining why communications by non-control-group members should be within the scope of the privilege, the Court pointed out that middle- and lower-level employees "can, by *actions* within the scope of their employment, embroil the corporation in serious legal difficulties."[75] Moreover, discussing the history of the corporate privilege, the Court referred to its 1947 decision in *Hickman v. Taylor* without questioning its continued vitality.[76] Yet *Hickman* stated that "the protective cloak of [the corporate attorney–client] privilege does not extend to information which an attorney secures from [an employee witness] while acting for his client in anticipation of litigation,"[77] though the court recognized that a lawyer's interview notes summarizing such witness statements may be entitled to the qualified protection of the work-product doctrine.[78]

In sum, the more plausible view is that fidelity to *Upjohn* would not compel courts to treat employee-witness statements as privileged.

*3. Pre-*Samaritan *Law in Other States*

When *Samaritan* was decided, state law governing the corporate privilege was less developed than federal law and quite diverse. And, as late as 1997, a survey found that only fourteen states had adopted—by high court decision, rule of evidence, or statute—"an *Upjohn* or subject matter test," eight had adopted the control group test, and twenty-eight had not yet addressed the issue,[79] including

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72. *But see* Louis A. Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-*Upjohn *Analysis*, 44 WASH. & LEE L. R. 1181, 1222 (1987) (stating that the employees interviewed by Upjohn's counsel had not necessarily participated in illegal activities themselves, yet their communications with counsel were privileged).

73. Presumably, however, the nurses and technician whose statements were at issue in *Samaritan* were not serving in the operating room in a supervisory capacity.

74. *Upjohn*, 449 U.S. at 394.

75. *Id.* at 391 (emphasis added). Similarly, Chief Justice Burger, in a concurring opinion, chastised the majority for not making it clear that communications are privileged whenever an employee speaks with an attorney at the direction of management about "conduct" within the scope of his employment. *Id.* at 402, 403 (Burger, C.J., concurring).

76. *Id.* at 391 (majority opinion).

77. Hickman v. Taylor, 329 U.S. 495, 508 (1947). Moreover, in a 1985 decision, the Court noted that *Upjohn* held that communications between corporate counsel and lower-level employees are protected "under certain circumstances" but did not specify the circumstances. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985).

78. *Hickman*, 329 U.S. at 510.

79. Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney–Client Privilege*, 1997 ANN. SURV. AM. L. 629, 633 (1997). California, Florida, and Utah were described as subject-matter states that had "wavered from the

New York and other states with high corporate litigation rates.[80] Thus, although some states had tried to align their law with *Upjohn*, there was no real trend in favor of doing so. This section considers how the communications at issue in *Samaritan* would have fared under the approaches taken in three of the most frequently cited state supreme court decisions.

D.I. Chadbourne, Inc. v. Superior Court[81] arose out of an accident in which a woman allegedly slipped and fell on a sidewalk as a result of the defendant company's negligence. In discovery, the company acknowledged that it had taken a written statement from an employee who had performed work on the sidewalk, but it refused on privilege grounds to let the plaintiffs see the statement.[82] The employee was serving in the armed forces and was unavailable.[83] When the trial court ordered the company to show the plaintiffs the document, the company petitioned for a writ of mandamus, arguing that the document was privileged as a matter of law.[84] The California Supreme Court held that because the facts before the trial court revealed neither an effort by either party to show that the employee "was (or could be) responsible for the condition which caused the accident" nor a claim that the statement contained information "which could not have been known to a nonemployee witness," the judge did not abuse his discretion by requiring the statement to be produced.[85]

Although the *Chadbourne* court was particularly concerned not to give corporations a greater privilege than natural persons "merely because [corporations] must utilize a person in order to speak,"[86] the opinion was like *Upjohn* in that it provided no "black-letter" test for deciding which communications fall within the scope of the corporate privilege. But, unlike *Upjohn*, it did offer a set of "basic principles" to guide California courts in making such decisions.[87] One of these principles stated,

> When an employee has been a witness to matters which require communication to the corporate employer's attorney, and the employee has no connection with those matters other than as a witness, he is an independent witness, and the fact that the employer requires him to [give a statement to its] attorney does not alter his status or make his statement subject to the attorney–client privilege.[88]

Upjohn model." *Id.* at 641; *see also* Brown, *supra* note 15, at 934 (stating that in state courts even today "both the control group and subject matter tests, and everything in between[,] appear to be possibilities").

80. Hamilton, *supra* note 79, at 645.

81. 388 P.2d 700 (Cal. 1964).

82. *Id.* at 703.

83. *Id.* at 704.

84. *Id.* at 703–04.

85. *Id.* at 711.

86. *Id.* at 709.

87. *Id.*

88. *Id.* A more recent California decision confirms that when an employee witnesses an incident and communicates about his observations with corporate counsel, the

On this principle, the statements at issue in *Samaritan* would not be privileged.

Two other state supreme court decisions came on the heels of *Upjohn*. In *Leer v. Chicago, Milwaukee, St. Paul & Pacific Railway Co.*,[89] a switchman sued the railroad that employed him. He sought damages for the loss of a limb allegedly caused by the railroad's negligence.[90] At the request of defense counsel, an investigator obtained statements about the accident from other members of the plaintiff's switching crew.[91] In discovery, the defense refused on privilege grounds to produce the statements.[92] The trial judge ruled that the statements were privileged, but certified the question to the Minnesota Supreme Court,[93] which reversed.[94] The court noted that the workers whose statements were at issue were not themselves defendants in the case and appeared to have been mere witnesses to the plaintiff's accident. Without committing itself to a particular test, the court concluded that the statements were not privileged and would not be privileged under the control group test or the Seventh and Eighth Circuits' subject matter tests.[95] The court took note of the United States Supreme Court's recent decision in *Upjohn*, but found it "critically different" because the communications in *Upjohn*, in contrast to employees' witness statements, "regarded a matter within the scope of the employee's duties."[96] Clearly, the *Leer* court would not have privileged the communications at issue in *Samaritan*.

Two other points about *Leer*. The first concerns the court's policy analysis. The court recognized that the attorney–client privilege has the desirable purpose of promoting candid lawyer–client communications, but asserted that a privilege broad enough to protect employee-witness statements would unduly "suppress relevant facts" and be inconsistent with Minnesota's "liberal construction of the discovery rules so as to uncover all relevant matters before trial."[97] In other words, the court saw the virtue of considering the scope of the attorney–client privilege in light of the interaction between the privilege and discovery policies.[98]

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communication is not privileged. Martin v. Workers' Comp. Appeals Bd., 69 Cal. Rptr. 2d 138, 147 (Ct. App. 1997).

89. 308 N.W.2d 305 (Minn. 1981).

90. *Id.* at 306.

91. *Id.*

92. *Id.*

93. *Id.* at 306–07.

94. *Id.* at 309.

95. *Id.* at 308–09.

96. *Id.* at 309 n.8.

97. *Id.* at 309.

98. Interestingly, a federal district court recently went so far as to consider the proper scope of the corporate privilege in light of contemporary discovery *practice*, suggesting that the privilege should be construed more narrowly than in the past because lawyers have become so dependent financially on their clients that they are all too willing to advance tenuous privilege claims and withhold unprivileged documents from opposing counsel. Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., No. 95 Civ. 8833, 1998 WL 474206, at *2 (S.D.N.Y. Aug. 12, 1998). This case is cited in GERGACZ, *supra* note 25, § 1.13, at 1-13 n.1.

Second, the *Leer* court noted that the case concerned the "investigative scenario of an overwhelming percentage of personal injury litigation."[99] The same may be said of *Chadbourne* and *Samaritan*. Indeed, personal injury claims against companies are clearly more representative than regulatory-compliance cases like *Upjohn* of litigation governed by state law in which state corporate privilege issues arise.[100]

Finally, in *Consolidation Coal Co. v. Bucyrus-Erie Co.*, the Illinois Supreme Court held that the control group test would continue to govern under Illinois law,[101] notwithstanding the United States Supreme Court's criticism of the test in *Upjohn*. As in *Leer*, the court feared that a broad test would insulate too much material from the "truth seeking process" and, thus, be "incompatible with [the state's] broad discovery policies."[102]

Measured by the 1997 survey mentioned above and by these three leading cases, it was by no means the prevailing state view when *Samaritan* came before the Arizona courts that employee-witness statements were within the scope of the corporate privilege.

B. The Arizona Sequence: Samaritan *and the 1994 Statute*

This section of the Article offers a detailed account of the events from which the conflicting judicial and legislative tests for determining which communications fall within Arizona's corporate privilege emerged.

1. The Samaritan *Case*

Samaritan Foundation v. Goodfarb[103] arose out of an incident in which a child's heart stopped beating during an operation at the Phoenix Children's Hospital ("PCH") in the Good Samaritan Medical Center. Some time later, the child and her parents brought a malpractice action against the hospital and the physicians who performed the surgery.

Two years after the incident, when the plaintiffs' attorneys were deposing three nurses and a scrub technician who were employed by Samaritan and present in the operating room as the incident occurred, each testified that she could remember little or nothing of what had transpired. But plaintiffs' counsel learned that days after the surgery a paralegal had interviewed the employees at the direction of a lawyer in Samaritan's legal department and had summarized their accounts of the incident in memoranda on file in the department.[104] Plaintiffs

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99. *Leer*, 308 N.W.2d at 308.

100. *See* Sexton, *supra* note 19, at 519–20. Of course, federal diversity cases are governed by state law, including state privilege law. *See supra* note 25.

101. 432 N.E.2d 250, 257 (Ill. 1982) ("The control group test appears to us to strike a reasonable balance by protecting consultations with counsel by those who are the decision makers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery.").

102. *Id.*

103. Samaritan Found. v. Goodfarb, 862 P.2d 870 (Ariz. 1993).

104. Samaritan Health Services shared some facilities and personnel with PCH and its legal department assisted PCH in connection with incidents potentially giving rise to

requested the summaries in order to refresh the deponents' recollection, but Samaritan (a non-party in the malpractice suit) and PCH resisted, claiming the summaries were protected by the attorney–client privilege and the work-product doctrine.[105]

When the plaintiffs moved to compel disclosure, the trial judge examined the documents *in camera* and agreed that the portions recording the paralegal's impressions were immune from production under the work-product doctrine, but held that the other portions, which the judge called "the functional equivalent of a witness statement," had to be produced.[106] Because the attorney–client privilege, unlike the work-product doctrine, provides absolute protection for everything within its ambit, this implied that the judge considered the privilege inapplicable. Samaritan and PCH filed special actions in the court of appeals, claiming that the order to produce the "witness statements" was an abuse of discretion. The Arizona Hospital Association considered the issues important enough to file an *amicus* brief.[107]

a. The Court of Appeals Decision

The court of appeals held, in an opinion by Judge Fidel, that the trial court did not abuse its discretion by treating the witness statements as unprivileged.[108] The opinion noted that Arizona courts had not previously considered how to apply the attorney–client privilege to corporate clients and that an Arizona statute codifying the common law attorney–client privilege for civil proceedings neither excluded corporate clients nor defined the scope of their privilege.[109] Calling

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malpractice liability. Samaritan Found. v. Superior Court, 844 P.2d 593, 596 (Ariz. Ct. App. 1992).

105. Samaritan Found. v. Goodfarb, 862 P.2d at 873. The court of appeals had ruled in a previous case that allowing witnesses to review summaries of their lawyer-directed interviews for purposes of refreshing their recollection would waive any work-product immunity or attorney–client privilege to which the summaries were otherwise entitled and would entitle opposing counsel to review them. Samaritan Health Servs., Inc. v. Superior Court, 690 P.2d 154, 157 (Ariz. Ct. App. 1984).

106. Samaritan Found. v. Superior Court, 844 P.2d at 596.

107. *See id.* at 594–95.

108. *Id.* at 607. My discussion of the court of appeals opinion focuses on the privilege issue. The court also held that the summaries were work product within the meaning of Rule 26(b)(3) of the Arizona Rules of Civil Procedure because they were prepared in anticipation of litigation; that the trial judge correctly treated portions of the summaries recording the paralegal's impressions as work product; and that the judge did not abuse his discretion in ordering the "witness-statements" to be produced because: (a) the work-product doctrine provides only qualified protection for witness statements incorporated in summaries of interviews; (b) the protection is lost if the party seeking production shows a substantial need for the statements and an inability to obtain their equivalent by other means; and (c) the judge's finding that the plaintiffs had met this burden was reasonable in view of the deponents' memory failures. *Id.* at 597–98.

