THE EXTENT OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGE IN ARIZONA

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I. INTRODUCTION

The attorney-client privilege ensures that communications between an attorney and his or her client are confidential.[1] This privilege has been acknowledged for many years and applies to both individuals and corporations.[2] Although corporations hold the privilege, it has not been clear how far the privilege extends in a corporation.[3] That is, are communications between a corporation's attorneys and *all* of the corporation's employees protected by the attorney-client privilege? Or, does the privilege only apply to *some* of the corporation's employees, depending on the situation? Or, are communications between the corporation's attorneys and the corporation's top ranking officers the *only* communications protected by the attorney-client privilege?

Over the years, several tests have been developed regarding the extent of the attorney-corporate client privilege.[4] The most stringent test, the control group test, limits the privilege to control group employees, such as a corporation's top ranking officers.[5] An intermediate test, the subject matter test, extends the privilege to any other employee who has information related to the subject matter of his or her employment and needed by the corporation's attorney.[6] The broadest test, a fact-specific test, extends the privilege to potentially all corporate employees.[7]

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1. 8 JOHN H WIGMORE, WIGMORE ON EVIDENCE § 2292 at 552 (1961).
2. 3 SPENCER A. GARD, JONES ON EVIDENCE § 21:11, at 776 (5th ed. 1958).
3. *Id.*
4. Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962) (introduced the "control group" test); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348, *reh'g denied*, 401 U.S. 950 (introduced use of the "subject matter test"); Diversified Indust., Inc. v. Meredith, 572 F.2d 596, 606–611 (8th Cir. 1978) (en banc) (refined the "subject matter test"); Upjohn Co. v. United States, 449 U.S. 383 (1981) (rejected the control group test in favor of a case by case analysis of the extent of the privilege). *See infra* notes 36–99 and accompanying text.
5. Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D.Pa. 1962). *See infra* notes 37–48 and accompanying text.
6. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348, *reh'g denied*, 401 U.S. 950; Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 606–611 (8th Cir. 1978) (en banc). *See infra* notes 49–63 and accompanying text.
7. Upjohn Co. v. United States, 449 U.S. 383 (1981). *See infra* notes 66–99 and

Over the past two years, Arizona's definition of the attorney-corporate client privilege has undergone many changes. During this period of change, both the Arizona Court of Appeals and the Arizona Supreme Court declined to expressly adopt one of the above traditional definitions of the privilege.[8] Instead, each Arizona court adopted an innovative definition of the attorney-corporate client privilege.[9] Although the Arizona Supreme Court rejected the Arizona Court of Appeals' definition of the attorney-corporate client privilege, both courts strove to limit the privilege in order to promote availability of information.[10]

In apparent response to the Arizona courts' attempts to limit the attorney-corporate client privilege, the Arizona legislature enacted its own definition of the privilege.[11] On April 26, 1994, Governor Symington signed Arizona's amended attorney-client privilege statute.[12] The amended statute rejects the Arizona Supreme Court's limited definition of the attorney-corporate client privilege and adopts a much broader version of the privilege.[13] Under the new statute, a communication between a corporation's attorney and any corporate employee or agent is privileged if: (1) the communication regards the employee's acts or omissions or regards information obtained from the employee; and (2) the communication is for the purpose of providing legal advice or obtaining information needed to provide legal advice to the corporation.[14]

The first part of this Note examines the historical background of the attorney-client privilege, the policy bases for the privilege, and how the privilege applies to corporations.[15] The next section examines the various tests used by the judiciary to determine the extent of the privilege when applied to corporations.[16] This section is followed by a discussion of the United States Supreme Court's broad definition of the extent of the attorney-corporate client privilege.[17] Next, this Note discusses *Samaritan Foundation* and the approaches

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accompanying text.

8. Samaritan Found. v. Superior Court, 173 Ariz. 426, 844 P.2d 593 (Ct. App. 1992), *rev'd sub nom.*, Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993); Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

9. Samaritan Found. v. Superior Court, 173 Ariz. 426, 844 P.2d 593 (Ct. App. 1992) *rev'd sub nom.*, Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993); Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993). *See infra* notes 113–57 and accompanying text for a discussion of the Arizona Court of Appeals' definition of the attorney-corporate client privilege. *See infra* notes 158–93 and accompanying text for a discussion of the Arizona Supreme Court's definition of the attorney-corporate client privilege.

10. Samaritan Found. v. Superior Court, 173 Ariz. 426, 844 P.2d 593 (Ct. App. 1992) *rev'd sub nom.*, Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993); Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993). *See infra* notes 130–53 and accompanying text for a discussion of the Arizona Court of Appeals' method of limiting the attorney-corporate client privilege. *See infra* notes 158-93 and accompanying text for a discussion of the Arizona Supreme Court's method of limiting the attorney-corporate client privilege.

11. ARIZ. REV. STAT. § 12–2234 (as amended by 1994 Ariz. Sess. Laws ch. 334, § 1). *See infra* note 196 for a complete text of Arizona's amended attorney-client privilege statute.

12. ARIZ. REV. STAT. § 12–2234.

13. ARIZ. REV. STAT. § 12–2234.

14. ARIZ. REV. STAT. § 12–2234.

15. *See infra* notes 23–35 and accompanying text.

16. *See infra* notes 36–65 and accompanying text.

17. Upjohn Co. v. United States, 449 U.S. 383 (1981). *See infra* notes 66–99 and

taken by the Arizona Court of Appeals and the Arizona Supreme Court in defining the scope of the attorney-corporate client privilege.[18] This Note then compares the Arizona State Legislature's definition of the attorney-corporate client privilege's scope with both the United States Supreme Court's holding in *Upjohn* and the Arizona Supreme Court's holding in *Samaritan Foundation*.[19] This Note concludes that Arizona's new approach may serve the attorney-client privilege's policy of clear application.[20] However, this Note also concludes that, overall, Arizona's new definition of the attorney-corporate client privilege is too broad and undermines the attorney-client privilege's policies of fairness and availability of information.[21] This Note proposes a modification of the privilege's definition which would cure these problems.[22]

II. HISTORICAL BACKGROUND OF THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the "oldest of the privileges for confidential communications," having been recognized in both the United States and England for many years.[23] Generally, where legal advice is sought from an attorney, the communications made between the attorney and the client cannot be disclosed unless the client consents.[24] Although this rule of confidentiality is

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accompanying text.

18. *See infra* notes 100–93 and accompanying text.

19. *See infra* notes 194–283 and accompanying text.

20. *See infra* notes 222–31 and accompanying text.

21. *See infra* notes 232–76 and accompanying text.

22. *See infra* notes 284–93 and *Proposed Privilege*.

23. 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2290 at 542 (1961). According to Wigmore, the history of the privilege goes back to the reign of Elizabeth I, where it appears to be unqualified in Berd v. Lovelace, Cary 62, 21 Eng. Rep. 33 (Ch. 1577). The privilege has also been accepted in the United States for many years, beginning with Hunt v. Blackburn, 128 U.S. 464 (1888).

Initially, the privilege was seen as a consideration for the oath and honor of the attorney, not in response to the client's fear of disclosure. By the late 1700's, however, a new theory regarding the privilege arose. 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2290 at 543 (1961). This theory sought to make communications secret to provide for the client's fear of apprehension. *Id.* This theory eventually prevailed over the early theory. *Id.* As time progressed, other aspects of the privilege also became clear. For example, the privilege was deemed to belong to the client, not to the attorney. *Id.* at 544.

24. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (1950). This case stated:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. If any element of this rule is missing, the privilege does not apply. Thomas W. Hyland & Andrea E. Forman, *The Corporate Attorney-Client Privilege*, N.Y. ST. B.J.16, 17 (Dec. 1990).

This rule has also been accepted by the American Bar Association's MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.6. This states: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation...." (emphasis added).

not absolute, the majority of communications are protected.[25]

Because the attorney-client privilege allows a person to seek a lawyer's advice without fear that his or her confidences will be publicly exposed, it promotes open communication in the attorney-client relationship[26]. This open communication enables an attorney to receive all information necessary to best serve the client.[27] In turn, the legal system is furthered when an attorney receives enough information to represent his or her client well.[28]

These justifications for the attorney-client privilege exist whether the client is a private individual or a corporation.[29] Therefore, courts have applied the attorney-client privilege to corporate clients.[30] This is true despite concerns that, historically, there have been no specific legislative provisions for the privilege and that it is difficult to determine which employees have authority to speak for the corporation.[31]

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25. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992). Exceptions to confidentiality of information between attorneys and clients are "disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)." Paragraph (b) states:

> A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id.

26. *See Upjohn Co.*, 249 U.S. 383 at 391; *Samaritan Found.*, 862 P.2d 870 at 874.

27. *See* Hyland, *supra* note 24.

28. Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (The court states that confidential disclosure to attorneys is "in the interest and administration of justice."). *See also* People's Bank v. Brown, 112 F. 652 (3rd Cir. 1902).

29. *See infra* note 30.

30. *See, e.g.*, Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963); *Upjohn Co.*, 449 U.S. 383; City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

In *Radiant Burners*, the court held that the privilege has existed for more than a century and that it applies to both individuals and corporate clients. 320 F.2d at 322-23. The court additionally said that the attorney-client privilege is essential for the adequate representation of corporations: "The legal rights and duties of large corporations and those who dispute with them would not be susceptible of judicial administration in the absence of lawyers, nor, in the absence of the privilege could lawyers properly represent their clients. *Id.* at 320. Furthermore, the court held that in order to "facilitate the workings of justice," the privilege belongs to a "client," whether or not that client is a corporation. 320 F.2d at 322.

31. Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191 at 220 (1988–89). *See, e.g.* Radiant Burners, Inc. v. American Gas Association, 207 F. Supp. 771 (N.D. Ill), *supplemented*, 209 F. Supp. 321 (N.D. Ill 1962), *rev'd* 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963). In *Radiant Burners*, the application of the attorney-client privilege to corporations was questioned; and the district court determined that the privilege did not exist in this context. *Id.* at 773. The primary reason for this holding was that there was no specific precedent or legislation declaring that the privilege applied to corporations. *Id.* at 772. Chief Judge Campbell stated: "[A] corporation's right to assert the privilege has somewhat generally been taken for granted by the judiciary, myself included, without a proper reliance on *stare decisis* or the promulgation anywhere of record of a clear legal analysis of the issues involved." *Id.*

The court further reasoned that it would be too problematic to determine who, within the

Although the privilege unquestionably applies to corporations,[32] its scope and operation have not been definitively determined. Because privileges are governed under state law,[33] states define the privilege's scope and operation in a variety of ways, including a control group test and a subject matter test.[34] On the federal level, the United States Supreme Court has established a third, fact-based definition of the privilege's scope.[35]

III. DETERMINING THE EXTENT OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGE

A. Control Group Test

The control group test was the first guideline established for determining the scope of the attorney-corporate client privilege.[36] This test was created in *Philadelphia v. Westinghouse Electric Corporation.*[37] In *Westinghouse*, the Pennsylvania district court held that only members of a corporation's control group could invoke the attorney-client privilege and thus protect their communications from disclosure.[38] Generally, in order for an employee to be categorized as a control group member, that employee must be in a position to

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corporation, may be considered the "alter ego" of the corporation and would personify the corporation in legal representation. *Id.* at 774. Also, even if these individuals could be identified, because of the large number of people associated with corporations, information given to an attorney would not be of the proper confidential nature necessary to invoke the attorney-client privilege. "[I]t becomes apparent that the confidential nature of communications and documents so vital an element of the attorney-client privilege could never exist when such documents and information are readily available to so many thousand persons, whose qualifications for the most part are solely a monetary interest." *Id.* at 775.

The Seventh Circuit Court of Appeals reversed this decision. *See Radiant Burners*, 320 F.2d 314 (7th Cir. 1963), *supra* note 30.

32. *See Radiant Burners*, 320 F.2d 314.

33. FED. R. EVID. 501. Rule 501 states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, state or political subdivision thereof shall be determined in accordance with State law.

Id.

34. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962) (introduced the control group test); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) (introduced the subject matter test).

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

36. *See Westinghouse*, 210 F. Supp. 483. Today, approximately 1/5 of the states still use the control group test. Alexander, *supra* note 31, at 219. The majority of these do so by codification. Hyland, *supra* note 24, at 19. These states include: Alaska, Arkansas, Maine, Nevada, North Dakota, Oklahoma, South Dakota, and Texas. *See, e.g.*, ALASKA R. EVID. 503(A)(2) (West Pub. 1993); ARK. R. EVID. 502 (A)(2) (West Pub. 1993); ME. R. EVID. 502 (West Pub. 1993); NEV. REV. STAT. ANN. § 49.075 (Michie Co. 1993); N.D. R. EVID. 502(A)(2) (Michie Co. 1994); TEX. R. EVID. - CIVIL & CRIM. 503(A)(2) (West Pub. 1993). Some states, however, such as Illinois, have accepted the control group test through common law. *See, e.g.*, Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982).

37. 210 F. Supp. 483.

38. *Id.* at 485.

control, or participate in, a corporate decision made upon counsel's advice.[39] For example, a corporation's president and vice-president will almost always fall within the control group, while support staff usually will not.[40]

The control group test has been commended for preventing a "zone of silence" over corporate matters.[41] Because it limits the attorney-client privilege to a select group of corporate representatives, the control group test makes it difficult for corporations to hide discoverable material from legal opponents under the guise of the attorney-client privilege.[42]

Although praised for preventing corporate abuse of the attorney-client privilege, the control group test has also been criticized.[43] The test's primary criticism is that it fails to protect necessary communications between an attorney and a corporation's lower-level employees.[44] Attorneys may need information from lower-level employees to effectively represent the corporation.[45] In jurisdictions using the control group test, corporate attorneys may have to choose between getting all necessary information and taking the risk that the received information will not be protected.[46] Opponents of the control group test claim, therefore, that the test inhibits the free flow of information.[47] By doing so, the control group test defeats the privilege's purpose, which is to promote the free flow of all pertinent information from a client to that client's attorney.[48]

B. Subject Matter Test

Due to concerns with the control group test, some courts instead adopted

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39. *Id.* The court stated:

> [I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.

Id. See also Comment, *Discovery: Corporate Attorney-Client Privilege—What Employees May be Categorized as Being Members of a "Control Group?,"* 34 TRIAL LAW. GUIDE 605 (1990).

40. *See Discovery: Corporate Attorney-Client Privilege, supra* note 39.

41. Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

42. *See* Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982).

43. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc) (believing the control group test to be too narrow, expanded the types of communications protected by accepting the subject matter test). *See also* Upjohn Co. v. United States, 449 U.S. 383 (1981) (rejected the control group test because its application is too difficult to predict and because not enough employees' communications are protected).

44. *See Diversified Indus.*, 572 F.2d at 609; Samaritan Found. v. Goodfarb, 862 P.2d 870, 875.

45. *See Diversified Indus.*, 572 F.2d at 609; *Samaritan*, 862 P.2d at 875.

46. [T]he attorney dealing with a problem in which lower level employees must be consulted] is thus faced with a "Hobson's choice." If he interviews employees not having "the very highest authority," their communications to him will not be privileged. If, on the other hand, he interviews *only* those with "the very highest authority," he may find it extremely difficult, if not impossible, to determine what actually transpired.

Alan J. Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. IND. & COMM.L.REV. 873 (1970).

47. *Diversified Indus.*, 572 F.2d at 609.

48. *Id.*

a subject matter test for determining the scope of the attorney-corporate client privilege.[49] Under this test, employee communications are privileged if the communications are within the subject matter of the employee's employment.[50] This test extends the attorney-client privilege not just to the control group, but also, potentially, to any employee in the corporation.[51]

In *Harper & Row Publishers, Inc. v. Decker*,[52] the Seventh Circuit Court of Appeals stated that the attorney-client privilege should protect non-control group communications under certain circumstances.[53] To be protected under this subject matter test, a communication must be made at the direction of an employee's corporate superiors.[54] Also, the communication's subject matter must be directly related to the employee's responsibilities within the corporation.[55] When this occurs, the employee is sufficiently identified with the corporation that his communication should be privileged.[56]

Because the *Harper & Row Publishers* subject matter test expands the number of employees whose communications are privileged, some critics believe the test shields information from the discovery process.[57] Critics also contend that, where this subject matter test applies, corporations will funnel most corporate communications through their attorneys so that the information would be privileged in case future legal disputes arose.[58]

In response to these criticisms, the Eighth Circuit Court of Appeals limited the test's application in *Diversified Industries v. Meredith*.[59] In this case, the Eighth Circuit added several criteria to the test: the communication had to be made for the purpose of securing legal advice; the superior directing the communication to be made had to so direct in order to secure legal advice; and the information had to be limited to those who "need to know."[60] The court

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49. *See* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348, *reh'g denied*, 401 U.S. 950 (1971); *See also* Diversified Indus., Inc. v. Meredith, 572 F.2d 596 at 606-611 (8th Cir. 1978) (en banc).

50. *See supra* note 49.

51. *See supra* note 49.

52. *Harper & Row Publishers*, 423 F.2d 487 (7th Cir. 1970).

53. *Id.* at 491.

54. *Id.*

55. *Id.* at 491-492.

56. *Id.* at 491. In *Harper & Row Publishers*, the court held that communications made by employees of a publishing company were protected by the attorney-client privilege, even though the employees were not control group members. The court said:

> [I]t was not demonstrated that any of these employees was in a position to control or take a substantial part in a decision about action which the corporation may take upon the advice of the attorney, nor that he was a member of a group having that authority.... We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group... .

Id.

57. *See* Comment, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759, 761 (1971).

58. *Id.*

59. 572 F.2d 596 (8th Cir. 1978) (en banc).

60. Under *Diversified Industries*, the complete requirements for the subject matter test are:

> (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate

felt that these new requirements would eliminate any problems presented by the *Harper & Row Publishers* test.[61] The court asserted that this new, limited subject matter test would not protect communications merely because a corporation's counsel received routine reports.[62] Furthermore, the court believed that, under the modified test, corporations could no longer unfairly prevent disclosure of material that should not be privileged.[63]

After their development, both the subject matter test and the control group test were widely used, with jurisdictions differing about which test to adopt.[64] In 1981, however, the United States Supreme Court examined the extent of the attorney-corporate client privilege and impacted on the way in which many jurisdictions approach the issue.[65]

IV. THE UNITED STATES SUPREME COURT'S APPROACH TO THE ATTORNEY-CORPORATE CLIENT PRIVILEGE: *UPJOHN*

In *Upjohn Co. v. United States*, the United States Supreme Court rejected the control group test.[66] Notably, the Court did not explicitly accept either the subject matter test or any other specific test for determining the scope of the attorney-corporate client privilege.[67] Instead, in a fact specific holding, the Court held that the privilege's scope should be decided on a case-by-case basis.[68]

In *Upjohn* a pharmaceutical manufacturing corporation internally investigated whether one of its foreign subsidiaries had made questionable payments to foreign government officials in exchange for government

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> superior; (3) the superior made the request so that the corporation should secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Id. at 609.

61. *Id.*

62. *Id.*

63. *Id.*

64. Prior to 1981, the subject matter test was primarily accepted in the 7th and 8th Circuits. *See* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970); *Diversified Indus.*, 572 F.2d 596. The control group test was accepted in the majority of federal courts and several state courts, including Alaska, Maine, Illinois, and Texas. Alexander, *supra* note 31, at 219. *See supra* note 36 for a list of some of the states still using the control group test.

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

66. *Id.* at 392.

67. "Although the facts were tailor-made for application of the subject matter test as refined in *Diversified*, the Court surprisingly declined to adopt it or any other specific approach." Alexander, *supra* note 31, at 305.

68. The court acknowledged that such a fact specific holding may be problematic. However, it was clear that the control group test was explicitly rejected.

> While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" ... cannot ... govern the development of the law in this area.

