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Comments: The Corporate Attorney-Client Privilege in Maryland after Upjohn and the Recent Corporate Scandals: Where Do the Maryland Courts Go from Here?

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THE CORPORATE ATTORNEY-CLIENT PRIVILEGE IN MARYLAND AFTER *UPJOHN* AND THE RECENT CORPORATE SCANDALS: WHERE DO THE MARYLAND COURTS GO FROM HERE?

I. AN INTRODUCTION TO THE CORPORATE ATTORNEY-CLIENT PRIVILEGE AND THE MULTIPLE TESTS

The attorney-client privilege serves to protect and promote communications between clients and lawyers. According to the Supreme Court in *Upjohn Co. v. United States*,[1] the purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[2] This privilege only covers "communications between lawyer and client in which the client is seeking legal advice or other legal services."[3]

For a communication to be covered under the attorney-client privilege, the following five factors must be present: "(1) a client, (2) a lawyer, (3) a retainer for the purpose of rendering legal advice, (4) a communication between them, and (5) an intent that the communication be confidential."[4] This privilege is available to both individual and corporate clients.[5]

Prior to the decision in *Upjohn*, there were two primary tests used by the federal courts, as well as the courts of individual states, to determine if a communication in the corporate setting was covered under the corporate attorney-client privilege.[6] The first test, the control group test, "limits the privilege to communications from

1. 449 U.S. 383 (1981).
2. *Id.* at 389.
3. LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 166 (2005).
4. Dennis J. Black & Nancy E. Barton, *Implications of the Attorney-Client Privilege and Work-Product Doctrine*, *in* INTERNAL CORPORATE INVESTIGATIONS 17, 22–23 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2003).
5. LERMAN & SCHRAG, *supra* note 3, at 176.
6. *See* Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 474 (1987) (stating that the "two major tests" which emerged in the 1960s and the 1970s were the control group test and the subject matter test); *see also Upjohn*, 449 U.S. at 386 (stating that "two 'tests' [had] gained adherents in the courts of appeals").

persons in the organization who have authority to mold organizational policy or to take action in accordance with the lawyer's advice."[7] The second test, the subject matter test, "extends the privilege to communications with any [management or] lower-echelon employee or agent so long as the communication relates to the subject matter of the representation."[8]

Before *Upjohn*, the control group test was thought to be the test of the future.[9] In the *Upjohn* case, however, the Supreme Court held that the subject matter test was more appropriate, and therefore, it should be followed by all federal courts.[10] Where the Supreme Court failed in its *Upjohn* decision was its choice not to specifically layout the factors that should be used to determine if a communication is covered under the chosen subject matter test.[11]

As the Supreme Court's *Upjohn* decision was a federal decision, it is not binding authority on the individual states.[12] As such, some states have chosen to follow the Supreme Court's lead and apply the subject matter approach, while others have decided to continue with their application of the control group test.[13] The Court of Appeals of Maryland, however, has specifically declined to choose a test until the court determines it is necessary to do so;[14] therefore, an analysis of the two tests, the control group and the subject matter tests, will likely be performed by the Maryland courts in the future.

This Comment will discuss the rationale behind the Court's adoption of the subject matter test, while comparing this decision with that of some states to continue adhering to the control group test and that of yet other states adopting a version of the subject matter test that differs from *Upjohn*.[15] These different approaches are all options the Maryland courts will need to analyze when faced with choosing which test should be applied to determine whether or not a given communication is protected under the corporate attorney-client privilege.

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7. LERMAN & SCHRAG, *supra* note 3, at 180 (quoting RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 73 cmt. d (2000)).
8. *Id.* (alteration in original) (quoting RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 73 cmt. d (footnotes omitted)).
9. JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE 3-133 (3d ed. 2001).
10. LERMAN & SCHRAG, *supra* note 3, at 176; *Upjohn*, 449 U.S. 383.
11. *Upjohn*, 449 U.S. at 386.
12. GERGACZ, *supra* note 9, at 3-170.
13. LERMAN & SCHRAG, *supra* note 3, at 180.
14. E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 351 Md. 396, 421, 718 A.2d 1129, 1141 (1998).
15. *See infra* Parts III, IV, V.