109. *Id.* at 600–01. The referenced statute provides, in relevant part: "In a civil action an attorney shall not, without the consent of his client, be examined as to any communications made by the client to him, or his advice given thereon in the course of professional employment." ARIZ. REV. STAT. § 12-2234(A) (2003). The statute confirms that the attorney–client privilege is available in civil proceedings, but does little to define its

lawyer–client candor "important in corporate, as in individual, representation," the court declared that the privilege extended to corporate clients,[110] and proceeded to consider whether the privilege must extend to all confidential communications between a lawyer and an employee if it is to meet the purpose of promoting well-informed legal advice for a corporate client, or should instead exclude statements by employees "whose observations the lawyers and corporate decision-makers seek to discover, as they would [seek] the observations of any eyewitness, corporate employee or not."[111]

Noting that courts elsewhere had struggled with this question, the court examined the relevant commentary and case law, including *Upjohn*. The petitioners argued that *Upjohn* stood for the broad principle that the privilege covers any communications an employee makes to the employer's legal staff to enable its lawyers to provide informed legal advice.[112] The court rejected this as an unduly broad reading of *Upjohn*, because the Supreme Court had expressly confined its holding to the specific facts of the case,[113] and the "most salient" of those facts was the failure of the IRS to show that it would be unable to learn the facts known to Upjohn's managers by interviewing them itself.[114] Reading *Upjohn* as a case in which the privilege merely put the IRS to the trouble of gathering facts on its own and did not block its only access to vital information (as would be the case if the forgetful witnesses' statements were privileged in *Samaritan*),[115] the court refused to "dislodg[e] *Upjohn*'s broadest pronouncements from their factual context and accept[] them indiscriminately here."[116]

The court concluded that the control group test as elaborated by the Illinois Supreme Court in *Consolidation Coal*[117] was most appropriate for Arizona because any more expansive privilege would be "fundamentally incompatible with the State's broad discovery policies."[118] This relegated lawyers' communications

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contours. For example, it does not even mention that neither the lawyer nor the client can be compelled to testify about privileged communications. An equally skeletal statute codifies the privilege for criminal proceedings in Arizona. ARIZ. REV. STAT. § 13-4062(2) (2001). Neither statute refers to corporate clients, and neither played a significant role in the decisions of the court of appeals and the supreme court in *Samaritan*, but the supreme court cited both and understood that it was devising a test to be used in all judicial proceedings, civil or criminal, Samaritan Found. v. Goodfarb, 862 P.2d at 874, and presumably in legislative and administrative hearings as well, *cf. infra* notes 263, 268.

110. Samaritan Found. v. Superior Court, 844 P.2d at 601.

111. *Id.*

112. *Id.* at 602.

113. *Id.* at 602–03.

114. *Id.* at 603.

115. *Id.*

116. *Id.*

117. Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982). *See supra* note 101 and accompanying text.

118. Samaritan Found. v. Superior Court, 844 P.2d at 601 (quoting *Consolidation*, 432 N.E.2d at 257). Importantly, the court of appeals issued its decision in *Samaritan* just before new rules of civil procedure promulgated by the Arizona Supreme Court were to go into effect. *See* ARIZ. R. CIV. P. 26.1 ct. cmt. to 1991 amend. Those rules, commonly called the "Zlaket Rules" after Chief Justice Thomas Zlaket, went beyond traditional discovery to

with non-control group employees in anticipation of litigation to the qualified protection the work-product doctrine affords. But that doctrine exists to prevent litigants from piggybacking on the research, investigation, and strategies of opposing counsel, not to encourage candid lawyer–client communications. Concerned that counsel's communications with non-control group members would be left with no protection at all if no litigation was in prospect, the court took the surprising step of "importing the familiar discovery hurdles of the work product rule into a *qualified* attorney–client privilege" for communications with non-control group members.[119]

A dissenting opinion criticized the majority on the ground that counsel would be deterred from communications with employee witnesses if their communications were only protected by a qualified privilege.[120] Judge Fidel's response was twofold. He observed that litigators were not reluctant to interview witnesses without ties to the companies they represent, even though those interviews receive only the qualified protection of the work-product doctrine, and he drew further support from what remains the most complete empirical study of the corporate privilege in action.[121] That study surveyed more than 175 corporate lawyers and senior managers. Nearly two-thirds of the lawyers believed that a qualified attorney–client privilege, surmountable like the work-product immunity by a showing of special need, would not diminish the candor of non-control group employees. And nearly three-fourths said they would communicate as frequently

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require a civil litigant to disclose to other parties at the outset and without a discovery request the names of persons the party believes may have knowledge of the relevant events and the nature of the information they possess, the names of persons whose statements have been taken and the whereabouts of their statements, and a list of the relevant documents known to the party to exist, as well as the dates when those documents will be available for inspection and, unless good cause not to do so is shown, a copy of the documents themselves. This includes documents that contain, and persons who have, information adverse to the disclosing party. A supreme court comment called the disclosure rules necessary to reduce litigation "expense, delay, and abuse," avoid "litigation by ambush," and promote greater professionalism among counsel. *Id.* An early critic argued that the rules would narrow the protection provided by the attorney–client privilege, since a lawyer who takes a written statement from a client "might not be obliged to hand that piece of paper over to the opposing party, but [would be] obliged to include in [his] disclosure statement all the information he has learned through taking the statement." Robert J. Bruno, *The Disclosure Rule Is a Mistake*, 11-8 MARICOPA LAW. 1, 15 (Aug. 1992). This interpretation seems incorrect. It implies that if a surgeon who was the defendant in a malpractice suit sent a note to his lawyer admitting that he had had two beers shortly before the operation, the information (though not the note) would have to be disclosed to the plaintiff even in the absence of an interrogatory or deposition question asking if the surgeon had been drinking before the operation. If that were the case, the Zlaket Rules would compel waivers of the attorney–client privilege—but it does not. *See* ARIZ. R. CIV. P. 26.1(f).

119. Samaritan Found. v. Superior Court, 844 P.2d at 605 (emphasis in original). The qualified privilege would be surmountable in the same circumstances of special need that overcome the protection of the work-product doctrine. *Id.*

120. *Id.* at 607; *id.* at 610–11 (Voss, J., dissenting).

121. *Id.* at 605 (majority opinion) (citing Vincent C. Alexander, *The Corporate Attorney–Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191 (1989)).

with non-control group members whether the privilege was qualified or absolute.[122]

b. The Supreme Court's Decision

The Arizona Supreme Court granted Samaritan and PCH's petitions for review.[123] This time, the amici included America West Airlines, the Arizona Hospital Association, the Arizona Association of Defense Counsel, the Arizona Association of Industries, the Arizona Medical Association, the Arizona Chamber of Commerce, the Arizona Society for Healthcare Risk Management, McDonnell Douglas Helicopter Company, Phelps Dodge, the Product Liability Advisory Council, and Tucson Electric Power Company.[124] Clearly, the business community believed that the supreme court decision could have broad implications, especially for healthcare, manufacturing, and transportation companies, which must often defend large personal injury suits.

In an opinion by Justice Martone, the supreme court unanimously affirmed the trial court's order, but vacated the court of appeals's treatment of the scope of the corporate privilege[125] in favor of the following test:

> [W]here someone other than the employee initiates the communication, a factual communication by a corporate employee to corporate counsel is within the corporation's privilege if it concerns the employee's own conduct within the scope of his or her employment and is made to assist the lawyer in assessing or responding to the legal consequences of that conduct for the corporate client.[126]

Justice Martone emphasized at the outset that the attorney–client privilege is "central to the delivery of legal services in this country."[127] He agreed with *Upjohn* that the function of the privilege cannot be adequately served by defining the scope of the privilege solely on the basis of the communicator's status in the company[128] and therefore rejected the control group test.[129] Quickly concluding that the communications any employee *initiates* to obtain counsel's advice for the company should be privileged,[130] he moved on to the "real debate," namely, the

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122. Alexander, *supra* note 121, at 381.
123. Samaritan Found. v. Goodfarb, 862 P.2d 870 (Ariz. 1993).
124. *Id.* at 872.
125. *Id.* at 873.
126. *Id.* at 880.
127. *Id.* at 874.
128. *Id.*
129. *Id.* at 876.
130. *Id.* This would include everything from a CEO's statements to corporate counsel when seeking advice about the antitrust implications of corporate behavior, even if the behavior is not his own, to a company truck driver's statements in seeking counsel's advice about an accident he had just had. *Id.* Privileging a broad range of employee-initiated communications is consistent with a survey of 102 corporations which found that 86% of the companies authorized middle managers to seek legal advice from inside counsel without first obtaining permission from their superiors and 51% authorized lower-level employees to do so. Alexander, *supra* note 121, at 211.

applicability of the privilege to factual communications that employees make to counsel in response to instructions by someone else in the company.[131]

Using a functional approach that looks at "the relationship between the communicator and the incident that gives rise to the legal matter," the court distinguished between an employee witness and an employee whose conduct has exposed the corporation to potential liability,[132] on the ground that the costs and benefits of privileging their communications with corporate counsel differ. If witness statements are privileged, Justice Martone reasoned, the cost in terms of evidence that becomes unavailable can be serious,[133] as it is when the unavailability of interview summaries makes it impossible to refresh the recollection of key witnesses. But there may be little "countervailing benefit" because the *corporation's* privilege provides little incentive for the *employee*, who does not control the privilege, to be forthcoming.[134] Greater benefits in the form of sounder legal advice for corporations can be reaped by privileging an employee's statements to counsel about actions on his part that expose the company to liability, since unprivileged out-of-court admissions of *that* kind would be "directly admissible against the corporation"[135] and usually convey the most vital information for counsel to have when assessing a company's legal exposure and formulating a response.[136]

Next, the court stressed the importance of bringing Arizona law into line with federal law on the subject[137] and viewed *Upjohn*'s rejection of the control

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131. Samaritan Found. v. Goodfarb, 862 P.2d at 876.

132. *Id.* at 877.

133. *Id.* at 876–77. This is true, but no less true of employees' statements about their own, potentially liability-generating conduct, at least when there is no other evidence to prove that such misconduct occurred.

134. *Id.* at 877. Here, Justice Martone's reasoning is shaky but his conclusion is correct. There is little reason to suppose that employees who engaged in misconduct that is likely to be imputed to their employers as a basis for liability would be *more* motivated than employee witnesses to speak frankly when their communications fall within a privilege that is not their own. A better reason to suppose that the corporate privilege will have relatively little value in motivating employee witnesses to speak candidly is that they will not be revealing any misconduct on their own part and would probably speak frankly in any event.

135. *Id.* at 876. This was a reference to Rule 801(d)(2)(D) of the Arizona Rules of Evidence, which makes admissible an out-of-court statement by a party's servant "concerning a matter within the scope of the . . . employment, made during the existence of the [employment] relationship." The court was implicitly construing employees' statements about their on-the-job observations, as opposed to conduct, as not concerning a matter within the scope of employment.

136. Samaritan Found. v. Goodfarb, 862 P.2d at 877. A potential problem with the court's sharp distinction between statements by employee witnesses and statements by employees whose conduct may have exposed the company to liability is that a lawyer conducting an investigation soon after an accident will not always know in advance which employees are which. *See* Dowdell, *supra* note 17, at 748.

137. Justice Martone wrote,

> We should minimize disparities between federal and state law when it comes to privilege. When clients seek legal advice, they do not expect that the privilege will exist for purposes of some claims but not others. Much litigation today consists of both state and federal

group test as a reason for Arizona to do the same.[138] But was it consistent with *Upjohn* to put employee-witness statements beyond the scope of Arizona's corporate privilege? Samaritan argued that it was not, because (1) *Upjohn* adopted a "broad" subject matter test that privileges communications "by all employees who speak [to counsel] at the direction of their corporate superiors . . . regarding matters within the scope of their corporate duties"[139] and (2) that test would protect the "communications at issue here because the nurses and scrub technician were carrying out their corporate duties while present in the operating room."[140]

Justice Martone acknowledged that some language in *Upjohn* supports that reading, but found *Upjohn* more susceptible to an interpretation that excludes witness statements.[141] For one thing, the narrower reading is consistent with "[m]any of the most often cited authorities," including *Harper & Row* and *Diversified Industries*, whose positions on pure witness statements were not disavowed in *Upjohn*.[142] For another, nothing in *Upjohn* indicated that the managers who filled out the privileged questionnaires were mere observers of, rather than participants in, the payments under investigation.[143] Moreover, the majority and concurring opinions in *Upjohn* only referred to the value of privileging statements of employees whose *conduct* or *actions* could embroil the company in legal difficulties.[144]

Justice Martone also responded to amici's policy argument that, without a privilege broad enough to protect employee-witness statements, "corporations will forgo prompt post-accident investigations" and "cease policing their own activities

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> claims . . . . For example, there are frequently pendant state claims attached to federal question claims in the United States district courts.