Upjohn, 449 U.S. at 396, 397.

business.[69] During the investigation, the company's general counsel sent a questionnaire to foreign general area managers.[70] The counsel told the managers to treat the investigation as highly confidential and to only discuss the matter with company employees who might provide the needed information.[71]

After this investigation, Upjohn voluntarily submitted a preliminary report to the Securities and Exchange Commission, disclosing certain questionable payments.[72] The Internal Revenue Service soon began investigating the tax consequences of the questionable payments.[73] As part of its investigation, the Revenue Service demanded all company files relating to the company's internal investigation, including copies of the written questionnaires and memoranda of officer and employee interviews.[74] The company refused to produce these documents on the grounds of attorney-client privilege and the work-product doctrine.[75] The Sixth Circuit Court of Appeals held that the attorney-client privilege did apply.[76] However, using the control group test, the Sixth Circuit held that the privilege only protected communications made by officers and agents responsible for the company's response to legal advice.[77]

The United States Supreme Court reversed, rejecting the control group test as an appropriate method for determining the extent of the attorney corporate-client privilege.[78] In rejecting the control group test, the Supreme Court said that the test overlooks a primary reason for the attorney-client privilege: providing the attorney with information sufficient for the attorney to give informed advice.[79] Because non-control group employees can possess information needed by counsel, the privilege should also extend to these employees.[80]

The Court further noted that the control group test is unpredictable.[81] This unpredictability stems from the difficulty in defining which corporate executives belong in the control group.[82] The Court held that this uncertainty

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69. *Id.* at 386.
70. *Id.* at 387.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 387–388.
75. *Id.* at 388.
76. *Id.*
77. *Id.*
78. *Id.* at 392.
79. *Id.* at 390.
80. The court stated:

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

Id. at 391.

81. *Id.* at 393. The court stated that "[t]he very terms of the test...suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a 'substantial role' in deciding and directing a corporation's legal response." *Id.*

82. *Id.* at 393. The court cited cases in which courts differed in their definitions of "control group." *Compare* Hogan v. Zletz, 43 F.R.D. 308, 315-316 (ND Okla. 1967), *aff'd in part sub nom.*, Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968) (control group includes managers and assistant managers of corporate divisions), *with* Congoleum Indus., Inc. v. GAF

made the privilege practically useless because an attorney and client should be able to tell which information is protected in order for the privilege to be effective.[83]

The *Upjohn* decision has been both praised and criticized.[84] Supporters of the decision argue that it preserves the purposes of the attorney-client privilege because effective representation depends upon the lawyer being fully informed by the client.[85] Other *Upjohn* supporters say the case successfully manages to balance the competing interests of the attorney-client privilege and the need to avoid a corporate "zone of silence" by requiring a case-by-case analysis, to determine whether the privilege applies.[86]

Opponents of *Upjohn* believe the decision does create a "zone of silence" over corporate matters.[87] This "zone of silence" exists because corporations can conceal information merely by funneling information through the corporation's lawyers.[88] Other critics assert that the Supreme Court provided little certainty and guidance in determining when a communication is privileged.[89] These critics feel that the Court merely rejected the old guidelines and did not enumerate any new guidelines for determining the extent of the privilege.[90]

Corp., 49 F.R.D. 82, 83-85 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3rd Cir. 1973) (control group only includes division and corporate vice presidents).

But see Michael L. Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 WILLIAM & MARY L. REV. 473 at 499 (1986-87). Waldman asserts that the *Upjohn* court did not understand that the above two decisions may actually be consistent.

> The meaningful criteria are not the labels or titles used to designate various individuals, but those persons' actual duties and responsibilities. The "disparate decisions" may have been in fact the correct and predictable results of applying the control group test to the different organizational structures of different corporations.

Id.

83. *Upjohn*, 449 U.S. at 393. The court said that the uncertainty made the privilege "little better than no privilege at all." *Id.*

84. *See* Admiral Insurance Co. v. United States District Court for the District of Ariz., 881 F.2d 1486 (9th Cir. 1989) (praises *Upjohn* for providing all necessary information to the attorney); Lawrence R. Pynes, *The Attorney-Client Privilege and the Corporate Client: What Role will S.E.C. v. Gulf & Western Industries, Inc. Play?*, 5 GLENDALE L. REV. 227 (1983) (approves of *Upjohn*'s case-by-case approach); Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982) (suggests that *Upjohn* makes it too easy for corporations to hide information); Samaritan Found. v. Superior Court, 173 Ariz. 426, 844 P.2d 593 (Ct. App. 1992) (states that the *Upjohn* approach enables too much information to be kept secret), *aff'd in part, rev'd in part*, 176 Ariz. 497, 862 P.2d 870 (1993); Alexander, *supra* note 31 (suggests that the *Upjohn* decision resulted in very little loss of information to corporation's legal opponents); Waldman, *supra* note 82 (criticizes *Upjohn* for providing too little guidance to lower courts in determining when information will be privileged).

85. *See Admiral Insurance Co.*, 381 F.2d at 1492. The court stated that "*Upjohn* stands for the proposition that the advantages of preserving the privilege outweigh the inescapable disadvantages of the resultant secrecy." *Id.*

86. *See* Pynes, *supra* note 84.

87. *See Consolidation Coal Co.*, 432 N.E.2d at 257-58 *Also see Samaritan Found.*, 173 Ariz. 426. *But see* Alexander, *supra* note 31, at 318. In a study conducted by the author of this article, it was found that, from the perspective of judges and magistrates, the overall loss of evidence created by rejecting the control group test is small.

88. Waldman, *supra* note 82, at 494. Although this problem would theoretically be avoided by the subject matter test, "[t]he pervasive involvement of in-house and regular counsel in corporate affairs makes such a distinction difficult to perceive...." (the distinction being that of whether or not the communication was made for the purposes of securing legal advice). *Id.* at 494.

89. *Id.* at 493.

90. *Id.* at 496; Upjohn Co. v. United States, 449 U.S. 383, 404 (1981) (Burger, C.J.,

Critics contend this lack of guidance simply maintains the uncertainty which the Court claims was inherent in the control group test.[91] In fact, *Upjohn* critics believe the *Upjohn* decision left the issue even more murky than it was under the control group test.[92]

Some commentators, however, have attempted to clarify this somewhat vague state of the attorney-corporate client privilege as defined by the United States Supreme Court.[93] These commentators assert that the Supreme Court did give guidance in its opinion and that, according to the *Upjohn* opinion, several factors should be examined when determining if the privilege exists in a given situation.[94] These factors include:

1. Whether the communicated information concerned matters within the scope of the employee's corporate duties.[95]
2. Whether the communications were made to counsel at the direction of corporate superiors.[96]
3. Whether the employees were aware they were being questioned in order for the corporation to obtain legal advice.[97]

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concurring). In his concurrence, Justice Burger noted that the court acknowledged that certainty may be undermined by adopting a case-by-case approach (*see supra* note 68) and said that the court's concession "neither minimizes the consequences of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented." *Id.* at 404.

91. Waldman, *supra* note 82, at 493.

92. *Id.* at 498. Some critics of the *Upjohn* decision believe the control group test may not be as unpredictable as the court claimed it was. *See supra* note 82. *See also Consolidation Coal Co.*, 432 N.E.2d at 257 (the court stated that "the control-group test has been noted for its predictability and ease...."); *In re Grand Jury*, 599 F.2d 1224, 1235 (3rd. Cir. 1979) (the Third Circuit Appeals Court said that the control group test "draws as bright a line as any of the proposed approaches.").

93. *See* John William Gergacz, *Attorney-Corporate Client Privilege*, 37 BUS. LAW. 461 (Jan. 1982); Gerald F. Lutkus, Note, *The Implications of Upjohn*, 56 NOTRE DAME LAW. 887 (Oct. 1980).

94. Gergacz, *supra* note 93, at 504-506; Lutkus, *supra* note 93, at 893. Gergacz stated:

> Although the Court clearly rejected the control group test and indirectly rejected the subject matter test, it did give guidance in its opinion. The Court clearly stated that its decision applied only to the *Upjohn* facts. Its use of those facts, however, suggested various factors which may be important in future "case-by-case approaches."

Gergacz, *supra* note 93, at 504.

95. Gergacz, *supra* note 93, at 505; Lutkus, *supra* note 93, at 893. Gergacz stated:

> [Another] factor refers to a common law analysis of the attorney-client privilege; namely, when does an individual who speaks with an attorney assume the role of "client"? In the corporate context, the inquiry is when the communicator may be said to be communicating as a personification of the corporation. That occurs when the communication concerned matters within the employee's corporate duties. The employee is not then communicating personally acquired information (i.e., as a witness to an accident), but is communicating as a cog in the corporate organization. This factor limits the employee communications subject to the privilege...

Gergacz, *supra* note 93, at 505. *See also* Upjohn Co. v. United States, 449 U.S. 383, 394 (1981).

96. Gergacz, *supra* note 93, at 504; Lutkus, *supra* note 93, at 893. *See also*, *Upjohn*, 449 U.S. at 394.

97. Gergacz, *supra* note 93, at 506; Lutkus, *supra* note 93, at 893. Gergacz stated:

> Since the corporate entity cannot speak with counsel, its communications must be through employees. In order for select employees to approximate the role of "clients," they need to know the reason for the conversation. Through knowledge they would be enabled to provide all the facts.... Employees are more akin to

By applying the above factors, which some believed could be discerned from the *Upjohn* facts, commentators felt the lower federal courts would have some guidance in determining the scope of the attorney-corporate client privilege.[98] Despite this limited certainty, however, some critics still held that the privilege was not clearly defined in *Upjohn* and that it would be difficult, at the time of a communication, to determine whether that communication would be privileged.[99]

V. THE ARIZONA COURTS' APPROACH TO THE ATTORNEY-CLIENT PRIVILEGE: *SAMARITAN FOUNDATION*

A. Facts of Samaritan Foundation

In *Samaritan Foundation v. Goodfarb*,[100] a child suffered a cardiac arrest while in surgery at Phoenix Children's Hospital.[101] After this incident, a nurse paralegal interviewed four witnesses - three nurses and one scrub technician.[102] She summarized these interviews in written memoranda.[103] Additionally, each witness signed a form consenting to representation by Samaritan if a claim was filed against her.[104]

The child and the child's parents filed a medical malpractice suit against the hospital and two physicians.[105] In preparation for trial, the plaintiff's attorney attempted to obtain statements from the witnesses.[106] The employees, however, stated that they remembered little or nothing of the event.[107] The plaintiff's attorney then sought to depose Samaritan's attorney regarding the witnesses' statements.[108] Samaritan and Phoenix Children's Hospital moved for a protective order, asserting both attorney-client privilege and the work-product doctrine.[109]

The trial court ordered the memoranda for inspection and extracted "witness statements" from the documents.[110] These statements were taken from the memoranda, excluding all attorney opinion.[111] Samaritan sought a stay to

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"clients" rather than to witnesses when they know the nature and reason for their discussion with counsel.

Gergacz, *supra* note 93, at 506. *See also Upjohn*, 449 U.S. at 394.