Further considerations have also arisen as a result of the corporate scandals of the past ten years. The consequences of the recent scandals have forced corporations to waive the attorney-client privilege and provide as much information as possible to government prosecutors in order for a corporation to be deemed cooperative in an investigation of an alleged wrongdoing.[16] As such, employees are often left unprotected as corporations simply turn over their statements to prosecutors, leading to self-incrimination and other constitutional issues.[17] Therefore, the Maryland courts should also consider these recent events in determining which test should be applied to ensure a corporation's employees are adequately protected.

This Comment will also consider Maryland's policies in regards to promoting a broad level of discovery and how these policies point towards the adoption of the control group test.[18] Additionally, the adoption of the control group test by Maryland courts will likely promote a narrowing of the corporate attorney-client privilege in Maryland which is preferable as corporations are unlikely to anticipate in which venue they will ultimately face litigation; therefore, this will protect Maryland corporations from using the broader subject matter test and then ultimately facing litigation in a venue that applies the more narrow control group test.[19]

The Comment will begin with a discussion of the history of the attorney-client privilege prior to *Upjohn*, which defined the two current tests.[20] Next, this Comment will provide an overview of the Supreme Court's *Upjohn* decision that limited the federal courts to use of the subject matter test.[21] The current status and continuing application of the control group test by various states will also be discussed,[22] as will the modifications made to the subject matter test by other state courts.[23] The effect that current events, such as the government's request for waivers of the attorney-client privilege and the introduction of the Sarbanes-Oxley Act,[24] will have on the attorney-client privilege and how these changes could lead to the renewal of the control group test will also be explored.[25] The

16. *See infra* Part VI.A.
17. *See infra* Part VI.A.
18. *See infra* Part VIII.B.
19. *See infra* Parts VII, X.
20. *See infra* Part II.
21. *See infra* Part III.
22. *See infra* Part IV.
23. *See infra* Part V.
24. Pub. L. No. 107-204, 116 Stat. 745 (2002).
25. *See infra* Part VI.

removal of the attorney-client privilege altogether has been debated in the past, and therefore, this option will also be considered.[26] Lastly this Comment will discuss the history of the attorney-client privilege in Maryland, along with public policies of the Maryland courts that support those policies best advanced by the control group test;[27] therefore, the Court of Appeals of Maryland should adopt the control group test if faced with a choice between these two tests in the future.[28]

Overall, federal law related to the corporate attorney-client privilege is flawed due to the government's current demands for waivers of the corporate attorney-client privilege. The subject matter test also provides too much protection of corporate senior management and too strictly restrains discovery;[29] therefore, the Maryland courts should adopt the control group test when inevitably faced with this decision in the future.

II. THE ATTORNEY-CLIENT PRIVILEGE PRIOR TO *UPJOHN*

Although the current status of the corporate attorney-client privilege in the United States is a result of the Supreme Court's *Upjohn* decision, a brief review of the history of the privilege and the decisions that came before this landmark case are important to help gain an understanding of how the two tests have evolved. Before the Supreme Court decided the *Upjohn* case, it was generally believed that the control group test would be the test of the future.[30] This test was first applied in *Philadelphia v. Westinghouse Electric Corp.*,[31] when Judge Kirkpatrick indicated:

> [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.[32]

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26. *See infra* Part VII.
27. *See infra* Part VIII.
28. *See infra* Parts VIII, IX.
29. *See infra* Part IX.
30. GERGACZ, *supra* note 9, at 3-133.
31. 210 F. Supp. 483 (E.D. Pa. 1962).
32. *Id.* at 485.