Samaritan Found. v. Goodfarb, 862 P.2d at 877.

138. *Id.*

139. *Id.* at 878.

140. *Id.*

141. *Id.* at 879.

142. *Id.* at 878. Justice Martone also observed, *id.* at 878–79, that the court's position was consistent with California Supreme Court's longstanding decision in *D.I. Chadbourne, Inc. v. Superior Court*, 388 P.2d 700 (Cal. 1964). Furthermore, Justice Martone suggested that a broad interpretation of *Upjohn* would have incongruous results: the statement of an executive who happened to see a company truck hit a vehicle while looking out of his office window would be unprivileged because it would not concern matters within his corporate duties, while the statement of a deliveryman who was riding in the truck as a passenger in order to make deliveries and was no more involved than the executive in causing the accident would be privileged. Yet both would be employee-witness statements. Samaritan Found. v. Goodfarb, 862 P.2d at 878.

143. Samaritan Found. v. Goodfarb, 862 P.2d at 879. To the extent that any Upjohn manager gathered information from another employee about a payment that the manager neither observed nor participated in, the manager would presumably be viewed as corporate counsel's investigating agent, like the paralegal who conducted interviews at counsel's request in *Samaritan*.

144. *Id.* (citing the reference in Chief Justice Burger's concurrence to employee statements regarding conduct or proposed conduct within the scope of employment); *see supra* note 75.

to ensure that they comply with the law."[145] He rejected the first point on the ground that corporations realize that "ignorance is too high a price to pay to avoid taking witness statements that are potentially discoverable" (but still entitled to qualified work-product protection), and they would not want to be "the last to know the facts when . . . facing potential liability."[146] He rejected the second point on the ground that corporations are strongly motivated in any event to police themselves in order to prevent conduct that would expose them to liability.[147]

Finally, as discussed above, the court of appeals and supreme court took pains in *Samaritan* to place the corporate privilege in the broader context of procedural law, including the supreme court's rules of civil procedure concerning the work-product doctrine[148] and mandatory pre-trial disclosures,[149] and its evidentiary rule making an employee's out-of-court admissions about conduct within the scope of her employment admissible against her employer.[150] It is worth noting here that the supreme court also considered how its test squared with the Arizona Rules of Professional Conduct, which are also promulgated by the court and play a vital role in governing the practice of law.[151]

The amici seized on a comment to Ethical Rule 1.13 which provides that, when a constituent of an "organizational client" (such as an employee) communicates in that person's organizational capacity with the client's counsel, counsel has an ethical duty to the organization to keep the communication in confidence.[152] The amici argued that the comment supported the view that employee-witness statements should be privileged. The court disagreed, correctly observing that the ethical duty of confidentiality covers a much broader range of information than the privilege (including information from non-client sources), that a lawyer must reveal confidential but unprivileged information when required by a court to do so, and that a communication does not become privileged "simply because a lawyer has a[n ethical] duty to keep it confidential."[153]

The court also observed that its test was consistent with a comment to ER 4.2, which prohibits the lawyer for a party in a matter in which an organization is also represented by counsel from contacting (without counsel's consent) persons within the organization "whose act or omission . . . may be imputed to the organization for purposes of civil or criminal liability or whose statement may

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145. Samaritan Found. v. Goodfarb, 862 P.2d at 879.

146. *Id.*

147. *Id.* Maintaining systems to prevent and detect internal wrongdoing may also mitigate the sanctions that a corporation incurs when regulatory violations come to the government's attention. *See* U.S. Sentencing Guidelines Manual § 8B2 (2005) (identifying the features of a corporate-compliance program that can serve as a mitigator).

148. *See supra* note 108.

149. *See supra* note 118.

150. *See supra* note 135.

151. Samaritan Found. v. Goodfarb, 862 P.2d at 879–80.

152. ARIZ. RULES OF PROF'L CONDUCT ER 1.13 cmt. ¶ 2.

153. Samaritan Found. v. Goodfarb, 862 P.2d at 879.

constitute an admission on the part of the organization."[154] The fact that *those* persons are identified with the corporate party, the court wrote, "suggests that an uninvolved employee (as we have defined it) is not."[155]

2. The Legislature's Response

The supreme court decided *Samaritan* in November 1993.[156] By late April 1994, the Arizona Legislature had passed a bill rejecting *Samaritan* in favor of a broader test that brings employee-witness statements within the scope of the corporate privilege.[157] The legislation amended Arizona Revised Statutes section 12-2234, which codified Arizona's common law privilege for civil cases but had previously been silent about how the privilege applied to corporate or other entity clients.[158] As amended, section 12-2234 privileges communications between counsel for a corporation (or other entity) and any employee regarding the "acts or omissions of *or information obtained from* the employee," so long as the communication is "[f]or the purpose of providing legal advice to the entity" or "obtaining information in order to provide legal advice to the entity."[159] Since witness statements convey information, even if not about the witness's own conduct, they meet the test.[160]

The Arizona Legislature had codified the common law attorney–client privilege as early as 1901.[161] Generally, however, statutes that have codified the privilege in other jurisdictions have not displaced the courts as the primary

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154. ARIZ. RULES OF PROF'L CONDUCT ER 4.2 cmt. ¶ 2; *see also* Brown, *supra* note 15, at 952–53 (explaining the relationship between the anti-contact rule and the corporate attorney–client privilege).

155. Samaritan Found. v. Goodfarb, 862 P.2d at 880. Here, Justice Martone was implicitly construing employee-witness statements that may be adverse to an employers' interest as not constituting admissions on the part of the company. This is consistent with his treatment of the evidentiary rule governing the admissibility of employees' out-of-court statements concerning matter within the scope of their employment. *See supra* note 135.

156. Samaritan Found. v. Goodfarb, 862 P.2d at 870.

157. Act of Apr. 26, 1994, ch. 334, 1994 Ariz. Sess. Laws 2018 (amending ARIZ. REV. STAT. § 12-2234).

158. *Id.* Curiously, the amendment made no reference to the parallel statute recognizing the privilege for criminal cases, an omission that became consequential in *Roman Catholic Diocese v. Superior Court*, 62 P.3d 970 (Ariz. Ct. App. 2003). *See* discussion *infra* Part II.A.1.a.

159. ARIZ. REV. STAT. § 12-2234(B) (2003) (emphasis added). Subsection B also applies to government agencies and private entities other than corporations, but *Samaritan* did not address the applicability of the "corporate" privilege to these entities or the scope of their privilege.

160. Section 12-2234(B) may also conflict with the *Samaritan* test in other respects, but judicial construction could probably minimize them. For example, the provision could be read to protect employees' statements about their *off*-the-job activities or observations, but legislative history suggests that the statute was not intended to be read so broadly. David G. Campbell, *A Legislative Response to* Samaritan*: Arizona's Restive Attorney–Client Privilege for Corporations*, 31 ARIZ. ATT'Y 29, 33 (1994).

161. ARIZ. REV. STAT. ANN. § 12-2234 (2003) (historical and statutory notes).

lawmakers on the subject[162] and this remained the case in Arizona until 1994.[163] By then, the legislature had enacted detailed statutes defining other privileges,[164] but the scope of the attorney–client privilege was essentially left to the courts.[165] From this perspective, what is striking about the 1994 statute is that, far from codifying the *Samaritan* test, it flatly rejects the supreme court's exclusion of witness statements from the protection of the corporate privilege. How and why did this new legislative "activism" come about?

According to Bill Jones, whose law firm was outside counsel to Samaritan in the lawsuit, and who personally played a large part in drafting the proposed amendment to section 12-2234,[166] mobilization for possible legislation began as early as the court of appeals decision in *Samaritan*. At that time, "corporate Arizona" felt quite threatened by the conjunction of two events.[167] One was the court of appeals decision in *Samaritan*, which offered only "qualified" protection for communications between corporate counsel and non-control group employees.[168] The other was the supreme court's promulgation of the "Zlaket Rules,"[169] which for the first time required civil litigants, at the outset of a case and without a discovery request, to provide other parties with relevant unprivileged documents and other information, even if doing so would be adverse to the disclosing party's interests. Business leaders feared that the Zlaket Rules would change for the worse the balance of power between plaintiffs and defendants in tort litigation, and the court of appeals decision in *Samaritan* added fuel to the fire.[170] In other words, proponents sought the 1994 legislation in large part as a "tort reform" measure.[171]

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162. Dean Wigmore described the bulk of state statutes on the attorney–client privilege as having "seldom helped to settle any mooted point [or] chanced to disfigure the common law rule or to unsettle its logical development" and found that "[t]heir original wording was commonly ignored by the courts as being merely an attempt to name and to recognize the common law privilege." WIGMORE, *supra* note 18, § 2292, at 552.

163. *See id.* § 2292, at 552 n.2 (listing Arizona's prior statutes dealing with attorney–client privilege).

164. *E.g.*, ARIZ. REV. STAT. § 12-2238 (2003) (privilege for communications during mediation); *id.* § 36-445.01 (2003) (privilege for records and materials prepared for hospital peer reviews).

165. For an example of pre-1994 legislative deference to the courts on attorney–client privilege issues, see Act of June 27, 1976, ch. 171, 1976 Ariz. Sess. Laws 838 (amending ARIZ. REV. STAT. § 13-3620(C)) (abrogating every *other* evidentiary privilege for litigation concerning child abuse).

166. Interview with William R. Jones Jr., Partner, Jones, Skelton & Hochuli, in Phoenix, Ariz. (July 26, 1999).

167. *Id.*

168. Samaritan Found. v. Superior Court, 844 P.2d 593 (Ariz. Ct. App. 1992). The business community was not as upset, but still dissatisfied, by the subsequent supreme court decision. Interview with William R. Jones Jr., *supra* note 166.

169. *See supra* note 118.

170. Interview with William R. Jones Jr., *supra* note 166.

171. However, Mr. Jones testified in favor of the proposed legislation at a hearing of the Senate Judiciary Committee on behalf of the Arizona Chamber of Commerce, which, according to him, regarded the matter "as a business issue rather than a tort issue." Letter

In January 1994, Bruce Crawford, Mr. Jones's partner and Samaritan's lead counsel in the *Samaritan* case, notified the lawyers who had represented various amici before the supreme court that his firm was preparing to introduce in the current legislative session amendments to section 12-2234 that would "track the language of the . . . Supreme Court's decision in *Upjohn*."[172] Mr. Jones, who acknowledged in 2005 that he had helped draft and lobby for "almost every piece of tort reform legislation in Arizona for the last 27 years," was engaged by Samaritan to rewrite section 12-2234 and lobby the amended version through the legislature.[173]

The legislative process from which the 1994 amendments emerged has been described by one commentator as one of "almost unseemly haste, and very little fanfare."[174] One can hardly disagree. The draft was "introduced" when the Senate Judiciary Committee passed a "strike-everything" amendment to House Bill 2161, an insurance measure that had already passed in the House but was not making progress in the Senate.[175] The Committee gutted the bill and substituted language defining the scope of the corporate privilege in civil litigation.[176] This maneuver meant that the House, having already passed the bill, could not give the new version full consideration.[177] But although the legislative process was hasty[178] and less than transparent, one important interest group, the Arizona Trial Lawyers Association ("ATLA"), actively opposed the legislation. Many ATLA members specialize in plaintiff's personal injury work. Kenneth Clancy, an ATLA leader whose firm had represented the plaintiffs in *Samaritan*, testified against the bill at a March 22, 1994 meeting of the Senate Judiciary Committee at which Bill Jones

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from William R. Jones Jr., Partner, Jones, Skelton & Hochuli, to Kenneth P. Clancy, Partner, Leonard & Clancy (Apr. 26, 1994) (on file with author).

172. Letter from Bruce D. Crawford to various attorneys (Jan. 25, 1994) (on file with author). Many of the amici were associated with the manufacturing, healthcare, and transportation industries. *See supra* text accompanying note 124.

173. E-mail from William R. Jones Jr., Partner, Jones, Skelton & Hochuli, to Thomas A. Mauet, Professor of Law, University of Arizona College of Law (Aug. 9, 2005) (on file with author).