98. *See supra* note 94 and accompanying text.

99. Waldman, *supra* note 82, at 493. *See also* Gergacz, *supra* note 93, at 509–11.

100. 176 Ariz. 497, 862 P.2d 870 (1993).

101. Samaritan Found. v. Superior Court, 173 Ariz. 426, 844 P.2d 593 (Ct. App. 1992), *rev'd sub nom.*, Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993). The Samaritan Legal Department advises Phoenix Children's Hospital and its employees with respect to professional liability incidents and adverse patient occurrences. 173 Ariz. at 428, 844 P.2d at 595.

102. *Id.*

103. *Id.* at 429, 844 P.2d at 596.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

prevent the release of the statements.[112]

B. The Arizona Court of Appeals

The Arizona Court of Appeals determined that the trial court did not abuse its discretion in releasing the statements.[113] This decision was based upon an analysis of the work-product rule and the attorney-client privilege.[114]

Materials prepared in anticipation of litigation, though ordinarily privileged as attorney work-product, are discoverable if the party seeking discovery can show substantial need for the information contained in the materials and that the party cannot obtain the information without undue hardship.[115] In *Samaritan Foundation*, the Arizona Court of Appeals found undue hardship present due to a "significant witness'" inability to remember the events.[116] Also, the court felt that the trial court took proper measures to protect the working impressions of the legal staff.[117] On these grounds, the trial court's decision was held to satisfy the exception to work-product protection, and, therefore, the witnesses' statements were not protected by the work-product rule.[118] The Arizona Supreme Court affirmed this portion of the appeals court decision.[119]

The appeals court then examined the extent of the attorney-client privilege and similarly found no protection.[120] First, the court determined that

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112. *Id.*
113. *Id.*
114. *Id.* In addition to the attorney-client privilege, the work product rule protects communications between attorneys and their clients. First introduced in Hickman v. Taylor, 329 U.S. 495 (1947), this rule states that a party may not obtain discovery of materials prepared in anticipation of litigation. *Id.* at 510. This privilege is not absolute, however. Where facts are relevant, are not protected under the attorney-client privilege, and are not available from any other source, discovery may occur. *Id.* at 511.

> [T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who will invade that privacy to establish adequate reasons to justify production through a subpoena or court order.

Id. at 512. In other words, information is only available in cases of undue hardship to obtain the substantial equivalent of the materials by other means. *Id.* If this is shown, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions or legal theories concerning the litigation. 23 AM. JUR. 2D, Depositions and Discovery, § 50, p. 387.

115. ARIZ. R. CIV. P. 26(b)(3) (West. Pub. 1993). The pertinent part of this rule states:

> A party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means....

Id. See also supra note 114.
116. 173 Ariz. at 431, 844 P.2d at 598.
117. *Id.*
118. *Id.*
119. Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993). The Arizona Supreme Court stated: "we agree with the resolution by the court of appeals of issues relating to the work product doctrine." *Id.* at 500, 862 P.2d at 873.
120. *Samaritan Found.*, 173 Ariz. at 437–39, 844 P.2d at 604–06.

the attorney-client privilege may apply to communications to a paralegal.[121] Though paralegals were not mentioned in Arizona's attorney-client privilege statute,[122] the court noted that it has been recognized that an attorney may properly and efficiently work by using a paralegal.[123] In this case, the court held that communications to the paralegal could be privileged because the paralegal was acting in anticipation of litigation.[124] The Arizona Supreme Court did not comment on this portion of the appeals court decision.[125]

Despite holding that the attorney-client privilege may apply to a paralegal, the appeals court decided that the communications in this case were not privileged.[126] The nurses did not need personal legal advice.[127] Thus, they were classified as witnesses, not clients.[128] Because the attorney-client privilege does not protect mere witnesses' communications to attorneys or paralegals, the appeals court did not apply the attorney-client privilege to the nurses' communications.[129]

Most significantly, the court rejected the claim of attorney-client privilege by limiting the privilege primarily to the hospital's control group.[130] The court wanted to promote lawyer-client communications,[131] however, they did not wish to do so at the expense of blocking access to internal corporate witnesses and facts.[132] After reviewing decisions in other jurisdictions, the court rejected *Upjohn* and, following the Illinois Supreme Court, limited the attorney-corporate client privilege to the control group.[133]

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121. 173 Ariz. at 432, 844 P.2d at 599.

122. ARIZ. REV. STAT. § 12–2234 as written at the time of the *Samaritan Foundation* decision stated:

> In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. An attorney's secretary, stenographer or clerk shall not, without the consent of his employer, be examined concerning any fact the knowledge of which was acquired in such a capacity.

Id. See infra note 196 for the amended text of this statute.

123. 173 Ariz. at 432-33, 844 P.2d at 599-600.

124. *Id.* at 433, 844 P.2d at 600.

125. *See* Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

126. 173 Ariz. at 439, 844 P.2d at 606.

127. *Id.* at 437–38, 844 P.2d at 604–05.

128. *Id.*

129. *Id.* at 438, 844 P.2d at 605.

130. *Id.* at 437, 844 P.2d at 604.

131. *Id.*

132. *Id.*

133. *Id.* The Illinois Supreme court said:

> Under some circumstances...the privilege poses an absolute bar to the discovery of relevant and material evidentiary facts, and in the corporate context, given the large number of employees, frequent dealings with lawyers and masses of documents, the "zone of silence grows large."...That result, in our judgment, is fundamentally incompatible with this State's broad discovery policies looking to the ultimate ascertainment of the truth, which we continue to find essential to the fair disposition of a lawsuit. Its potential to insulate so much material from the truth-seeking process convinces us that the privilege ought to be limited for the corporate client to the extent reasonably necessary to achieve its purpose.

Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 257-58 (Ill. 1982) (citations omitted).

The Illinois Supreme Court decided that, in light of these difficulties, the privilege should be limited only to those employees who personify the corporation by their managerial or

In rejecting *Upjohn*, the court noted that *Upjohn* does not bind state courts and that it is only persuasive authority.[134] The court also discussed scholarly criticisms of the decision, including the argument that corporations can easily conceal information under the guise of the attorney-client privilege.[135] The court also noted the fact-specific holding of *Upjohn* and stated that the facts of *Samaritan* were far different. [136]

The court applied the control group test in order to remain consistent with the fundamental tenets of Arizona's attorney-client privilege.[137] The privilege encourages client candor so that the lawyer can ascertain the truth and give well-informed advice.[138] The court felt that the control group test meets both purposes and strikes a reasonable balance between them because the test provides for a significant measure of confidentiality in corporations, while not insulating all corporate communications from discovery.[139]

The court also invoked the control group test because it believed that communication of an event's facts should not be privileged solely because the witness is fortuitously also a corporate employee.[140] In such a situation, the employee's communications should not be protected under the attorney-client privilege.[141] Instead, the court felt that the work product rule sufficiently protects information which ought to remain confidential.[142]

The *Samaritan Foundation* appeals court also believed that an absolute privilege is unnecessary to encourage open communication between employee witnesses and corporate attorneys.[143] The court noted that a corporation has little incentive not to provide information to its attorney, even if the information is not absolutely privileged.[144] It is in the corporation's best interest to inform its attorney of all relevant information, and limiting the scope of the privilege to the control group is unlikely to stifle communication.[145]

Although the court primarily limited the scope of the attorney-corporate

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advisory authority and who shape corporate decisions in response to the corporation's attorney's advice, namely, the control group. *Id.*

134. 173 Ariz. at 435, 844 P.2d at 602.

135. *Id. See supra* notes 87–88 and accompanying text for a discussion of this criticism.

136. 173 Ariz. at 436, 844 P.2d at 603. The *Samaritan* court stated: "We cannot do [the case] justice by dislodging *Upjohn's* broadest pronouncements from their factual context and accepting them indiscriminately here." *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 437, 844 P.2d at 604.

141. *Id.*

142. *Id.* The court relies on MORRIS K. UDALL, ARIZONA PRACTICE: LAW OF EVIDENCE (3rd ed. 1991), stating:

> While one can understand a lawyer's desire to keep everything concerning his client's case secret, that function has traditionally been performed by the work product doctrine, prohibiting discovery of trial preparation materials absent a showing of special need, rather than the attorney-client privilege which is an absolute bar to discovery.

Id. § 74, at 140.

143. 173 Ariz. at 438, 844 P.2d at 605.

144. *Id.*

145. *Id.* The court cited Alexander, *supra* note 31, stating that nearly two-thirds of a surveyed group of corporate lawyers felt that a non-absolute attorney-corporate client privilege would not diminish the candor of non-control group employees. *Id.*

client privilege to communications made by members of the control group, it acknowledged that this should not be an absolute boundary.[146] The court noted that there may be situations when the privilege should apply to communications made by non-control group members.[147] When the lawyer is acting in a purely advisory role, the communications of lower level employees should be protected to promote compliance with the law and prevent later litigation.[148] To secure this purpose, the court created a qualified privilege for communications made by non-control group employees.[149]

This qualified privilege includes several elements. Before a non-control group employee's communications are privileged, management must direct the employee to confidentially communicate with the corporation's counsel about matters within the scope of employment.[150] While this communication must be made to secure legal advice for the corporation, the communication need not be undertaken in anticipation of or in preparation for litigation.[151] However, like the work-product privilege, this privilege may be overcome by a showing of "substantial need" and that the party is unable, without "undue hardship," to obtain the information.[152] Additionally, the party seeking discovery must show that this substantial need outweighs the corporation's interest in maintaining confidentiality.[153]

Under this rule, the communications made to the paralegal in *Samaritan Foundation* were not protected for the same reasons the communications were not protected under the work-product doctrine.[154] The plaintiffs had proven substantial need for the evidence and that the evidence was otherwise unavailable.[155] Furthermore, the need for this information outweighed the hospital's interest in keeping the information confidential.[156] As a result, the plaintiffs were able to obtain limited disclosure of the memoranda.[157]

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146. *Id.*
147. *Id.*
148. *Id.* The work-product doctrine does not always sufficiently protect communications because it only applies to communications made in anticipation of litigation. The court stated:

> We have one reservation, however, about leaving non-control group communications wholly to the protection of the work product rule. Work product protection is traditionally confined to lawyers' efforts in anticipation of litigation, whereas corporations seek legal advice on a broad range of matters, in many of which the litigation prospect is remote. Timely and informed legal advice may enhance corporate compliance with the law and prevent later litigation. We believe that the flow of information from the corporation to its lawyer should be promoted whenever useful to this advisory role....