As such, members of the control group were not viewed based upon their place in the organization, but instead upon their authority to play a role in its decision making and to authorize the actions that the corporation would ultimately take based upon the recommendations of the attorney; therefore, the control group could consist of chief executives of a corporation as well as lower level managers with authority to assist in the decision-making process.[33] If the corporate employee communicating with the employer was within the control group, then the communication was considered to be covered under the attorney-client privilege.[34]

After the introduction of the control group test by the *Philadelphia* court, there were mixed reviews of the strengths and weaknesses of the test. The primary advantages of the test were considered to be the narrowness of its scope and the predictability of its application.[35] The primary complaints regarding the control group test were that it was too limiting of the flow of information between corporate attorneys and employees, that it only protected upper level employees of the corporate client, and that it tried too hard to turn the corporate client into an individual client.[36]

The subject matter test was also in existence prior to the *Upjohn* decision. The first subject matter test was applied by the Court of Appeals for the Seventh Circuit in *Harper & Row Publishers, Inc. v. Decker*.[37] The subject matter test outlined by the *Harper* court is as follows:

> [A]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.[38]

This test was introduced as a way around the weaknesses of the control group test. The subject matter test broadened the scope of

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33. GERGACZ, *supra* note 9, at 3-133 to -134.
34. *Id.* at 3-133.
35. *Id.* at 3-134 to -135.
36. *Id.* at 3-135 to -136.
37. 423 F.2d 487, 491–92 (7th Cir. 1970).
38. *Id.*

employees who were to be covered by the privilege, acknowledging that employees outside of those considered to be within the control group may have information needed by an attorney.[39] Although this test took into account this weakness of the control group test, other courts refused to adopt it due to its "overbreadth."[40] As such, multiple versions of the subject matter test came into existence prior to the *Upjohn* decision in 1981 in attempt to keep the corporate attorney-client privilege from becoming overly broad.[41]

III. AN OVERVIEW OF THE *UPJOHN V. UNITED STATES* DECISION

After the development of the control group and subject matter tests, each federal court independently chose which test to apply, resulting in many different applications of the tests among federal circuits; therefore, the Supreme Court finally addressed this split of authority in the *Upjohn* decision.[42] In *Upjohn*, the Supreme Court recognized this lack of consensus amongst the federal circuits, as both the control group and subject matter tests were being followed, often in different forms.[43] As such, the Supreme Court, through its decision in *Upjohn*, undertook to limit the federal circuits to the subject matter test.[44]

In order for the *Upjohn* decision to be clearly understood, a brief overview of the facts of this case is necessary. In the *Upjohn* case, corporate counsel for Upjohn was notified that a foreign subsidiary had been making "questionable payments to foreign government officials in order to secure government business."[45] An internal investigation of the payments was performed and questionnaires were sent to all foreign Upjohn managers requesting information regarding

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39. GERGACZ, *supra* note 9, at 3-137.
40. *Id.* at 3-137 to -138.
41. *See, e.g.*, Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (applying an alternate version of the *Harper & Row* subject matter test, under which "the attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents."); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1975) (applying both the control group test as well as the *Harper & Row* subject matter test).
42. Upjohn Co. v. United States, 449 U.S. 383, 386 (1981).
43. *See id.*
44. *See id.* at 390–97.
45. *Id.* at 383.

the alleged payments.[46] Those who received the questionnaires, as well as officers and other employees, were then interviewed by legal counsel.[47] Corporate counsel voluntarily notified the Internal Revenue Service (IRS), and the IRS began their own investigation.[48] The IRS demanded copies of the questionnaires and notes from the interviews, but corporate counsel refused to provide them as they believed the requested materials were covered under the attorney-client privilege.[49] The *Upjohn* case ensued.