174. Daniel J. McAuliffe, Article *re* Attorney–Client Privilege 2 (unpublished manuscript, on file with author).

175 *See* Coleman, *supra* note 10, at 341–42.

176. *Id.* at 342. A "strike-everything" amendment could be used at the time as a late-session maneuver to gut a bill and substitute proposed legislation on another subject, so long as the "new" bill, if passed, would be codified under the same Title of the Arizona Revised Statutes—in this case, Title 12. Therefore, it would have been impossible simultaneously to amend Arizona Revised Statutes section 13-4062(2), the parallel statute recognizing the attorney–client privilege in criminal cases, which fell under Title 13. At any rate, no one who took an interest in the amendment to section 12-2234 was thinking about the parallel issue in criminal proceedings. *See* Dowdell, supra note 17, at 744 n.194.

177. However, the House refused to approve the bill as amended after it passed the Senate and the bill had to go to a conference committee where it was further amended before final adoption. Coleman, *supra* note 10, at 344 & nn.71–74.

178. According to Mr. Jones, few state legislators had a grasp of the issues involved, but Senators Spitzer and Blanchard on the Senate Judiciary Committee did. Interview with William R. Jones Jr., *supra* note 166.

appeared in support.[179] This suggests that those who took an interest in H.B. 2161 on *both* sides viewed the matter chiefly as one more battle in the state's tort reform wars. Because the key witnesses who testified for and against the bill were a plaintiffs' personal injury lawyer and a partner in a firm that regularly defends corporations in tort cases,[180] one can safely infer that both sides were concerned more about the impact of the corporate privilege on tort litigation than its impact on regulatory compliance advice, which was the concern in *Upjohn*.

What positions did the two sides take in the debate? Proponents of the bill argued that the legislation was needed because *Samaritan* had deviated from *Upjohn* and it was important for Arizona's corporate privilege to be consistent with federal (and other states') law. At the Senate Judiciary Committee hearing, Senator Marc Spitzer stated that the bill was needed because *Samaritan* had "resulted in a court of appeals decision and . . . supreme court decision that have thrown the attorney–client privilege with respect to a corporation into turmoil."[181] Spitzer also called the bill "an attempt to codify [*Upjohn*]" because "[t]here is no reason to have a different standard in federal or state courts."[182] A "fact sheet" prepared by a Senate staffer stated that H.B. 2161 "enacts" *Upjohn* to "replace the case law authority of *Samaritan*, and conform the elements of Arizona's corporate attorney–client privilege to those of the federal courts and the *majority of other states' courts*."[183] And, according to Mr. Clancy, at the March 22 hearing, Mr. Jones "insisted that no attorney could realistically read the 'strike everything' language as going beyond a codification of *Upjohn*."[184] On the other hand, Mr. Clancy supposedly maintained at the hearing that the bill "was contrary to the spirit and purpose of the disclosure [i.e., Zlaket] rules and went beyond the *Upjohn* case."[185]

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179. Letter from William R. Jones Jr. to Kenneth P. Clancy, *supra* note 171.

180. According to Mr. Jones, he and Mr. Clancy were two of the three witnesses who testified on the bill at the Senate Judiciary's hearing on March 22, 1994. *Id.*

181. Coleman, *supra* note 10, at 340 n.43 (quoting Audio tape: Arizona Senate Judiciary Committee Meeting on H.B. 2161, 41st Leg., 2d Reg. Sess. (Mar. 22, 1994)). According to Mr. Coleman, the proposed legislation was "an attempt to nullify the [Arizona Supreme Court's] decision and codify the federal standard for attorney–corporate client privilege set forth by the United States Supreme Court in [*Upjohn*]." Coleman, *supra* note 10, at 336–37 & n.14 (citing Audio tape: Speeches on H.B. 2161 before the Arizona Senate Committee of the Whole, 41st Leg., 2d Reg. Sess. (Mar. 31, 1994)).

182. *See* Dowdell, *supra* note 17, at 745 n.204 (quoting Audio tape Arizona Senate Judiciary Committee Meeting on H.B. 2161, 41st Leg., 2d Reg. Sess. (Mar. 22, 1994)).

183. ARIZ. STATE S. FACT SHEET FOR H.B. 2161 (Apr. 19, 2004) (quoted in Dowdell, *supra* note 17, at 745 n.201 (emphasis added)).

184. Letter from Kenneth P. Clancy, Partner, Leonard & Clancy to William R. Jones Jr., Partner, Jones, Skelton & Hochuli (Apr. 13, 1994). In a response, Mr. Jones did not confirm or deny that he had made that statement, but recalled that he had said that the bill adopted "the philosophy" of *Upjohn*. Letter from William R. Jones Jr. to Kenneth P. Clancy, *supra* note 171.

185. Letter from William R. Jones Jr. to Kenneth P. Clancy, *supra* note 171.

Thus, the two salient issues raised in the debate over H.B. 2161 were the impact the bill would have on the availability of evidence in tort litigation and the relative consistency of the bill and the *Samaritan* test with *Upjohn*.

II. WHY THE SUPREME COURT'S EXCLUSION OF EMPLOYEE-WITNESS STATEMENTS FROM THE PROTECTION OF THE CORPORATE PRIVILEGE IS PREFERABLE TO THE LEGISLATURE'S INCLUSION, AND WHY THE STATE JUDICIARY IS BETTER SUITED THAN THE LEGISLATURE TO DEFINE THE PRIVILEGE'S SCOPE

Drawing on material provided in Part I, I will now argue that, if the supreme court has the authority (and opportunity) to do so, it should strike down the 1994 amendments to Arizona Revised Statutes section 12-2234 insofar as they conflict with the court's treatment of employee-witness statements in *Samaritan*. Part II.A argues that the *Samaritan* test is superior on the merits because the employee-witness statements that corporate counsel gather in anticipation of litigation should not be afforded the absolute protection of the corporate privilege. Instead, memoranda summarizing those statements should receive the more limited protection of the work-product doctrine.[186] Part II.B argues that the Arizona judiciary is better suited than the legislature to make policy on this issue, at least as evidenced by the manner in which they reached their conclusions. On this view, even if the supreme court's test is not clearly superior on the merits, it is nonetheless the product of a more reliable policymaking process and preferable for that reason. Both sub-parts require comparative judgments based on appropriate criteria. Because several of the criteria applied in Part II.B may be unfamiliar or controversial, I will explain why they are appropriate.

A. Why the Samaritan *Test Is Superior as a Matter of Public Policy*

The legislature and supreme court agreed that Arizona's corporate privilege should be closely aligned with other law, especially federal privilege law as enunciated in *Upjohn*. They sharply disagreed, however, about how to treat employee-witness statements taken by corporate counsel in anticipation of litigation. Accordingly, I compare the substantive merits of their tests under two simple criteria. First, which test better promotes consistency in the law—both internal consistency in Arizona's corporate privilege and consistency with *Upjohn* and corporate-privilege law in other states? Second, which test better balances the cost and benefits of privileging employee-witness statements? Benefits consist of improvements in the legal services companies receive thanks to communications that would not have occurred, or would have been less likely to occur, if unprivileged. The cost is the reduction in the reliability of judicial fact-finding that results from evidence being withheld because it is privileged. While no empirical

186. It is beyond the scope of this Article to compare the merits of the two tests in respects in which they differ but do not necessarily conflict. For example, while *Samaritan* is silent on the point, the 1994 amendments to Arizona Revised Statutes section 12-2234 confer the same privilege on corporations and government entities. It is debatable whether government agencies should have any attorney–client privilege and, if so, whether it should be as broad as the corporate privilege. *See* WOLFRAM, *supra* note 16, at 289–92.

data exist to establish how the judicial and legislative tests affect the soundness of legal advice or the availability of evidence in legal proceedings, one can still make educated guesses about the relative merits of the two tests in these respects.[187]

1. Maintaining Consistency in the Law Governing the Scope of the Corporate Privilege

a. The Internal Consistency of the Privilege Under Arizona Law

The most obvious advantage of the supreme court's version of the corporate attorney–client privilege is that it applies uniformly in civil and criminal proceedings. The scope of the privilege should not differ in these settings. If it differs with respect to employee-witness statements, the status of those statements ex post will depend on whether they turn out to be relevant in a civil or a criminal matter and this fortuity will make the applicability of the privilege less predictable ex ante. This is not a grave problem because criminal proceedings against corporations are rare in Arizona. But, as became clear in *Roman Catholic Diocese of Phoenix v. Superior Court*,[188] it is not a purely hypothetical concern.

Arizona has long had separate statutes codifying the common law attorney–client privilege for civil cases (ARIZ. REV. STAT. § 12-2234) and for criminal matters (ARIZ REV. STAT § 13-4062(2)), but both were skeletal and neither referred to the corporate privilege.[189] Prior to the 1994 legislation, however, no one supposed that they differed in scope. The supreme court referred to both statutes in *Samaritan*[190] and understood that it was defining the scope of the corporate privilege for all judicial proceedings. But when the legislature amended the civil statute to "nullify *Samaritan*"[191] and broaden the scope of the

187. If one test put corporate clients and their lawyers on clearer notice of the employee communications that would be privileged, that would also bear on the merits of the tests. But neither test has a clear advantage in this respect. They are equally clear (and are clearer than *Upjohn*) regarding employee-witness statements: *Samaritan* rules them unprivileged; Arizona Revised Statues section 12-2234(B) rules them privileged. *Samaritan* offers less certainty when lawyers performing corporate investigations cannot tell in advance whether an employee's communications will reveal conduct by the employee that could embroil the company in legal difficulties or will only be important to establish the conduct she observed on the part of others. *See supra* note 136. However, which employees are which will often be clear enough by the time interviews are conducted, as they presumably were in the *Samaritan* interviews. The statutory test introduces other uncertainties. On its face, it seems to protect an employee's communications about her off-the-job observations or conduct, as *Samaritan* clearly would not. *But see* Campbell, *supra* note 160, at 33 (quoting a statement by Senator Blanchard of the Senate Judiciary Committee that the statute was not meant to privilege such communications).

188. 62 P.3d 970 (Ariz. Ct. App. 2003).

189. *See supra* note 109; *supra* text accompanying notes 161–65.

190. Samaritan Found. v. Goodfarb, 862 P.2d 870, 874 (Ariz. 1993).

191. *See supra* note 10.

privilege, it did not consider amending the criminal statute and, thus, created the mischief that subsequently required the attention of the lower courts.[192]

In *Roman Catholic Diocese*, the State subpoenaed the diocese (a corporation) to produce certain documents in a grand jury proceeding.[193] The diocese withheld some of those documents, asserting its attorney–client privilege. After reviewing the documents *in camera* and holding a hearing to decide which privilege standard it should apply, the trial court held that the criminal statute "as interpreted" in *Samaritan* provided the correct standard. The diocese petitioned the court of appeals for relief,[194] but the court held that the *Samaritan* test was the appropriate one.[195]

The diocese argued that the trial court should have interpreted the criminal statute to incorporate the broader test in amended section 12-2234, because both statutes codified the same common law privilege and an amendment to one should be construed as an amendment to both.[196] The diocese also argued that, even if this was incorrect as a matter of statutory interpretation, the court of appeals should declare as a matter of "common law" that the test articulated in section 12-2234 applied across the board.[197] But the court concluded that section 12-2234 plainly applied only to civil proceedings and found no legislative history to suggest that the legislature intended to amend both statutes.[198] As for the diocese's "common law" argument, the court concluded that the *Samaritan* test should continue to govern in criminal cases because the supreme court had determined that its test adequately served the underlying purposes of the attorney–client privilege in all legal proceedings.[199] That being the case, it was not appropriate for the lower courts to depart from the *Samaritan* test in criminal matters.

The legislature could restore consistency in the scope of the corporate privilege by amending the criminal statute. But in twelve years, punctuated by *Roman Catholic Diocese*, it has not considered doing so. A court decision striking down the 1994 legislation that nullified *Samaritan* may well be the surer route to consistency.

b. Consistency with *Upjohn* and Privilege Law in Other States

Proponents of the 1994 amendments to section 12-2234 insisted that the legislation was needed in order to bring Arizona's corporate privilege into line with *Upjohn*,[200] which, they claimed, the supreme court had refused or failed to do

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192. For procedural reasons, the legislature could not have amended the criminal statute in the 1994 statute that amended Arizona Revised Statutes section 12-2234, *see supra* note 176, and the legislature has taken no steps since then to reconcile the two.