Id.
149. *Id.*
150. 173 Ariz. at 438, 844 P.2d at 605. This requirement is substantially similar to the original subject matter test set forth in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970). *See supra* notes 49–56 and accompanying text.
151. *Id.*
152. *Id.* The requirements for overcoming the qualified privilege are the same as the requirements for overcoming work-product protection. *See* ARIZ. R. CIV. P. 26(b)(3), *supra* note 115.
153. 173 Ariz. at 438-39, 844 P.2d at 605-06.
154. 173 Ariz. at 440, 844 P.2d at 607. *See supra* notes 115–119 and accompanying text.
155. *Id.*
156. *Id.*
157. *Id.*

C. The Arizona Supreme Court

Although the Arizona Supreme Court reached the same result as the Arizona Court of Appeals,[158] the Arizona Supreme Court vacated the appeals court opinion as it related to the attorney-corporate client privilege.[159] The court devised a new test for determining the scope of the attorney-corporate client privilege.[160]

In devising this new test, the court first examined the basic principles of the attorney-client privilege.[161] The court noted that there must be an attorney-client relationship before the privilege exists.[162] The court also noted that, to be privileged, the communication must be made for the purpose of securing legal advice, made in confidence, and must be treated as confidential.[163] Recognizing that the privilege is fairly easy to apply when the client is a person, the court stated that the issue becomes much more complex when applied to a corporation.[164]

The court then examined the dominant theories of the attorney-corporate client privilege.[165] First, it discussed the control group test and criticized the test for being underinclusive.[166] Next, the court discussed the subject matter test and criticized the subject matter test for being overinclusive.[167]

In trying to avoid a test which would suffer from either the control-group test's underinclusiveness or the subject matter test's overinclusiveness, the Arizona Supreme Court decided to use a "functional" approach in deciding the extent of the attorney-corporate client privilege.[168] The decision to use a functional approach was based on comparisons to other legal areas involving corporations.[169] For instance, an agent's conduct will be imputed to the corporation *when* that conduct is committed within the scope of the agent's

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158. Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).
159. *Id.*
160. *Id.* at 499-500, 862 P.2d at 872–73.
161. *Id.* at 501, 862 P.2d at 874.
162. *Id.*
163. *Id.* (citing 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2292, at 554 (McNaughten rev. ed. 1961)).
164. *Id.* at 502, 862 P.2d at 875.
165. *Id.*
166. *Id.* The court stated:

> If otherwise privileged, [the control group test] protects communications by decision makers or those who substantially influence corporate decisions. Our court of appeals relied on *Consolidation Coal* in adopting the control group test. But it too acknowledged that the control group test is underinclusive....

Id.
167. *Id.* The court stated: "The vice of the subject matter test as it has evolved is its overinclusiveness. It will capture statements by employees who, because of their duties, are witnesses to the conduct of others." *Id.*
168. *Id.* at 503, 862 P.2d at 876. The court stated that:

> [B]ehavior, knowledge, and statements are imputed to the corporation as a function of the nature of the behavior, knowledge, and statements, and the context surrounding them, and not upon the identity of the actor or speaker. This suggests that a functional approach ought similarly to apply to the problem posed by the corporate entity within the context of the attorney-client privilege.

Id.
169. *Id.* at 502, 862 P.2d at 875.

employment.[170] Also, a corporate agent's knowledge will be imputed to the corporation *when* it is acquired by the agent acting within the scope of employment and relates to a subject within the agent's authority.[171] Because the employee's knowledge or conduct is imputed to the corporation regardless of the employee's corporate position in these instances, the court felt a similar test should apply in the attorney-corporate client privilege context.[172] The court, therefore, decided that, as in the above situations, determinations of attorney-corporate client confidentiality should focus on the nature, purpose, and context within which an employee communicates to corporate counsel.[173]

The court then decided that corporate communications fall into two categories: (1) communications initiated by an employee seeking legal advice for the corporation, and (2) communications made on the instruction of another corporate employee.[174] The court also held that the test for determining which communications are privileged differs in each of these two circumstances.[175]

First, under the Arizona Supreme Court's rule, communications directly initiated by an employee seeking legal advice on the corporation's behalf are privileged, regardless of the employee's position in the corporate hierarchy.[176] According to the court, these communications are at the heart of the attorney-client privilege because when an employee independently asks for legal advice, that employee is acting for the corporation, not in an individual capacity.[177] Therefore, the court held that these communications, including factual communications, are entirely privileged.[178]

The Arizona Supreme Court then addressed the second type of corporate communications: those made in response to an overture initiated by another corporate employee. The court emphasized that in this situation, the privilege must have some sort of limiting feature so that mere witness communications would not be privileged.[179] In defining a test that would avoid protecting mere witness communications, the court first explicitly rejected the control group test.[180] According to the court, the control group test could protect mere

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170. *Id.*
171. *Id.* at 499-500, 862 P.2d at 876.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* The court stated:

> And it is plain that these communications can occur at any level of the chain of command. At one end of the spectrum is the chief executive officer seeking advice from corporate counsel on the antitrust implications of corporate behavior, even if the behavior is not his. At the other end, the driver of a corporate truck may run into corporate counsel's office seeking advice about an accident. In either case, the privilege applies because the employee is seeking legal advice concerning that employee's duties... or behavior... on behalf of the corporation.

Id.
177. *Id.* at 503, 862 P.2d at 876.
178. *Id.* The court stated:

> As to these kinds of communications, including the communication of facts, we hold that all communications made in confidence to counsel in which the communicating employee is directly seeking legal advice are privileged.

Id.
179. *Id.*
180. *Id.* at 504, 862 P.2d at 877.

witness communications if an employee was also fortuitously a control group member.[181] The court also stated that the control group test fails to protect communications by lower level employees whose behavior may have subjected the corporation to liability.[182]

In rejecting the control group test, the Arizona Supreme Court also rejected the appeals court holding.[183] In addition to noting the above problems with the control group test, the court also noted that the hybrid control group test with a qualified privilege for non-control group employees was an uncertain test.[184] The court declared that this uncertain privilege was tantamount to no privilege at all.[185]

Based on this analysis, the court held that when someone other than the employee initiates a communication to counsel, factual communications will be privileged only if the communication concerns the employee's own conduct within the scope of his or her employment and is made to help counsel respond to the legal consequences of that employee's conduct.[186] The court explicitly excluded communications by employees, including control group members, who merely witness the event in question.[187]

Using this test, the court held that the nurses' and scrub technician's statements to Samaritan's counsel were not privileged.[188] Because these witnesses did not initiate the communication, the court examined whether the employees' communications related to their own conduct.[189] Under the Arizona Supreme court's test, when an employee does not initiate contact with counsel, that employee's communications are only privileged if the communications concern the employee's own conduct within the scope of his or her employment.[190] The nurses and scrub technician did not discuss their own conduct with counsel.[191] Instead, they were mere witnesses.[192] Therefore, their statements were not privileged.[193]

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181. *Id.*
182. *Id.*
183. *Id.* at 506, 862 P.2d at 879.
184. *Id.*
185. *Id.* The court stated that "[b]alancing competing interests is appropriate when formulating the extent of the privilege, but balancing in a case by case basis defeats the purpose of the privilege." *Id.*
186. *Id.* at 507, 862 P.2d at 879–80. The court stated:

> [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.

Id.
187. *Id.* The court stated that this "excludes from the privilege communications from those who, but for their status as officers, agents or employees, are witnesses." *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*

VI. THE ARIZONA LEGISLATURE'S APPROACH: THE NEW ATTORNEY-CLIENT PRIVILEGE STATUTE

Shortly after the Arizona Supreme Court's decision in *Samaritan Foundation*, the Arizona legislature adopted its own version of the attorney-corporate client privilege.[194] This new privilege is much broader and protects the majority of communications between corporate attorneys and corporate employees.[195]

Under amended *Arizona Revised Statutes* section 12–2234, many changes were made to Arizona's attorney-client privilege.[196] Most significantly, the new statute provides that any communication between a corporate employee and the corporation's attorney is privileged if: (1) the communication regards the employee's acts or omissions or regards information obtained from the employee; and (2) the communication is for the purpose of providing legal advice or obtaining information needed to provide legal advice to the corporation.[197]

Other changes to *Arizona Revised Statutes* section 12–2234 include:

1. Clarifying that the attorney-client privilege applies to conversations between attorneys for governmental entities

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194. Legislative history suggests the statute was primarily a reaction to the Arizona Supreme Court's decision in *Samaritan Foundation*. Senator Spitzer emphasized this fact in the March 22, 1994 meeting of the Senate Judiciary Committee. Senator Spitzer stated that:

> [T]ough cases make bad law, and I think that's what happened here. We had...an unusual fact situation that resulted in a Court of Appeals decision and then, subsequently, a Supreme Court decision that have thrown the attorney-client privilege with respect to a corporation in turmoil.

Tape record of Senate Judiciary Committee Meeting regarding H.B 2161 (Mar. 22, 1994) (on file with author).

195. *See* ARIZ. REV. STAT. § 12-2234 (as amended by 1994 Ariz. Sess. Laws ch. 334, § 1), *infra* note 196.

196. ARIZ. REV. STAT. § 12-2234 (1994) states:

> A. In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. An attorney's *paralegal, assistant,* secretary, stenographer or clerk shall not, without the consent of his employer be examined concerning any fact the knowledge of which was acquired in such capacity.
>
> *B. For the purposes of subsection A, any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:*
>
> *1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.*
>
> *2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.*
>
> *C. The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney.*

(Additions are indicated by *italics*.)