First, the United States Court of Appeals for the Sixth Circuit applied the control group test.[50] The Sixth Circuit indicated their concerns with the subject matter test, primarily indicating that the test encourages senior managers to "ignore important information they have good business reasons to know and use."[51] Additionally, the Sixth Circuit was concerned that the subject matter test was overbroad.[52] The court discussed their concerns with the subject matter test in detail, warning that it encourages corporate management to inform corporate counsel only generally as to a given issue; therefore, corporate counsel must then discuss the transactions with subordinate employees at the direction of management, putting the full details of a given issue in the hands of corporate attorneys, and thereby protecting it under the attorney-client privilege.[53] The fear of the Sixth Circuit was that the subject matter test could severely limit discovery, especially in this case where the subordinate employees were located in foreign countries, causing the information to be extremely burdensome to discover.[54] As such, the Sixth Circuit declined application of the subject matter test in favor of the more narrow control group test.[55]

However, the Supreme Court reviewed the case and overturned the decision of the Court of Appeals for the Sixth Circuit, refusing to apply the control group test in favor of the broader subject matter test.[56] In its decision the Supreme Court detailed its rationale behind the privilege and how the subject matter test best supports this

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. United States v. Upjohn Co., 600 F.2d 1223, 1226–27 (6th Cir. 1979).
51. *Id.* at 1227.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *See* Upjohn Co. v. United States, 449 U.S. 383, 391–92, 395–97 (1981).

rationale.[57] According to the Court, "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[58] The Court also cited the ABA Code of Professional Responsibility, Ethical Consideration 4-1 indicating that:

> A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.[59]

As the attorney-client privilege applies to corporations, the Court recognized that employees outside of the traditional "control group" will often be the employees who hold information needed by corporate legal counsel.[60] Not only management level employees, but also middle and lower level employees, may actually create legal issues for corporations.[61] As such, corporate lawyers often need to obtain information from those employees outside of the traditional control group to adequately advise the corporation regarding a legal issue being reviewed.[62]

In *Diversified Industries, Inc. v. Meredith*,[63] this problem was acknowledged.[64] Where a corporate legal issue involves a complex problem, corporate attorneys are faced with a difficult choice under the control group test: They can either interview lower level employees who may have the necessary information knowing these communications will not be privileged, or they can interview those high level employees covered by the control group test knowing it will be difficult, if at all possible, to obtain the needed information.[65]

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57. *Id.* at 390.
58. *Id.*
59. *Id.* at 391 (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1980)).
60. *Id.*
61. *Id.*
62. *Id.*
63. 572 F.2d 596 (8th Cir. 1978).
64. *Id.* at 608–09.
65. *Id.* (citing Alan J. Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COM. L. REV. 872, 876 (1971)).

Additionally, the *Upjohn* Court recognized that employees outside of the control group are often the employees more likely to be in need of legal advice from corporate counsel than those who are of higher authority.[66] The Court indicated that the control group test "makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[67] The Court noted the importance of being able to predict whether a communication will be protected under the privilege, which it believed would be better accomplished by the application of the subject matter test.[68]

Although the majority opinion in *Upjohn* held that the subject matter test should be applied moving forward, the Supreme Court declined "to lay down a broad rule."[69] Justice Burger, in his concurring opinion, expressed his concerns with the majority's decision not to define a broad rule and opined that a standard should have been provided by the Court.[70] Therefore, Justice Burger formulated the following standard:

> [A] communication is privileged at least when . . . an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.[71]

Others have also attempted to detail the factors that the *Upjohn* Court intended to promote. For example, John William Gergacz outlined two groups of factors.[72] The first group of factors are "common to all claims of attorney-client privilege" and indicate that "[t]he communication was made to corporate counsel," "[t]he

66. *Upjohn*, 449 U.S. at 392.
67. *Id.*
68. *Id.* at 393.
69. *Id.* at 386.
70. *Id.* at 402 (Burger, J., concurring).
71. *Id.* at 403.
72. GERGACZ, *supra* note 9, at 3-153 to -154.

communications were made to secure legal advice from counsel," and "[t]he confidentiality requirements."[73] The second group of factors "limit[s] the scope of corporate communications that would otherwise be subject to the privilege."[74] These factors are as follows:

> 1. The communication was made by a corporate employee. 2. The communication was made upon order of the employee's superiors. 3. The information needed by counsel was not available from upper level management. 4. The information communicated concerned matters within the scope of the employee's corporate duties. 5. The employee was aware that the reason for communicating with counsel was so the corporation could obtain legal advice. 6. The identity and resources of the opposing party.[75]