193. *Roman Catholic Diocese*, 62 P.3d at 972.

194. *Id.*

195. *Id.* at 974.

196. *Id.* at 972.

197. *Id.*

198. *Id.* at 974–75.

199. *Id.* at 973.

200. *See supra* notes 181–85 and accompanying text.

in *Samaritan*. Yet *Samaritan* had stressed the importance of "minimiz[ing] disparities between federal and state law when it comes to privilege."[201] Moreover, Justice Martone's opinion analyzed *Upjohn* closely and concluded that, although some language in *Upjohn* might be read to the contrary, the more plausible interpretation placed employee-witness statements outside the scope of the corporate privilege.[202]

Justice Martone's reasoning on this point[203] was sound. It included a reference to the Eighth Circuit's exclusion of employee-witness statements from protection under its subject matter test in *Diversified Industries*, which *Upjohn* never questioned, and a reference to language in *Upjohn* itself that stressed the need to privilege employees' statements about their own *conduct* that could embroil their company in legal difficulties. Moreover, the leading treatise on the corporate privilege not only applauds the exclusion of employee-witness statements as a matter of policy, but also views the supreme court's approach in *Samaritan* as "consistent with *Upjohn*" while providing "*additional guidance* about the structure of corporate communications with counsel."[204] Far from rejecting *Upjohn*, in other words, *Samaritan* provided useful elaboration on a decision that never directly addressed the status of employee-witness statements and explicitly left further elaboration on the scope of the corporate privilege to "case-by-case" development.[205] The *Samaritan* test is at least as "consistent" with *Upjohn* as the statutory test, and probably more so.

What about consistency with other states' approaches to the corporate privilege? A "fact sheet" prepared by a senate staffer stated that the 1994 legislation was needed not only to bring Arizona's corporate privilege into line with federal law as defined in *Upjohn*, but also to bring it into line with the privilege as defined by "the majority of other state courts."[206] But this was clearly incorrect. As noted above, as late as 1997, more than half the states had not yet taken a position on the scope of the corporate privilege and eight had adopted the control group test.[207] Among the states that had adopted subject matter tests, at least three "wavered from the *Upjohn* model."[208] And the California Supreme Court's early and often-cited decision in *D.I. Chadbourne, Co. v. Superior Court* is on "all fours" with *Samaritan* with respect to employee-witness statements,[209] as are the often-cited cases from the Illinois and Minnesota Supreme Courts, which were decided soon after *Upjohn* and explicitly took *Upjohn* into account.[210]

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201. Samaritan Found. v. Goodfarb, 862 P.2d 870, 877 (Ariz. 1993); *see supra* note 137.

202. *Id.* at 879.

203. *See supra* text accompanying notes 141–44.

204. GERGACZ, *supra* note 25, § 3.98, at 3-182 (emphasis added).

205. Upjohn Co. v. United States, 449 U.S. 383, 396 (1981).

206. ARIZ. STATE S. FACT SHEET FOR H.B. 2161 (Apr. 19, 2004) (quoted in Dowdell, *supra* note 17, at 745 n.201).

207. *See supra* note 79 and accompanying text.

208. Hamilton, *supra* note 79, at 641.

209. 388 P.2d 700 (Cal. 1964); *see* discussion *supra* Part I.A.3.

210. *See* discussion *supra* Part I.A.3.

2. Balancing the Costs and Benefits of Privileging Employee-Witness Statements

The *Samaritan* test is also superior from the standpoint of balancing the costs and benefits of privileging the employee-witness statements that corporate counsel take in anticipation of litigation. Privileging employees' statements of *any* kind can contribute only marginally to their willingness to speak because few employees have a say in their employer's later decision to invoke or waive its privilege.[211] But the corporate privilege is especially unlikely to motivate employee *witnesses* to speak, and speak candidly. Their statements, by definition, concern only their observations, not *conduct* on their part that is imputable to their company as a basis for liability. Consequently, they would ordinarily be willing to communicate candidly with corporate counsel at their employer's request *in any event*.[212]

Of course, the benefits of privileging employee-witness statements also depend on the utility of the privilege in motivating corporate counsel to *seek* those statements. Amici argued in *Samaritan* that without the absolute protection of the privilege, corporations will forgo post-accident investigations.[213] But Justice Martone responded that corporations know that "ignorance is too high a price to pay to avoid taking witness statements that are potentially discoverable,"[214] and this seems likely to be the case. Interview notes that summarize employee-witness statements in accident cases, if unprivileged, nonetheless enjoy the qualified protection of the work-product doctrine. Moreover, there is no evidence that lawyers investigating accidents for corporations in anticipation of litigation are deterred from interviewing *independent* witnesses because their notes will only receive qualified protection from discovery.[215] And there is survey evidence suggesting that corporate counsel would not be less likely to interview employee witnesses if their communications only had qualified rather than absolute protection.[216]

Thus, measured by their impact on the internal consistency of Arizona corporate privilege law, by their consistency with the corporate privilege under federal law and law in other states, and by the balance they achieve between the costs and benefits of privileging employee-witness statements, the *Samaritan* test is, as a matter of public policy, superior to the statutory test in defining the scope of Arizona's corporate attorney–client privilege.

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211. *See supra* note 134 and accompanying text.

212. *Id.*

213. *See supra* text accompanying note 145.

214. Samaritan Found. v. Goodfarb, 862 P.2d 870, 879 (Ariz. 1993); *see also* Stephen A. Saltzburg, *Corporate and Related Attorney–Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 300–02 (explaining why the work-product doctrine suffices to encourage lawyers investigating accidents to interview even witnesses who are likely to possess adverse information).

215. *See supra* text accompanying note 121.

216. *See* Alexander, *supra* note 121, at 381.

B. Why the Supreme Court Is Better Suited than the Legislature to Decide Which Communications Between Employees and Corporate Counsel Fall Within the Scope of the Corporate–Attorney Client Privilege

If my argument for the superiority of the *Samaritan* test is sound, that in itself could justify the supreme court striking down the relevant portion of the 1994 legislation, assuming it has the constitutional authority to do so. But even if the court is less than certain on that score, it might nonetheless be justified in invalidating the legislation if the judiciary proved to be better suited than the legislature to be the policymaker with final-word authority on the scope of the corporate privilege.

I want now to suggest that this is the case, using four criteria to compare the policymaking strengths and weakness of the two branches with respect to the corporate privilege and perhaps the attorney–client privilege generally.[217] First, which branch displayed greater capacity to grasp the issue and greater willingness to gather the necessary information to resolve it wisely? Second, which branch took pains to coordinate the scope of the corporate attorney–client privilege with procedural and evidentiary law and Arizona's rules of legal ethics? Third, which branch's policymaking process is less likely to have been distorted by institutional bias? And fourth, which branch honored the principle of "trans-substantivity," which plays an important role in the making of procedural law?

1. Capacity to Grasp the Issues and Gather the Necessary Input

In many respects, legislatures are undoubtedly superior to courts as public policymakers. They are structured to be more responsive to public input and can gather information from many sources. Courts, when adjudicating, must rely heavily on input from the parties themselves, who are not always motivated or competent to address broad policy issues that may be implicated in their case. In this instance, however, the legislative process was decidedly inferior to the judicial process. There is evidence that few of the legislators who voted on the H.B. 1261 understood its implications.[218] The legislative process was irregular as well. Introducing the bill in a late-session "strike everything" maneuver did not allow for careful deliberation or broad input.[219] The Senate Judiciary Committee heard testimony from very few opponents of the legislation.[220] By contrast, thanks to the many amici who filed briefs when *Samaritan* was before the supreme court arguing for a corporate privilege that would protect employee-witness statements, the court surely heard well-articulated arguments against the approach it eventually took.[221]

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217. The reader should bear in mind that I am not comparing the policymaking competence of the courts and the legislature in a global sense or even with respect to evidentiary privileges generally. I am concerned solely with the scope of the attorney–client privilege and, even more particularly, the scope of the corporate privilege.

218. *See supra* note 178.

219. *See supra* notes 174–78 and accompanying text.

220. *See supra* note 180.

221. *See supra* text accompanying note 124.

What about *legal* input? The court and legislature both considered it important to adopt a test that would be consistent with privilege law elsewhere and particularly with *Upjohn*. To that end, both the court of appeals and the supreme court took account in *Samaritan* of the leading cases on the scope of the corporate privilege, which were undoubtedly analyzed as well in the briefs that were submitted. Writing for the supreme court, Justice Martone made a strong case that denying protection for employee-witness statements was consistent with those cases, including *Upjohn*.[222] Given the vagueness of the *Upjohn* decision, there was at a minimum no basis for concluding that *Samaritan* rejected or was inconsistent with *Upjohn*, as supporters of the 1994 amendments insisted.[223]

Finally, although no empirical data can conclusively demonstrate the costs and benefits of particular tests, policymakers should consider respectable surveys that bear on these matters. The court of appeals and the supreme court referred in their *Samaritan* opinions to a well-conceived survey in which sizable majorities of corporate lawyers indicated that the frequency and candor of their communications with low- and mid-level corporate employees for the purpose of providing their clients with legal advice would not be diminished if those communications only enjoyed qualified rather than absolute protection in legal proceedings.[224] Nothing in the legislative history of the 1994 amendments suggests that the legislature took any empirical data into account.

2. Incentive and Competence to Coordinate the Attorney–Client Privilege with Related Law

Because the law of attorney–client privilege is in many respects related to other procedural and evidentiary law and to the law governing law practice, the ideal policymaker to define the scope of the corporate privilege would be willing and able to consider the potential interactions. The connections between the corporate privilege and the new Zlaket Rules got attention in both the supreme court and the legislature as they addressed the corporate privilege.[225] But the court went much further to ensure that its definition of the scope of the corporate privilege meshed properly with related law.

For example, the court noted that although counsel-initiated employee-witness statements and summaries of their interviews conducted in anticipation of litigation were unprivileged, they would have the qualified protection of the work-product doctrine as provided in Rule 26 of the Arizona Rules of Civil Procedure.[226] The court construed Rule 801(d)(2)(D) of the Arizona Rules of Evidence, which governs admissibility against a corporation of an employee's out-of-court statements about conduct within the scope of his employment, to ensure that it dovetails with the exclusion of employee-witness statements from the protection of

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222. *See supra* text accompanying notes 137–44.

223. *See supra* text accompanying notes 181–85.

224. *See supra* note 122 and accompanying text.

225. *See supra* note 118 and accompanying text (discussing the court of appeals decision in *Samaritan*); *supra* text accompanying note 185.

226. Samaritan Found. v. Goodfarb, 862 P.2d 870, 879 (Ariz. 1993).

the corporate privilege.[227] It also reconciled its privilege test with the ethical duty of confidentiality that lawyers owe to their corporate clients under the Arizona Rules of Professional Conduct,[228] and observed that its test was consistent with the "anti-contact" provisions in those Rules as well.[229]

There is no evidence that the legislature or its staff considered these interactions, but even if they had done so, the supreme court would still be the superior policymaker in this respect because the Arizona Rules of Civil Procedure, the Arizona Rules of Evidence, and the Arizona Rules of Professional Conduct are all promulgated as well as interpreted *by the court.*

3. Susceptibility to Institutional Bias

A substantial body of scholarship and case law has addressed whether the judiciary or the legislature is the better policymaking branch to decide whether to create evidentiary privileges and how broad they should be.[230] There is a sharp disagreement, largely because participants in the debate tend to emphasize one side of the privilege equation and disregard the other. Those who argue that the judiciary is the better policy maker are preoccupied with the cost side—the loss of evidence that privileges cause in legal proceedings. In Professor Edmund Morgan's view, for example, privilege law should be set by the judiciary because privileges are

> nothing more or less than privileges to suppress the truth, and no officers of any department of government, other than the judiciary, have the constant opportunity to observe them in operation and the skill to determine how far and in what respects they interfere with the orderly and effective administration of justice.[231]

For others, however, the salient point about privileges is their capacity to foster valuable social relationships, e.g., doctor–patient relationships, that thrive on confidentiality. According to the Illinois Supreme Court, for example, the legislature has the comparative advantage because formulating privilege law

> involves a balancing of public policies which should be left to the legislature. A compelling reason is that while courts . . . find it easy to perceive value in public policies such as those favoring the admission of all relevant and reliable evidence which directly assist the judicial function of ascertaining the truth, it is not their primary

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227. *Id.* at 876.

228. *Id.* at 879–80.