197. ARIZ. REV. STAT. § 12–2234(B).

and employees of that governmental entity.[198]

2. Extending the attorney-client privilege to privileged communications between an attorney's paralegal or assistant and the client in civil actions.[199]

3. Stating specifically that the attorney-client privilege does not relieve employees or agents of the duty to disclose facts simply because the facts have been previously communicated to an attorney.[200]

A. Legislative Intent: Is it Upjohn?

The legislative history of amended *Arizona Revised Statutes* section 12–2234 suggests that the legislature attempted to codify the United States Supreme Court's holding in *Upjohn* into Arizona law.[201] As stated in the March 22, 1994 meeting of the Arizona Senate Judiciary Committee, this means the privilege would apply to communications between corporate employees and corporate counsel, if the communications are for the purpose of giving the corporation legal advice and concern matters within the scope of the employee's employment.[202]

Comments by Senator Spitzer suggested this broadening of the attorney-corporate client privilege was meant to encourage communication between clients and attorneys.[203] Senator Spitzer also stated that it would be beneficial to have the same standard for the privilege in both state and federal courts.[204]

Despite the intent stated in the March 22, 1994 meeting of the Arizona Senate Judiciary Committee, the amended statute itself does not clearly reflect the United States Supreme Court's holding in *Upjohn*. In *Upjohn*, the United States Supreme Court refused to define a broad rule which would govern all future cases regarding the attorney-corporate client privilege.[205] Instead, the

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198. *Id.*; *See also* Fact Sheet for H.B. 2161, at 2.

199. ARIZ. REV. STAT. § 12–2234(A); *See also* Fact Sheet for H.B. 2161, at 2.

200. ARIZ. REV. STAT. § 12–2234(C); *See also* Fact Sheet for H.B. 2161, at 2.

201. The Arizona State Senate Fact Sheet for H.B. 2161 states:

> This...amendment enacts the U.S. Supreme Court's standard, as enunciated in *Upjohn*, into Arizona law. Statutory guidelines would 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.

Id. at 2.

202. Greg Cygan, Arizona Senate Assistant Research Analyst, stated in the March 22, 1994 meeting:

> *Upjohn* applies the privilege to confidential communications between corporate employees and corporate counsel if those communications are made for the purpose of getting legal advice to the corporation or employee and if they concern matters within the scope of the employee's duties.

Tape record of Senate Judiciary Committee Meeting regarding H.B. 2161 (Mar. 22, 1994) (on file with author).

203. Senator Spitzer noted that the privilege applies to "communications between a client ... and [that] it's designed to foster a free flow of ideas and communication." Tape record of Senate Judiciary Committee Meeting on H.B. 2161 (Mar. 22, 1994) (on file with author.)

204. Senator Spitzer stated that "...this amendment...is an attempt to codify the Supreme Court decision in *Upjohn*, which is already the law in federal courts....There is no reason to have a different standard in federal or state courts." *Id.*

205. Upjohn Co. v. United States, 449 U.S. 383 (1981). The Court stated: "We decline

Supreme Court stated that a case-by-case factual analysis would be applied.[206]

In contrast, under Arizona's new statute, there is no suggestion of such a case-by-case analysis.[207] Instead, the statute broadly states that the privilege shall apply if the communication regards "information obtained from the employee," if the information is for the purpose of "providing legal advice to" *or* "obtaining information in order to provide legal advice to" the corporation.[208] Under the Arizona statute, *any* information received by corporate counsel could be construed to be, at a minimum, "for the purpose of obtaining information to provide legal advice"[209] to the corporation. This language is much broader than the United States Supreme Court's language in *Upjohn,* and, contrary to the Court's intent in *Upjohn*, adopts a broad rule. [210]

A similar view was taken by Kenneth Clancy, one of the attorneys for the plaintiffs in *Samaritan Foundation.* At the March 22, 1994 meeting of the Senate Judiciary Committee, Mr. Clancy declared that the statute was much broader than the United States Supreme Court's holding in *Upjohn.*[211] He stated that the bill would serve, not simply to promote communication, but to insulate the discovery of underlying facts.[212] Mr. Clancy declared that the privilege should not be used to hide underlying facts, and that this aspect of the bill was inconsistent with the United States Supreme Court's holding in *Upjohn.*[213]

There is an additional inconsistency between the Arizona statute and the *Upjohn* decision: the statute does not account for the factors present in *Upjohn.* The *Upjohn* decision suggests that several factors should be present for the attorney-corporate client privilege to apply.[214] These factors include: (1) the communication was made regarding something within the scope of the employee's employment; (2) the communication was made to counsel at the direction of corporate superiors; and (3) the communication was made by employees who were aware they were being questioned in order for the corporation to obtain legal advice.[215] Although Arizona's new statute requires

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to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so." *Id.* at 386.

206. *Upjohn*, 449 U.S. at 396-397. The Court stated:

> [W]e decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501....While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the rules.

Id. See also, supra note 68.

207. *See supra* note 196 for the text of ARIZ. REV. STAT. § 12-2234.

208. ARIZ. REV. STAT. § 12-2234. *See supra* note 196 for the complete text of the statute.

209. *Id.*

210. *See supra* notes 205-06 and accompanying text.

211. Mr. Clancy stated: "This bill is not *Upjohn*. This bill goes way beyond what the court in *Upjohn* identified as the problem or the solution to the problem." Tape record of Senate Judiciary Committee Meeting regarding H.B. 2161 (Mar. 22, 1994) (on file with author).

212. In discussing *Samaritan Foundation*, Mr. Clancy stated that "[t]he employees couldn't remember the facts. This pending bill seeks to insulate those factual matters from testimony....*Upjohn* does not go that far...." Mr. Clancy also stated that the bill's language "specifically seeks to exclude those facts from any discovery by calling them privileged." *Id.*

213. Mr. Clancy stated that "[w]e cannot insulate the facts by calling them privileged." *Id. See also supra* notes 211–12.

214. *See supra* notes 94–98 and accompanying text.

215. *See supra* notes 94–98 and accompanying text.

the communication to be made for the purpose of giving the corporation legal advice, the other factors are absent from the statute.[216] Most notably, the statute does not require the communication to be made regarding information within the scope of an employee's duties.[217] Although this factor was suggested in the Senate Judiciary Committee meeting on March 22, 1994,[218] this factor is not explicitly noted in the statute.[219] Absence of this requirement could enable the attorney-client privilege to be applied to communications which the United States Supreme Court did not intend to be privileged under *Upjohn.* [220]

Due to the discrepancies between the United States Supreme Court's holding in *Upjohn* and the statutory language of Arizona's amended attorney-client privilege statute, it is not clear whether the Arizona statute is truly a codification of *Upjohn*, as suggested in the March 22, 1994 meeting of the Senate Judiciary Committee.[221] Thus, Arizona courts will have to determine whether to follow the exact language of the statute or to follow the legislature's suggestion that the statute actually codifies *Upjohn.* If courts choose to apply the statute literally, courts may declare "privileged" an even greater scope of communications than the United States Supreme Court intended to be privileged under *Upjohn.*

B. The Arizona Supreme Court's Approach v. The Legislative Approach

1. A Certain Privilege

Tests defining the extent of the attorney-corporate client privilege must be definitive enough to provide clear guidance to courts.[222] Some believe the control-group test is the easiest test to apply.[223] Other tests, however, including both the test created by the legislature and the test created by the Arizona Supreme Court, should be equally easy to apply.

When the Arizona Supreme Court created its definition of the attorney-corporate client privilege, the court clearly delineated the circumstances in which a communication would be privileged.[224] Under the Arizona Supreme Court's test, a communication would be privileged when an employee initiates the communication with corporate counsel for the purpose of securing legal

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216. ARIZ. REV. STAT. § 12-2234. *See supra* note 196 for a complete text of the statute.
217. ARIZ. REV. STAT. § 12–2234. *See supra* note 196 for a complete text of the statute.
218. *See supra* notes 201-04 and accompanying text.
219. ARIZ. REV. STAT. § 12-2234. *See supra* note 196 for a complete text of the statute.
220. When discussing the facts of *Upjohn*, the Supreme Court noted that the communications "concerned matters within the scope of the employees' corporate duties." Upjohn Co. v. United States, 449 U.S. 383, 394 (1981). Also, in his discussion of *Upjohn*, John William Gergacz stated that an employee is a "client," for the purposes of the attorney-client privilege, when "the communication concerned matters within the employee's corporate duties." Gergacz, *supra* note 93, at 505.
221. *See supra* notes 201–04 and accompanying text.
222. *See supra* notes 81–83, 91–92 and accompanying text.
223. *See supra* note 92. Many courts praise the control group test because it is predictable. *See, e.g.,* Consolidation Coal Co.v. Bucyrus-Erie Co., 432 N.E.2d 250, 257 (Ill. 1982) (the court stated that "the control group test has been noted for its predictability and ease of application.").
224. *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 862 P.2d 870 (1993).

advice.[225] Communications would also be privileged when an employee is directed to communicate with counsel about that employee's own behavior.[226] If the employee was a mere witness, the communication would not be privileged.[227] This definition is unambiguous: if an employee did not independently approach counsel or only witnessed an event, the communication would not be privileged.

Some may argue that it would have been difficult to apply the Arizona Supreme Court's definition of the privilege. This difficulty, however, would have arisen, if at all, only before the communication was made and only in situations where the employee did not initiate the communication. In these situations, because the communication would only be privileged if it referred to the employee's own behavior, the attorney might not know whether information was privileged until the attorney learned whose behavior was in issue. However, upon discovering this preliminary information, the attorney could easily tell whether the information was privileged. Therefore, the Arizona Supreme Court successfully defined a very certain privilege.

The legislature's definition of the privilege is arguably even more clear. This clarity exists because, under the statutory language, there is no case-by-case analysis.[228] Instead, every communication for the purpose of providing legal advice to the corporation or obtaining information to give the corporation legal advice is privileged.[229]

However, an ambiguity does exist. This ambiguity is two-fold. First, it is not clear whether the statute should be read strictly, according to its language, or whether courts should apply *Upjohn*, as was the suggested legislative intent.[230] If courts interpret the statute as codifying *Upjohn*, the second ambiguity arises: in *Upjohn*, the United States Supreme Court gave very little guidance to lower courts for applying the attorney-corporate client privilege.[231] Thus, although under a strict reading of the statute there is little uncertainty in its application, under an Upjohn interpretation, it would be much more difficult to apply the statute.