229. *Id.*

230. *Compare* WIGMORE, *supra* note 162, § 2286, at 532–36 (suggesting that legislatures too often confer privileges on powerful occupational groups seeking to protect their particular interests), *with* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 75, at 282 (John Strong ed., 4th ed. 1992) ("It may be argued that legitimate claims to confidentiality are more equitably received by a branch of government not preeminently concerned with the factual results obtained in litigation and that the legislatures provide an appropriate forum for the balancing of the competing social values necessary to sound decisions concerning privilege.").

231. Edmund M. Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 483–84 (1957).

> function to promote policies aimed at broader social goals more distantly related to the judiciary. This is primarily the responsibility of the legislature.[232]

It is worth noting, however, that, although the Illinois Legislature is the source and primary designer of every other evidentiary privilege in the state, it has left the attorney–client privilege to be shaped by the courts.[233] Could it be that even if legislatures have a comparative advantage in formulating privilege law generally, the judiciary nonetheless has the advantage where the attorney–client privilege is concerned? I believe so.

Even if judges have a general bias in favor of narrow privileges because the value of reliable fact-finding in litigation is more salient for them than the more "distant" value of fostering social relationships that thrive on confidentiality, that bias is very unlikely to be at work when courts fashion the attorney–client privilege. The judiciary can be expected to give the non-evidentiary side of that privilege its due. Indeed, the Arizona Supreme Court is likely to have special insight into the value of the attorney–client privilege in fostering candid lawyer–client relations because here, as in most states,[234] the supreme court has long borne primary responsibility for regulating law practice, including those aspects that have little or nothing to do with litigation. Thus, the court is likely to have a comparative advantage over the state legislature in gauging *both* sides of the privilege equation.

4. Respect for the Principle of Trans-Substantivity

The principle of "trans-substantivity" posits that procedural law should transcend the subject matter of cases, the substantive law that governs particular classes of cases, and the status of litigants. The principle carries considerable weight in making rules of procedure and evidence, though it is not an absolute. There are exceptions, such as rules requiring allegations of fraud to be pleaded with particularity,[235] and the principle appears not to be as widely honored today as it once was.[236] But there is good reason to continue to honor it. If procedural law were readily allowed to vary with the subject matter of cases or the types of parties involved, special pleading would become rampant in the lawmaking process. For

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232. People v. Sanders, 457 N.E.2d 1241, 1245 (Ill. 1983). The Arizona Supreme Court has itself acknowledged that the state legislature has a legitimate role to play in making privilege law because it is generally as competent as the court, if not more so, to assess the social value of relationships and the extent to which they require legally protected confidentiality in order to thrive. Readenour v. Marion Power Shovel, 719 P.2d 1058, 1062 (Ariz. 1986).

233. *Sanders*, 457 N.E.2d at 1244. *See also* Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 257 (Ill. 1982) (adopting the control group test for deciding issues involving the scope of the corporate attorney–client privilege in the state).

234. *See* WOLFRAM, *supra* note 16, at 24–31 (comparing the role of the high courts in various states in regulating law practice).

235. *E.g.*, ARIZ. R. CIV. P. 9(b).

236. *See* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L. J. 281, 301–02 (noting growing politicization of federal procedural rulemaking).

example, personal injury lawyers and corporate defense counsel might all too often jockey for rules that, whatever their procedural merits, will give their clients an advantage.

In *Hickman v. Taylor*,[237] a wrongful death claim arising out of a tugboat accident, the United States Supreme Court defended the principle of trans-substantivity in the context of personal injury litigation. Soon after the fatal accident, counsel for the towing company, anticipating litigation, interviewed and took written statements from the surviving crew members, who were company employees.[238] After filing the action against the towing company, plaintiff's counsel requested that the defense produce those statements and other relevant information provided by the interviewees and summarized in memoranda.[239] The defense refused to do so on the ground that the "requests called for privileged matter obtained in preparation for litigation."[240] The Supreme Court affirmed the Third Circuit's holding that the defense was entitled to withhold the material on work-product, but not privilege, grounds.[241]

To support his position that such materials should be discoverable, the petitioner argued that, otherwise, a corporate defendant would have "a tremendous advantage in a suit by an individual plaintiff. . . . [T]he corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect . . . merely on the assertion that such facts were gathered by its large staff of attorneys . . . ."[242] Justice Murphy, writing for the Court, flatly rejected this argument:

> [F]raming the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery . . . is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem . . . far transcends the situation confronting this petitioner. And we must view that problem in light of the limitless situations where the particular kind of discovery sought by the petitioner might be used.[243]

In other words, Justice Murphy honored the trans-substantivity principle by ruling the petitioner's argument out of bounds. One could argue, of course, that the Court was concerned only with the factors *courts* may consider in adjudicating cases, not the considerations that should guide policymakers when formulating procedural and evidentiary law. On that view, although it would have been improper for the supreme court in *Samaritan* to decide on the scope of the corporate privilege with a view to adjusting the personal-injury "playing field" for or against corporate defendants, the state legislature need not (and perhaps should

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237. 329 U.S. 495 (1947), *aff'g* 153 F.2d 212 (3d Cir. 1946).
238. *Id.* at 498.
239. *Id.* at 498–99.
240. *Id.* at 499.
241. *Id.* at 513–14.
242. *Id.* at 506.
243. *Id.* at 507.

not) operate under the same constraint. But if trans-substantivity is a policymaking principle that courts should honor when they fashion new procedural law through rulemaking and not just in adjudication, as of course it is, the legislature should presumably honor it as well. In the case of the 1994 amendments to Arizona Revised Statutes section 12-2234, the principle appears to have been disregarded.

From the standpoint of trans-substantivity, the sole considerations in defining the scope of the attorney–client privilege are how greatly the privilege will impair truth-finding in legal proceedings and how greatly it will foster the lawyer–client communications that are necessary in order for clients to receive sound legal advice. How greatly or in what direction the privilege will affect who wins and who loses in tort litigation is beside the point. Yet, my account of the 1994 legislative process strongly suggests that the proponents and opponents of the amendments to section 12-2234, legislators and lobbyists alike, were interested in the legislation precisely because of how it would affect the frequency and outcomes of tort suits against corporate defendants.

Many of the business interests that supported the legislation came from the manufacturing, healthcare, or transportation sectors, where corporations must often defend tort cases.[244] They pressed for the legislation because they feared that the Zlaket Rules, in combination with the *Samaritan* test, would change for the worse the balance of power between plaintiffs and corporate defendants in litigation.[245] Samaritan engaged Mr. Jones, who for many years has drafted and lobbied in favor of tort reform legislation in Arizona, to rewrite section 12-2234 and lobby the bill through the legislature.[246] And the chief witness to testify against the legislation was counsel for the plaintiffs in *Samaritan* and a leader in the Arizona Trial Lawyers Association, whose members specialize in plaintiffs' personal injury work.[247]

Because the trans-substantivity principle deserves considerable weight when courts *or* legislatures make procedural and evidentiary law, but in this instance was ignored by the Arizona Legislature, the judiciary was again the superior policymaker.

Measured by their success in keeping Arizona's attorney–client privilege internally consistent and consistent with privilege law elsewhere, and in achieving an appropriate balance between the costs and benefits of the corporate privilege, the Arizona Supreme Court's exclusion of employee-witness statements from the protection of the privilege was the better choice. And measured by the four criteria for good policymaking that were applied in Part II.B, the judicial process for reaching conclusions on that issue was superior to the legislative process.

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244. *See supra* notes 124, 172 and accompanying text.
245. *See supra* text accompanying note 170.
246. *See supra* text accompanying note 173.
247. *See supra* text accompanying note 179.

III. WHY THE STATE SUPREME COURT HAS THE CONSTITUTIONAL AUTHORITY TO STRIKE DOWN THE 1994 AMENDMENTS TO ARIZONA REVISED STATUTES SECTION 12-2234 INSOFAR AS THEY PRIVILEGE EMPLOYEE-WITNESS STATEMENTS

If the arguments above are sound and the constitutional issue is raised in an appropriate case, the question remains whether the supreme court has the authority to invalidate the portion of amended Arizona Revised Statutes section 12-2234 that conflicts with the court's treatment of employee-witness statements. I believe that it does.

Articles III and VI of the Arizona Constitution contain the relevant provisions. Article III states the separation-of-powers principle. It provides that the three branches of government "shall be separate and distinct" and no branch "shall exercise the powers properly belonging to either of the others."[248] The supreme court has held that article III implicitly recognizes its inherent power to regulate the practice of law and conveys both affirmative power to regulate and negative power to reject or modify statutes or administrative regulations that "encroach" or "infringe" on its exercise of affirmative power.[249] Article VI empowers the court to "make rules relative to all procedural matters in any Court."[250] Here again the court calls its power "exclusive," but only in the sense that it may strike down statutes that conflict with its rules of procedure.[251] Generally, the court also regards evidence law as procedural, as it must in order to justify its promulgation of the Arizona Rules of Evidence without legislative approval.[252] Thus, the court has claimed final-word authority in both of these domains. Whatever authority the court has to strike down the portion of amended section 12-2234 that conflicts with its own treatment of employee-witness statements must flow from either or both of

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248. ARIZ. CONST. art. III.

249. *In re* Smith, 939 P.2d 422, 423 (Ariz. 1997) ("This court has long recognized that under article III of the Constitution 'the practice of law is a matter exclusively within the authority of the Judiciary.'" (quoting Hunt v. Maricopa County Employees Merit Sys. Comm'n, 619 P.2d 1036, 1038–39 (Ariz. 1980))). Many, but not all, state supreme courts claim to have similar authority under their state constitutions. *See* WOLFRAM, *supra* note 16, at 24–31. Federal separation-of-powers doctrine is different. The Supreme Court largely concedes Congress's final-word authority over judicial procedure and the practice of law in federal forums. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 387 (1989) (conceding Congress's authority to regulate practice and procedure in the federal courts); Sperry v. Florida *ex rel.* Florida Bar, 373 U.S. 379, 403–04 (1963) (recognizing Congress's authority to permit non-lawyers to represent clients in U.S. Patent Office proceedings).

250. ARIZ. CONST. art. VI, § 5. In recent cases, the court has cited several sections of article VI as additional sources of authority to regulate the practice of law. *See* Scheehle v. Justices of the Supreme Court, 120 P.3d 1092, 1100 (Ariz. 2005); *In re* Creasy, 12 P.3d 422, 424 (Ariz. 2000); *In re* Smith, 939 P.2d 422, 424 (Ariz. 1997); *In re* Shannon, 876 P.2d 548, 571 (Ariz. 1994). My analysis does not turn on any distinction between article III and article VI as sources of the court's authority to regulate the practice of law. To avoid confusion, I shall refer to that authority as article III authority and refer to the court's authority to make rules of evidence and judicial procedure as article VI authority.

251. *E.g.*, Daou v. Harris, 678 P.2d 934, 939 (Ariz. 1984).

252. State *ex rel.* Collins v. Seidel, 691 P.2d 678, 681 (Ariz. 1984).

these sources. Part III.A examines the constitutional issue under the court's authority to make rules of judicial procedure. Part III.B examines the issue under the court's authority to regulate law practice.

A. The Constitutional Authority to Regulate Matters of Judicial Procedure

Shortly after Arizona Revised Statutes section 12-2234 was amended, several commentators suggested that the court might possess constitutional authority to invalidate the legislation as an infringement on its article VI power to adopt rules of judicial procedure.[253] This argument should be rejected.[254] It is out of step with the court's sensible view of its lawmaking authority vis-à-vis the legislature in the procedural domain, as expressed in case law and in the Arizona Rules of Evidence.

1. Case law

Notwithstanding its claim to final-word authority, the Arizona Supreme Court generally upholds judicial procedure statutes unless they conflict with the court's own rules.[255] Seeking a *modus vivendi* with the legislature, the court has even upheld statutes on purely procedural aspects of evidence law that diverge from its Rules of Evidence, provided the statutes are "reasonable and workable" and neither "engulf" nor conflict with, but merely "supplement," those rules.[256]

Moreover, where the recognition and scope of evidentiary privileges are concerned, the court has been especially deferential to the legislature. In *State v. Watkins*, for example, the court rejected an argument for judicial extension of the

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253. *See, e.g.*, Campbell, *supra* note 160, at 34; Coleman, *supra* note 10, at 346–50.

254. How the courts should *construe* privilege statutes is, of course, another question. *See* Church of Jesus Christ of Latter-Day Saints v. Superior Court, 764 P.2d 759, 764 (Ariz. Ct. App. 1988) (stating that privilege statutes must be strictly construed because they "impede the truth-finding function of the courts"). *But see* State v. Holsinger, 601 P.2d 1054, 1058 (Ariz. Ct. App. 1979) (noting that one purpose of the attorney–client privilege is "to promote the administration of justice").

255. *E.g.*, State *ex rel.* Purcell v. Superior Court, 485 P.2d 549, 552 (Ariz. 1971); State v. Blazak, 462 P.2d 84, 85–86 (Ariz. 1969). The statute under review in *Blazak* created new substantive rights and provided procedures for effectuating only those rights. *Id.* Though upholding the statute, the court admonished the legislature to avoid, "as far as possible," enacting law governing judicial procedure "lest it infringe on the [court's] constitutional rule making authority and separation of powers." *Id.* at 86. The court also proclaimed its authority to nullify the statutory procedures at issue by promulgating inconsistent rules, but declined to do so for the time being. *Id.* "To attempt to promulgate such rules hastily without the necessary study and deliberation to make them effective," the court explained, "might produce a less than satisfactory result." *Id.*

256. *Seidel*, 691 P.2d at 682 (upholding statute making blood alcohol tests admissible under different conditions than those specified in the court's rules because the statutory conditions provided comparable assurance that test results were reliable, and holding that test results are admissible when either set of conditions is met). For decisions striking down statutes that engulf or conflict with rules created by the court, see Barsema v. Susong, 751 P.2d 969, 973–74 (Ariz. 1988); State v. Robinson, 735 P.2d 801, 807–08 (Ariz. 1987).

statutory anti-marital fact privilege to cover "de facto" marriage partners.[257] Explaining its hands-off response, the court noted that the privilege exists by "legislative fiat" and held that the legislature was entitled to decide which domestic relationships the privilege should protect and how broadly to protect them.[258] And, in *Readenour v. Marion Power Shovel*,[259] the court appeared to concede in dictum that legislative policy judgments concerning evidentiary privileges deserve special respect on grounds of comparative institutional competence.

Readenour upheld a statute making a manufacturer's post-sale changes in product design inadmissible to prove a design defect in a product liability action. Rule 407 of the Arizona Rules of Evidence excluded evidence of post-*accident* repairs to prove responsibility, but did not address evidence of post-sale, pre-accident design changes.[260] Plaintiffs argued that the statute infringed on the court's rulemaking power. Because the statute "appeared to diverge" from Rule 407, the court considered whether it conflicted with, or merely supplemented, the rule and found no conflict.[261] More importantly, the court upheld the statute on the strength of a feature it shares with privilege law but not with most rules of evidence:

> [T]he question of remedial changes or measures is not, in our view, either a purely evidentiary or purely procedural question.... The limitation provided by Rule 407 is not based so much on a lack of relevancy as it is upon the policy decision to promote changes which decrease accidents. Under our constitutional rule-making power, we cannot let the legislature define what is relevant; however, when it is appropriate we may defer to legislative decisions regarding the use or exclusion of relevant evidence to promote substantive goals of public policy such as accident prevention. In fact, one commentator suggests that the remedial measure exclusion is not truly a rule of evidence but one which should be "classified as a [rule] of privilege." Privilege statutes prohibit the use of highly relevant evidence in order to further policy goals such as physician–patient confidentiality. We believe [this statute] is similar to a privilege statute, having both procedural and substantive aspects.[262]

In other words, the value of a privilege depends on its utility in fostering socially desirable relationships that require confidentiality protections in order to

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257. 614 P.2d 835, 840 (Ariz. 1980).

258. *Id.* The court did not clarify whether it considered itself powerless to modify or overturn a privilege statute through adjudication rather than rulemaking, or simply chose not to do so because it found the statute desirable as a matter of policy. *Cf.* Humana Hosp. v. Superior Court, 742 P.2d 1382, 1387 (Ariz. Ct. App. 1987) (holding that statutory peer review privilege did not encroach on supreme court's power to make rules of procedure, but only after deciding that the privilege was desirable as a matter of policy).

259. 719 P.2d 1058 (Ariz. 1986).

260. ARIZ. R. EVID. 407.

261. *Readenour*, 719 P.2d at 1061–62.

262. *Id.* at 1062 (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 77, at 159 (1954)) (first alteration in original).

thrive. Assessments of that utility can be quite controversial, and judges bring no special insight to them. Thus, deference to the legislature is *more* appropriate on privilege issues than on most questions of evidentiary policy.

2. Rule 501 of the Arizona Rules of Evidence as a Privilege-Specific Allocation of Lawmaking Authority

Of course, *Readenour* hedged its position with the cryptic phrase, "when it is appropriate we may defer," and does not commit the court to upholding every privilege statute. But the Arizona Rules of Evidence provide further reason for the court to uphold Arizona Revised Statutes section 12-2234 as amended, if the statute is attacked as an encroachment on the court's constitutional authority to make rules of judicial procedure. No privilege statute can directly conflict with the Rules, because the Rules neither recognize nor define specific privileges.[263] Rule 501 states only that courts shall decide issues of privilege according to common law principles "*[e]xcept* as otherwise required by . . . the Constitution of Arizona, or by *applicable statute or rule*."[264] This appears to commit the supreme court to three principles in allocating authority to make privilege law. First, when no constitutional provision, statute, or supreme court rule controls, the courts will develop and apply common law doctrine to resolve privilege disputes, as the court of appeals and the supreme court did in *Samaritan*. Second, the court may supplant the common law of privilege through *rulemaking* (though it has not done so).[265] Third, privilege statutes prevail over the common law—even as declared by the court itself.

Without departing from these principles, or turning the *Samaritan* test into a formal rule, the supreme court cannot strike down any part of section 12-2234 on the ground that it encroaches on the court's constitutional authority to make rules of judicial procedure. How the court exercises that authority may be "peculiarly within its province,"[266] but it should not treat the *Samaritan* test as a "rule," because Rule 501 of the Arizona Rules of Evidence explicitly contrasts "promulgated rules" with "common law principles." Lawyers and judges

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263. Some state supreme courts have been much more aggressive in this area. *See, e.g.*, N.M. R. EVID. 501–11 (identifying and defining all the privileges that can be invoked in the state courts and making no provision for legislative modifications or additions); Ammerman v. Hubbard Broad. Inc., 551 P.2d 1354, 1358–59 (N.M. 1976) (invalidating statutory journalist's privilege for purposes of judicial, but not legislative, proceedings).

264. ARIZ. R. EVID. 501 (emphasis added).

265. In this respect, Rule 501 of the Arizona Rules of Evidence contrasts sharply with Rule 501 of the Federal Rules of Evidence, which were adopted in 1975, only two years before the Arizona Rules were issued. Federal Rule 501 reflects Congress's rejection of all the specific privilege rules that had been drafted by experts and recommended by the Court. As approved by Congress, Federal Rule 501 forbids the Supreme Court to make privilege rules without Congress's statutory approval.

266. Jones v. Lopez Plascencia, 458 P.2d 120, 124 (Ariz. 1969).

sometimes speak of cases standing for a common law "rule," such as the "rule" in *Shelley's Case*, but they do not speak of cases "promulgating" rules.[267]

B. Under the Court's Authority to Regulate the Practice of Law

If the article VI argument should be rejected, what about the article III argument? None of the authorities cited in the previous section concerns the attorney–client privilege or stands in the way of striking down the portion of the amended statute that conflicts with *Samaritan* as an encroachment on the court's article III authority to regulate the practice of law.[268] I believe the court has that authority, but acknowledge at the outset that convincing readers on this point may be an uphill battle. Several other states have comparably expansive corporate privilege statutes, and none appears to have been attacked on this ground.[269] And only one commentator on the constitutionality of the 1994 amendment has considered the issue.[270]

The argument begins with the court's declaration in *Samaritan* that the attorney–client privilege "is central to the delivery of legal services in this country."[271] This is clearly the case. The privilege plays a key role in structuring lawyer–client relations in most fields of law practice. It is no less central in the regulatory "mix" by which law practice is governed than many provisions in the Arizona Rules of Professional Conduct, including provisions that define the scope of the lawyer's ethical duty of confidentiality, both in general[272] and in the context of corporate representation.[273] Moreover, the court has recognized that its confidentiality rules must work in tandem with the attorney–client privilege to give effect to the "principle of client–lawyer confidentiality."[274] And it has carefully

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267. *See* Campbell, *supra* note 160, at 34 (questioning whether the holding in *Samaritan* can be characterized as a rule, since it has not been formally promulgated by the court).

268. Even if the article VI argument were sound, the article III approach, if available, has two advantages. It would enable the court to ensure that the scope of the corporate privilege is consistent in legislative and administrative proceedings as well as in litigation. And it would not throw the constitutionality of any other statutory privilege in doubt.

269. *See, e.g.*, OR. REV. STAT. § 40.225(1)(d)(A) (broadening the scope of the corporate privilege by statute in 1987); *see also* Kenneth E. Bemis IV, *Oregon Expands the Protections of the Attorney–Client Privilege for Corporations and Other Business Entities*, 24 WILLAMETTE L. REV. 157 (1988) (discussing the 1987 legislation). For similar developments in Texas, see Fred A. Simpson, *Has the Fog Cleared? Attorney Work Product and the Attorney Client Privilege: Texas's Complete Transition into Full Protection of Attorney Work in the Corporate Context*, 32 ST. MARY'S L.J. 197 (2001).

270. McAuliffe, *supra* note 174, at 11. Mr. McAuliffe, a leading trial lawyer in Phoenix who often represents corporations, speculated that the court "might very well be persuaded to declare the 1994 amendments unconstitutional" on this ground. *Id.*

271. Samaritan Found. v. Goodfarb, 862 P.2d 870, 874 (Ariz. 1993).

272. ARIZ. RULES OF PROF'L CONDUCT ER 1.6.

273. ER 1.13 cmt. ¶ 2.

274. ER 1.6 cmt. ¶ 3.

spelled out the complementary roles of the privilege and the confidentiality rules.[275]

In 2003, the supreme court revised the Arizona Rules of Professional Conduct by adding new exceptions to the lawyer's duty of confidentiality, thereby narrowing the scope of the duty.[276] One of the new exceptions, ER 1.6(d)(2), permits a lawyer to reveal otherwise confidential client information to the extent the lawyer reasonably believes necessary "to mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."[277] Suppose the legislature enacted a statute that purported to abrogate this exception. I believe the court has and should have the authority to invalidate the statute, as long as it can adduce good reasons for doing so. Yet the only difference between ER 1.6(d)(2) and the limits the court has placed on the scope of the corporate privilege is that the former was promulgated as a rule and the latter were articulated in a judicial opinion. For present purposes, this is a distinction without a difference. While the court appears to concede that it does not have final-word authority to strike down statutes on matters of judicial procedure unless they conflict with or engulf rules, it has already held that it is under no such constraint when it comes to regulating the practice of law.[278]

Nor should the court be limited to exerting final-word authority on the corporate attorney–client privilege through rulemaking. Its position that employee-witness statements are unprivileged, as articulated in *Samaritan*, is as clear as the legislature's conflicting position,[279] and there is much to be said for defining the scope of the privilege through adjudication, as the federal courts are *obliged* to do.[280] Adjudication gives the supreme court the benefit of lower-court thinking, and insulates the shaping of the privilege from political pressures. Judicial rulemaking can be as politicized as the legislative process.[281]

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275. *See supra* text accompanying notes 152–53.

276. ARIZ. RULES OF PROF'L CONDUCT ER 1.6(d).

277. ER 1.6(d)(2).

278. *See* Hunt v. Maricopa County Employees Merit Sys. Comm'n, 619 P.2d 1036, 1039 (Ariz. 1980) (holding that representing clients in quasi-judicial administrative hearings is the practice of law and striking down or modifying certain provisions in a statute permitting lay representation in such proceedings without finding the statute in conflict with specific court rules); *cf. In re* Shannon, 876 P.2d 548, 575 (Ariz. 1994) (interpreting statute requiring court to regulate judicial procedure solely by promulgating rules as inapplicable to the court's authority to regulate the practice of law).

279. *See supra* note 187.

280. *See supra* notes 61–62 and accompanying text.

281. *See, e.g.*, WOLFRAM, *supra* note 16, at 31 ("Courts have shown themselves at least as vulnerable to the influence of lawyer groups lobbying for favorable treatment . . . as legislatures might be."); Linda S. Mullinex, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 830–50 (1991) (observing that the U.S. Judicial Conference's process for drafting amendments to the Federal Rules of Civil Procedure has become a magnet for interest groups hoping to tilt certain kinds of litigation in their favor, and a far cry from the earlier conception of the Advisory Committee on Civil Rules as a promulgator of trans-substantive rules).