2. Promoting Open Communication between Counsel and Employees

One of the generally accepted primary purposes of the attorney-client privilege, is that the privilege should promote open communication between counsel and his or her client.[232] Several approaches have been taken in promoting this openness. For example, the Arizona Supreme Court in *Samaritan Foundation* declared that, in order to promote open communication

225. 176 Ariz. at 503, 862 P.2d at 876.
226. *Id.* at 504, 862 P.2d at 877.
227. *Id.*
228. ARIZ. REV. STAT. § 12–2234. *See supra* note 196 for a complete text of the statute. *See also, supra* notes 207–10 and accompanying text.
229. ARIZ. REV. STAT. § 12–2234. *See supra* note 196 for a complete text of the statute.
230. *See supra* notes 201–21 and accompanying text.
231. Upjohn Co. v. United States, 449 U.S. 383, 396 (1981). The court acknowledged this lack of guidance, stating that "[w]hile such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the [Federal Discovery] Rules." *Id.* at 396–97. *See also supra* notes 89–92 and accompanying text.
232. *See supra* notes 23–28 and accompanying text.

between corporate employees and corporate counsel, the privilege should be precisely defined and ambiguity should be removed.[233]

Commentators debate, however, about whether precisely narrowing the privilege's definition is the best way to promote open communication.[234] Some courts believe the best way to promote communication is to extend the privilege to potentially all corporate employees.[235] This view is based on the tradition and purpose of the attorney-client privilege.[236] Because the privilege facilitates open communication between a client and an attorney, the privilege enables the attorney to provide the best possible legal representation.[237] Additionally, the client need not fear disclosure of information.[238] This open communication and adequate representation engendered by the attorney-client privilege is a fundamental tenet of our legal system.[239] Therefore, some courts and legislatures, including the United States Supreme Court and the Arizona legislature, believe the privilege should extend to potentially all corporate employees.[240]

Despite the noble principles of the attorney-client privilege, the Arizona Court of Appeals and the Arizona Supreme Court were correct in not providing an absolute privilege. The attorney-client privilege should not be absolute when applied to corporations because too much relevant information can be unfairly shielded from discovery.[241] As the courts in *Consolidation Coal* and *Samaritan Foundation* remarked, if the privilege is an absolute bar to discovery of all corporate communications, it is difficult to ascertain the truth.[242] Furthermore, although the privilege is worth preserving, it may serve to hide the truth and should be limited as much as possible.[243]

Arguably, the Arizona legislature shielded against this potential "zone of silence" by specifically providing that the attorney-corporate client privilege does not permit an employee to withhold facts on the basis of the attorney-client privilege.[244] It is true that the privilege only protects communications, not the

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233. 176 Ariz. at 505, 862 P.2d at 878. The court also stated that "[u]nless the privilege is known to exist at the time the communication is made, it will not promote candor." *Id.* at 506, 862 P.2d at 879.

234. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

235. *Id.*

236. *Id.*

237. *Id.*

238. *See* 8 JOHN H WIGMORE, WIGMORE ON EVIDENCE § 2291 (McNaughton rev. 1961).

239. *Id.* Upjohn Co. v. United States, 449 U.S. 383 (1981).

240. *See Upjohn*, 449 U.S. 383; ARIZ. REV. STAT. § 12–2234.

241. Consolidation Coal Co. v. Bucyrus-Erie Co. 432 N.E.2d 250, 256 (Ill. 1982).

242. *Id.* at 256, 257. The court, citing David Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L. J. 953, 955 (1956), stated: "Under some circumstances...the privilege poses an absolute bar to the discovery of relevant and material evidentiary facts, and in the corporate context, given the large number of employees, frequent dealings with lawyers and masses of documents, the 'zone of silence grows large.'" *Id. See also*, Samaritan Found. v. Superior Court, 173 Ariz. 426, 844 P.2d 593 (Ct. App. 1992), *rev'd sub nom.*, Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

243. WIGMORE, *supra* note 238, at 554. The attorney-client privilege should be "strictly confined within the narrowest possible limits consistent with the logic of its principle... [because it is an] obstacle to the truth." *Id.*

244. ARIZ. REV. STAT. § 12-2234(C). *See supra* note 196 for a complete text of the statute.

facts underlying the communications,[245] however, discovery of underlying facts my be hindered if the privilege's scope is defined too broadly.

Samaritan Foundation is a prime example of a case in which discovery would be hindered by a broad attorney-corporate client privilege. In *Samaritan Foundation*, the witnesses could not remember what they observed in the operating room.[246] When such witnesses cannot recall facts previously communicated to an attorney or are unavailable at the time of discovery, the attorney may become the only means through which the facts can be discovered. If the attorney refuses to disclose the facts based on the attorney-client privilege, those facts may be forever concealed from the opposing party.

Therefore, in attempting to balance the competing policies behind the different approaches to the attorney-corporate client privilege, an absolute privilege should be rejected, and a more limited privilege should be applied. One way to do this is to adopt a control group test[247] similar to that adopted by the Arizona Court of Appeals.[248] The Arizona Supreme Court, however, used a different method to limit the attorney-corporate client privilege.[249] This method narrowed the circumstances in which communications are privileged.[250] Under the Arizona Supreme Court rule, the privilege only protected communications under two circumstances: when the communicator independently approached counsel for corporate legal advice and when the communicator's actions gave rise to the incident in question.[251]

Some may argue that this rule would not promote open communication. This argument focuses on the idea that, because such a narrow sphere of communications are privileged, corporate counsel would be deterred from questioning employees who merely witnessed an accident that could lead to liability. These employees may have necessary information which the employee who participated in the event may not have. Despite needing the information, however, the attorney may be hesitant to question the employees because the attorney is aware that their communications will not be privileged. When communications are not privileged, corporate counsel may have to disclose the information to opposing counsel. Arguably, therefore, corporate attorneys may choose not to question fact witnesses, and communication will be stifled, not promoted.

This argument, however, is not convincing. Even if confidentiality is strictly limited, it is not clear whether such limits affect communication between corporate attorneys and their clients.[252] A study researching the effects

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245. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981); Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962); Samaritan Found. v. Goodfarb, 176 Ariz. 497, 501, 862 P.2d 870, 874 (1993).

246. *See supra* notes 101–07 and accompanying text.

247. *Consolidation Coal Co.*, 432 N.E.2d at 257. The court held that the control group test strikes a reasonable balance by protecting consultations with counsel by those who control or substantially influence corporate decisions and by limiting the amount of factual material which is immune from discovery. *Id.*

248. Samaritan Found. v. Superior Court, 173 Ariz. 426, 844 P.2d 593 (Ct. App. 1992), *rev'd sub nom.*, Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

249. *Samaritan Found.*, 176 Ariz. 497, 862 P.2d 870.

250. *Id.*

251. *Id.*

252. *See* Alexander, *supra* note 31, at 306-319.

of the control group test found that only one-third of lawyers surveyed took the control group limit into account prior to the *Upjohn* decision.[253] Instead, most attorneys communicated with all necessary parties within the corporation, regardless of whether the communications would be protected under the control group test.[254] Thus, even a narrow test, such as that adopted by the Arizona Supreme Court in *Samaritan Foundation*, is unlikely to adversely affect corporate counsels' job performance because the need to zealously represent clients outweighs the mild threat of receiving non-privileged information.

3. Consistency with Other Legal Doctrines

Courts have suggested that the scope of the attorney-corporate client privilege should be consistent with other legal doctrines in a state.[255] This was a view shared by the Arizona Supreme Court in crafting the *Samaritan Foundation* rule.[256] Unlike Arizona's new attorney-client privilege statute, *Samaritan Foundation* and other narrow definitions of the attorney-corporate client privilege achieve this goal. Such definitions are consistent with both general policy principles of the attorney-client privilege and with Arizona's newly enacted discovery rules.

In the summer of 1992, Arizona enacted a new discovery rule.[257] This rule, referred to as the "disclosure rule," requires each party to disclose to the other party all relevant information.[258] This broad rule has received substantial criticism on the grounds that it practically eliminates the attorney-client privilege.[259] Primary criticisms relate to the fact that even if an attorney does not have to hand over a client's exact statement to the opposing attorney, they will have to disclose everything that was revealed in the statement.[260]

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253. *Id.* at 306.

254. *Id.*

255. *See* Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982) (suggesting that the attorney-corporate client privilege should be consistent with a state's discovery policies. The Illinois Supreme Court stated that an extremely broad privilege "is fundamentally incompatible with this State's broad discovery policies looking to the ultimate ascertainment of the truth." *Id.* at 257.).

256. The court noted that its "functional approach" is consistent with agency law and Rules of Professional Conduct. 176 Ariz. at 503–04, 506–07, 862 P.2d at 876–77, 879–80.

257. ARIZ. R. CIV. P. 26.1.

258. *Id.* The provisions of the rule provide for mandatory disclosure of: (1) the factual basis of the claim or defense; (2) the legal theories of a claim or defense; (3) the name, address and phone number of witnesses that will be called and a designation of the subject matter on which they will testify; (4) the names and addresses of all persons who have information "relevant to the events, transactions or occurrences that gave rise to the action"; (5) the names of all persons who have given statements and the names of those in possession of the statements; (6) the names and addresses of expert witnesses to be called, the subject matter on which they will testify, a summary of the grounds for each opinion, the witnesses' qualifications, and names of persons in possession of any reports prepared by the expert; (7) a computation and measure of damages alleged and the documents and testimony on which this measure was based; (8) the existence, location, and general description of any tangible evidence or relevant documents the disclosing party plans to use at trial and relevant insurance agreements; and (9) a list of documents known by a party to exist which are relevant to the subject matter of the litigation. *Id.*

259. *See* William R. Jones, Jr. & Janet A. Napolitano, *The Great Experiment: Arizona's Newly Enacted Rules of Discovery and Arbitration* 28 ARIZ. ATT'Y 18 (May 1992); Robert J. Bruno, *The Disclosure Rule is a Mistake*, 11-8 MARICOPA LAW. 1 (Aug. 1992).

260. *See* Bruno, *supra* note 259. The author states:

> There is no attorney/client privilege. The attorney who takes a statement from his

Furthermore, the rule is seen to undermine the zealous advocacy so fundamental to an adversary system.[261]

The promulgators of the rule believed differently.[262] They intended to make the judicial system in Arizona more fair,[263] and they wished to encourage honesty in attorneys.[264] Furthermore, the promulgators of the rule ultimately wished to increase "voluntary cooperation and exchange of information."[265] These principles are similar to the principles promoted by the *Samaritan Foundation* decision because both the case and the rules promote the exchange of information.[266] The privilege defined in *Samaritan Foundation* does not protect mere witness statements[267] and, therefore, allows more information to be given to opposing counsel in the search for the truth. Thus, *Samaritan Foundation* is consistent with the current direction of Arizona law.