Of course, the mere fact that a statute can somehow affect law practice should not suffice to trigger the court's final-word authority to strike the statute down as an infringement on its authority to regulate law practice. If it did suffice, the court could, for example, strike down on infringement grounds a statute of limitations on legal malpractice claims or an attorney's fee–shifting statute, actions I believe should be beyond the judicial pale. The challenge for the court is to recognize the limits of its authority in this field in order to maintain the legitimacy of exercising that authority when appropriate. What are those limits?

The court's *affirmative* power to regulate law practice unquestionably extends well beyond the topics addressed in its Rules of Professional Conduct.[282] It includes, for example, the power to admit lawyers to practice based on its own criteria, to disbar and otherwise discipline lawyers, to define the unauthorized practice of law, and to establish a state bar and require Arizona lawyers to be dues-paying members.[283] And because of the close relationship that exists between the attorney–client privilege and various rules of legal ethics, the court could presumably have adopted a rule under its article III authority that codifies its version of the corporate attorney–client privilege before the legislature addressed the question.

But if the court were to strike down part of the 1994 legislation, it would be exercising *negative* power, not simply regulating. Charles Wolfram, a leading scholar in the field of lawyer regulation, has long argued that a state supreme court's negative power should be far less extensive than its affirmative power. He believes the judiciary should have final-word authority to "insist upon its own conceptions of how to regulate the legal profession" only when "yielding to another branch would directly and substantially impair the ability of the courts to adjudicate cases and conduct other business necessarily and properly before them."[284] This is a very restrictive standard and might very well not warrant the court striking down the 1994 amendments to section 12-2234. The privileging of employee-witness statements may burden the adjudicatory process, but not constitute "substantial impairment."

The Arizona Supreme Court has certainly not limited itself by that standard in the past. One cannot say that striking down a portion of the 1994 legislation and "reinstating" *Samaritan* would be outside the boundaries of negative power that the court has already drawn for itself. Two cases illustrate the point. In *Hunt v. Maricopa County Merit System Commission*,[285] the court reviewed a statute permitting non-lawyers to represent county employees in

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282. *See, e.g.*, *In re* Smith, 939 P.2d 422, 424 (Ariz. 1997) (rejecting a claim that the court's promulgation of mandatory continuing legal education rules was a "legislative act" outside the court's authority).

283. *See* WOLFRAM, *supra* note 16, at 24 (listing the affirmative powers claimed by the supreme courts in most states).

284. *Id.* at 31; *see also* Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 802 (1976) (proposing that where statutes and judicial regulation governing law practice conflict, the legislature should have final-word authority unless the statute in question "unreasonably hamper[s] the judiciary in the adjudicative process").

285. 619 P.2d 1036 (Ariz. 1980).

personnel hearings. The court began by reaffirming its earlier holdings that representing clients before administrative tribunals is the practice of law and, thus, an activity from which the court can bar non-lawyers, even in the face of a statute purporting to authorize lay representation. Armed with that precedent, the court felt free to "amend" the statute. Bowing to the reality that employees are often unable to afford legal representation in personnel hearings, the court decided as a matter of comity to permit lay representation in this limited sphere. But it also imposed more onerous restrictions on lay representatives than the statute imposed,[286] and warned that its *permission* for this experiment would be withdrawn "should the results . . . prove to be against the public interest."[287] In *State Bar of Arizona v. Arizona Land Title & Trust Co.*, the supreme court made even more aggressive use of negative power when it invalidated statutes permitting real estate brokers to draft conveyances on the ground that drafting legal documents for real estate transactions constituted unauthorized practice of law.[288]

Professor Wolfram severely criticizes such decisions.[289] I agree that they go too far—*Hunt* because the statute in question directly impacted administrative proceedings with only incidental relevance for the courts that review agency decisions;[290] *Arizona Land* because it prohibited routine real estate practices that have nothing to do with adjudication; and both cases because they smack of lawyer protectionism. By going beyond the proper bounds of negative power, they undermine the legitimacy of appropriate uses of negative power. But using negative power to "reinstate" *Samaritan* would be distinguishable from those cases because the scope of the corporate privilege directly impacts litigation practice and lawyer–client relationships generally. Using negative power to reinstate the *Samaritan* doctrine would be more closely analogous to *In re Shannon*,[291] a sensible decision in which the court invalidated a statute of limitations that purported to govern bar disciplinary proceedings, which are overseen by the supreme court.

To be sure, the scope of the corporate privilege may have a greater impact on the quality of lawyer–client relations outside of court than it has on adjudication. If so, using negative power to reinstate *Samaritan* might not satisfy

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286. *Id.* at 1041. While the statute barred lay representatives from charging for their services, the court completely barred lay representation whenever the employee's stake in the matter was over $1,000 or otherwise sufficient "to warrant the employment of an attorney." *Id.* at 1038–39.

287. *Id.* at 1041.

288. 366 P.2d 1 (Ariz. 1961). The court recently took a more modest route to a similar result. In *Scheehle v. Justices of the Supreme Court*, the court construed a mandatory arbitration statute in a manner that would not conflict with the court's rule requiring lawyers to accept judicial appointments as arbitrators. 120 P.3d 1092, 1097–99 (Ariz. 2006). The court expressed reluctance "to imply a statutory limitation that would create a conflict in the constitutional prerogatives of separate branches of Arizona government." *Id.* at 1099. For discussion of the case, see Tracy Le, Case Note, *Scheehle v. Justices of the Supreme Court*, 48 Ariz. L. Rev. 413 (2006).

289. WOLFRAM, *supra* note 16, at 28 & nn.51–52.

290. The supreme court subsequently issued a series of rules authorizing lay representation in a substantial range of administrative proceedings. ARIZ. SUP. CT. R. 31(d).

291. 876 P.2d 548 (Ariz. 1994).

Professor Wolfram's restrictive standard. But if that is the case, I am tempted to say, so much the worse for the standard! There are concepts so central in the law of lawyering that the court would have good reason not to tolerate legislative tampering with them, even if the impact of the tampering on adjudication would be less than "substantial." One example, already discussed, is the lawyer's duty of confidentiality, which is vital in maintaining effective lawyer–client relationships, but does not protect against compelled disclosure of lawyer–client communications in court.[292] Another example is the fundamental question of who counts as a lawyer's client for various legal purposes.[293] Still another is the question of who should count as an "attorney" for various purposes including the attorney–client privilege itself.

With respect to client-status issues, the Arizona Rules of Professional Conduct state that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client–lawyer relationship exists."[294] This is hardly a concession that the legislature has final-word authority on the subject. On the contrary, it reflects the sensible view that the subtlety of the issue and the many different contexts in which it can arise militate in favor of approaching it on a case-by-case basis, which the legislature cannot do. And there is another reason not to concede final-word authority on the law of "clienthood" to the legislature. Consider the disciplinary case *In re Evans*.[295] There the court held that a lawyer who had not actually agreed to represent certain parties nonetheless owed them duties as clients, because they believed that they were his clients *and* his interactions with them had given them good reason to do so.[296]

Suppose that after *In re Evans* was decided the legislature enacted a statute designed to reduce lawyers' liability risks. Suppose also that one provision stated, contrary to the holding in *In re Evans*, that no lawyer–client relationship exists unless *both* parties actually agree to create one, and that in the absence of such a relationship the duties of care, loyalty, and confidentiality that lawyers owe to their clients under rules of professional conduct are not triggered. To fulfill its regulatory responsibilities, the court should, in an appropriate case, declare this provision an undue encroachment on its authority to regulate law practice. Otherwise, the legislature could drastically alter the trigger for the duties lawyers owe to clients or the parties to whom those duties run.[297]

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292. *See supra* text accompanying note 153.

293. *See* Theodore J. Schneyer, *Reflections on the Changing Concept of "Clienthood" in the Law of Lawyering*, RESEARCHING LAW, Spring 2001, at 1.

294. ARIZ. RULES OF PROF'L CONDUCT pmbl. ¶ 17.

295. 556 P.2d 792 (Ariz. 1976).

296. *Id.* at 796. This position is consistent with the general understanding of the conditions necessary to form what is sometimes called an "implied" lawyer–client relationship. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14(1)(b) & cmt. e.

297. This may seem entirely hypothetical but there are instances in which legislatures or administrative agencies do try to redefine who counts as a lawyer's client in order to alter the direction in which the lawyer's duties run. *See* Barbara Glesner Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D*

An interesting aspect of the supreme court decision in *Samaritan* concerned the attempt by Samaritan's lawyer to "sign up" the three nurses and scrub technician as clients in their own right, perhaps in hopes of assuring that the paralegal's communications with them would be protected by their personal attorney–client privileges.[298] The court dismissed this stratagem out of hand, stating that because the employees did not seek "legal advice in an individual capacity, no attorney–client relationship was created with Samaritan's counsel."[299] In the unlikely event that the legislature were to enact a statute providing that an attorney–client relationship would be established in such circumstances, surely the court would be entitled to invalidate the law as an undue encroachment on its authority to regulate the practice of law.

The remaining question is whether the supreme court has already *conceded* that the legislature is entitled to the final word on the attorney–client privilege or at least on who counts as an "attorney" for purposes of the privilege. There is language in *Hunt* to suggest that it has.[300] When the court agreed to permit non-lawyers to represent employees in personnel hearings under certain conditions, it faced the question whether the protections of the attorney–client privilege would apply to employee–lay representative relationships.[301] Because the court later described the privilege as "central to the delivery of legal services,"[302] one might have expected it to declare that the privilege was applicable. Instead, it held that because Arizona Revised Statutes section 12-2234 privileged communications between attorneys and clients and because lay representatives are not attorneys within the meaning of the statute, the privilege was inapplicable.[303] This implied that the term "attorney" was not open to interpretation and that the legislature intended to exclude from the category anyone who is not licensed to practice law.

What is more troubling is that the court also seemed to imply that the legislature was entitled to the final word on the subject, at least in the absence of a supreme court rule to the contrary. In that respect, *Hunt* was in my opinion an

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Child Support Enforcement Attorney, 67 FORDHAM L. REV. 2155 (1999) (reporting that states receiving federal welfare funds must give legal help to custodial parents seeking to collect unpaid child support, that the parents often receive welfare benefits to make up for unpaid child support, and that states that once viewed such parents as the clients of the government lawyers who assist them now have statutes identifying the states alone as the lawyers' clients).

298. Samaritan Found. v. Goodfarb, 862 P.2d 870, 880 (Ariz. 1993). If that was the rationale for trying to transform employees into clients, one may infer that even before the interviews were conducted, Samaritan's counsel assumed they would not be protected by the corporate privilege.

299. *Id.* at 880–81.

300. Hunt v. Maricopa County Employees Merit Sys. Comm'n, 619 P.2d 1036 (Ariz. 1980).

301. *Id.* at 1037, 1041.

302. Samaritan Found. v. Goodfarb, 862 P.2d. at 874.

303. *Hunt*, 619 P.2d at 1041 ("The lay representative is not an attorney within the means [sic] of [Arizona Revised Statutes] § 12-2234, so there is no statutory privilege to protect the confidentiality of communications between an employee and his lay representative.").

instance of undue institutional modesty that should not be repeated; the court should have recognized that it had final-word authority under article III of the Arizona Constitution to determine who counted as an attorney for purposes of the attorney–client privilege. In instances like this, judicial "activism" is not only permissible—it is the court's only responsible course. As Chief Justice Cameron wrote in 1977, judicial activism may be inappropriate elsewhere, but it is imperative in the exercise of judicial power to "regulate and to improve the administration of justice."[304]

CONCLUSION

The sequence of events in which the Arizona Supreme Court and the Arizona Legislature devised conflicting versions of the corporate attorney–client privilege lends itself well to thinking about today's threats to judicial independence at the state level. For the court, the question is which kinds of threats are worth resisting. In today's legal culture, unwarranted legislative assaults on the court's primacy in matters of procedural and evidentiary law and in the regulation of law practice are worth resisting. This Article has suggested how the court can resist one such assault without asserting any more authority than is necessary in order to fulfill its regulatory responsibilities.

304. James Duke Cameron, *The Place for Judicial Activism on the Part of a State's Highest Court*, 4 HASTINGS CONST. L.Q. 279, 293 (1977).