In contrast, the Arizona legislature's definition of the privilege is not consistent with the direction of Arizona law. This inconsistency is due to the fact that, under the statute, facts may be hidden from opposing counsel.[268] The statute makes privileged all communications made for the purpose of obtaining information in order to provide legal advice to the corporation.[269] A corporate employee who is the sole witness to an accident involving another corporate employee may communicate with the corporation's attorney. This communication's purpose may be for the attorney to obtain information in order to advise the corporation about the accident's legal consequences. Under the statute, this communication would be privileged. However, if the employee-witness becomes unavailable or is unable to later remember the accident, the facts of that accident may be hidden from opposing counsel because the

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client might not be obliged to hand that piece of paper over to the opposing party, but the attorney himself is obliged to include in the disclosure statement all the information he has learned through taking the statement.

Id. at 15.

261. *Id.* at 7.

According to the pronouncement of our Supreme Court, lawyers are to act as *zealous advocates* for their clients and serve an *adversarial* role to the opposing party. Our new rule of disclosure has simply swept aside this basic premise that has served our system well for a long, long time.

Id.

262. *See* ARIZ. R CIV. P. 26.1 (Court Comment, 1991 Promulgation).

263. *Id.* The Comment states:

[The rules are] designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people ... [and] to provide a framework which would allow sufficient discovery of facts and information to avoid "litigation by ambush."

Id.

264. *Id.*

[The] Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel.

Id.

265. *Id.*

266. *Id.*; Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

267. *See supra* notes 179–87 and accompanying text.

268. *See supra* notes 207–13 and accompanying text.

269. ARIZ. REV. STAT. § 12-2234(B)(2). *See supra* note 196 for a complete text of the statute.

communication was deemed privileged. Therefore, the new statute may hinder the search for the truth. This approach is in direct opposition to Arizona's broad discovery policies.[270]

The attorney-corporate client privilege should be easy to apply, should be consistent with a state's other legal doctrines, and should promote open communication between corporate counsel and his or her client.[271] At the same time, the privilege should not impair availability of information.[272] Both Arizona's new statute and the Arizona Supreme Court's approach in *Samaritan Foundation* may be easily applied.[273] Additionally, both would promote open communication.[274] However, the new statute is inconsistent with Arizona's broad discovery policies and may impair availability of information.[275] In comparison, the Arizona Supreme Court's approach in *Samaritan Foundation* limiting application of the privilege, would be consistent with the state's broad discovery policies and would not impair availability of information.[276] However, despite these benefits, the Arizona Supreme Court's test for the attorney-corporate client privilege is also not the best choice because it may lead to unreasonable disparities in application and has potential for corporate abuse.

a. An irrelevant distinction?

The Arizona Supreme Court's two-prong test for the attorney-corporate client privilege[277] may result in unreasonable disparities in application because the form of the test applied hinges on *who* initiates the communication. Under the test, when an employee does not initiate a communication, the communication will *only* be privileged when the subject of the communication is the employee's own behavior.[278] However, whenever an employee initiates a communication seeking legal advice on behalf of the corporation, that communication is *always* privileged.[279] The court gives very little reasoning for this second principle, merely noting that the principle is "universally accepted"[280] and that these communications are "at the heart of the attorney-client relationship."[281]

Although this distinction makes sense in many circumstances, it can lead to unjust results. For instance, suppose a corporate vice-president was on his or her way to work one day and saw one of the corporation's truck drivers run over a pedestrian while driving a corporate truck. When the vice-president got to the office, he immediately approached corporate counsel and said: "I saw this terrible accident. What can we do to protect ourselves from liability?" Under *Samaritan Foundation*, this communication would be protected because the

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270. *See* ARIZ. R. CIV. P. 26.1, *supra* notes 257-58 and accompanying text.
271. *See supra* notes 222–70 and accompanying text.
272. *Id.*
273. *See supra* notes 222–31 and accompanying text.
274. *See supra* notes 232–54 and accompanying text.
275. *See supra* notes 268–70 and accompanying text.
276. *See supra* notes 255–70 and accompanying text.
277. *See supra* notes 174–87 and accompanying text.
278. Samaritan Found. v. Goodfarb, 176 Ariz. 497, 507, 862 P.2d 870, 880 (1993).
279. *Id.* at 503, 862 P.2d at 876.
280. *Id.*
281. *Id.*

person initiating the communication was someone who was seeking legal advice from the attorney on behalf of the corporation.

In comparison, suppose the vice-president saw the same accident, but now, however, when he gets to work, the corporate counsel immediately approaches him and says: "I heard you saw a terrible accident. Let's talk about what we can do to protect ourselves." Under these facts, the communication regarding the accident would not be privileged merely because the vice-president did not initiate the communication himself. In fact, under a strict reading of *Samaritan Foundation*, even if the vice-president would *normally* seek legal advice on behalf of the corporation, this communication would not be privileged because, in this instance, he did not initiate the communication.

In both scenarios, the vice-president witnessed the same accident and probably communicated the same information to corporate counsel. It is illogical to automatically protect that communication in one instance and not the other.

b. Potential for Corporate Abuse

Another problem with the Arizona Supreme Court's definition of the privilege's scope is that there is potential for corporate abuse. Because the Arizona Supreme Court's definition of the privilege is very straightforward and hinges upon who initiates a communication,[282] a corporation could establish a policy preventing employees from directing other employees to speak to corporate counsel. Instead, the corporation could have a general policy that whenever an employee believes he or she has witnessed an event that could lead to the corporation's liability, that employee must independently approach corporate counsel. Under the Arizona Supreme Court's definition of the privilege, that communication would be protected merely because the employee initiated the communication with corporate counsel.

The Arizona Supreme Court specifically wished to avoid protecting mere witness communications.[283] However, the court's definition of the privilege leaves room for policies which would contravene this intent. If such abuse takes place, the benefits of the supreme court's narrowly defined privilege would be undermined.

VII. A NEW PROPOSAL

Under the Arizona legislature's analysis of the attorney-corporate client privilege, the privilege as defined by the Arizona Supreme Court was far too narrow to adequately protect communications between corporate counsel and corporate employees.[284] However, the legislature overcompensated for this perceived flaw and created a privilege which is far too broad. In addition, although the privilege adopted by the Arizona Supreme Court in *Samaritan Foundation* remains true to the original purposes of the attorney-client

282. *See supra* section VI. B. 3. a.
283. *See Samaritan Found.*, 176 Ariz. at 505, 862 P.2d at 878.
284. *See supra* notes 194–204 and accompanying text.

privilege, is easily applied, and prevents unfair shielding of information,[285] the Arizona Supreme Court's definition of the privilege is also inadequate due to potential disparities in application and potential for abuse.[286] This Note proposes a definition of the attorney-corporate client privilege which would be broad enough to cure the legislature's perceived problems with the *Samaritan Foundation* decision and which would avoid unfair shielding of information, while not suffering from the problems present in the Arizona Supreme Court's definition of the privilege.

Proposed Privilege:

General Statement of the Privilege: Communications between corporate employees and corporate attorneys shall be privileged when the communications (1) are for the purpose of providing legal advice to the corporation; and (2) related to matters within the scope of the employee's duties.

Exception: The above privilege shall be limited with respect to communications which regard facts or occurrences merely witnessed by the communicating employee. Under such circumstances, communications of factual observations shall not be privileged if the opposing party can show both a substantial need for the information and that the information cannot be obtained without undue hardship.

This proposed definition of the attorney-corporate client privilege would protect the majority of communications between corporate counsel and corporate employees. This is consistent with the Arizona state legislature's intent when it amended Arizona Revised Statutes section 12–2234.[287] The breadth of this proposed privilege would also fulfill the attorney-client privilege's goal of facilitating the free flow of information.[288] Furthermore, by explicitly stating that the privilege applies only if the communication (1) relates to matters within the scope of the employee's duties, and (2) is for the purpose of providing legal advice to the corporation, the proposed privilege is a more accurate reflection of the United States Supreme Court's decision in *Upjohn* than is Arizona's new statutory privilege.[289]

This broad privilege, however, is explicitly limited in cases where mere witness observations are communicated. Thus, the proposed privilege would not conceal facts from opposing attorneys. This limitation is consistent with the intent expressed by the Arizona Supreme Court and the Arizona Court of Appeals in the *Samaritan Found.* cases.[290] Also, by using a qualified privilege for these mere factual communications, the proposed privilege would lead to revelation of communications only under very limited circumstances. This qualified privilege would achieve a successful balance between the legislature's desire for a broad privilege and the court's desire to make facts available to both sides in a controversy.

Some may argue that this proposed qualified privilege, like the qualified

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285. *See supra* notes 222–70 and accompanying text.
286. *See supra* notes 277–83 and accompanying text.
287. *See supra* notes 194–220 and accompanying text.
288. *See supra* notes 232–70 and accompanying text.
289. *See supra* notes 201–220 and accompanying text.
290. *See supra* notes 113–87 and accompanying text.

privilege adopted by the Arizona Court of Appeals,[291] would lead to uncertainty in application.[292] However, although some uncertainty may exist in the proposed privilege, the degree of uncertainty in the proposed privilege is much less than in the Arizona Court of Appeals' qualified privilege. This reduction in uncertainty is due to the fact that, in the proposed privilege, the scope of material subject to a qualified privilege is much narrower than in the Arizona Court of Appeals decision: whereas the qualified privilege in the appeals court decision applied to all non-control group employees,[293] the qualified privilege in the proposed privilege only extends to communications by mere fact witnesses. Thus, there is much less uncertainty in the proposed definition's qualified privilege. Additionally, because the information is only discoverable upon a showing of undue hardship and substantial need, the attorney-corporate client privilege will be restricted as little as possible while serving the goals of information, availability and fairness.

VIII. CONCLUSION

For the past two years, Arizona has struggled with its definition of the attorney-corporate client privilege. The latest step in this series of change occurred when the legislature amended Arizona's attorney-client privilege statute and created an overly broad definition of the privilege as applied to corporations. The new statute, although promoting communication between corporate counsel and corporate employees, may shield facts from discovery. This Notes proposed definition of the scope of the attorney-corporate client privilege would achieve the Arizona Legislature's goal of establishing a broad privilege. At the same time, this Note's proposed definition would, consistent with the Arizona courts' intent, prevent corporations from shielding facts under the guise of the attorney-client privilege.

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291. *See supra* notes 146–153 and accompanying text.

292. *See supra* notes 184–85 and accompanying text for a discussion of the Arizona Supreme Court's criticism of the Court of Appeals' qualified privilege.

293. *See supra* notes 146–53 and accompanying text.