As such, the major concern with the *Upjohn* decision is its failure to identify a bright-line application of the subject matter test; therefore, each federal court may still mold its own version of the rule for attorney-client privilege as long as it follows under the subject matter test. An additional concern is that many state courts have attempted to follow the holding and apply the subject matter test,[76] while others have adopted their own version of the subject matter test,[77] and still others have continued to apply the control group test.[78] As a result, numerous tests continue to be applied, and these tests can vary greatly between jurisdictions.[79]

IV. THE CURRENT STATUS OF THE CONTROL GROUP TEST IN STATE COURTS

Although the Supreme Court adopted the subject matter test, which is now followed in all federal courts, some state courts have continued their adherence to the control group test even post-*Upjohn*. As of 1997, "fourteen [states had] adopted *Upjohn* or another subject matter approach and eight [had] adopted the control group test."[80] "Twenty-eight states [had] yet to decide which approach [would]

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73. *Id.*
74. *Id.* at 3-154.
75. *Id.*
76. Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 3 ANN. SURV. AM. L. 629, 633 (1997).
77. *Id.* at 640–44 (explaining that California, Florida, Utah, and Arizona have adopted variations of the subject matter test).
78. *Id.* at 644.
79. *Id.* at 633–46 (detailing the tests used in various states as of 1997).
80. *Id.* at 633.

govern, as there [had] been neither a state high court ruling nor a statute or evidentiary rule adopted on the matter in those states."[81]

Illinois is one example of a state that has continued to adhere to the control group test, even after *Upjohn*. In *Consolidation Coal Company v. Bucyrus-Erie Company*,[82] the Supreme Court of Illinois held that Illinois would continue to adhere to the control group test even post-*Upjohn*.[83] While the Illinois court recognized that the purpose of the attorney-client privilege is to promote communications between attorneys and clients, it refused to expand the privilege too far in corporate cases.[84] The court was concerned that if the privilege was expanded to include all employees covered under the subject matter test, that it could serve as "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.'"[85] The court recognized Illinois' policies of "broad discovery" and "the ultimate ascertainment of the truth" and found the subject matter test to be incompatible with those state policies.[86]

As a result, the court held that the privilege should be limited "to the extent reasonably necessary to achieve its purpose."[87] The control group test was found to be "a reasonable balance [of] protecting consultations with counsel by those who are the decisionmakers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery."[88] The court also noted their belief that the benefits of the control group test are "its predictability and ease of application."[89]

This court also opined as to who would be a member of the control group.[90] According to the opinion, an employee who advises top management, and whose opinion a decision normally would not be made without, is a member of the control group.[91] If an employee is

81. *Id.*
82. 432 N.E.2d 250 (Ill. 1982).
83. *Id.* at 257.
84. *Id.* at 256–57.
85. *Id.* (quoting David Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L. J. 953, 955 (1956)).
86. *Id.* at 257.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 258.
91. *Id.*

consulted in an effort to determine what action a corporate entity will take, then their communications are protected as a member of the control group.[92] On the other hand, employees who those individuals may rely on "for supplying information are not members of the control group."[93]

Illinois is not the only state that has chosen to continue to apply the control group test to the corporate attorney-client privilege. In addition to Illinois, other states have adopted the control group test, but most states have done so primarily through rules of evidence or legislation.[94] The states that have adopted the control group test have adopted a test similar to that recognized by the Illinois Supreme Court in *Consolidated Coal Company*.[95]

States which have adopted rules of evidence applying the control group test to the attorney-client privilege include: Alaska, Hawaii, Maine, New Hampshire, North Dakota, Oklahoma, and South Dakota.[96] The rules adopted by these states indicate that "[a] representative of a client is one having authority to obtain professional legal services and to act on advice rendered pursuant thereto on behalf of the client."[97] Additionally, New Hampshire indicates in their advisory committee notes that it advocates the control group test as opposed to *Upjohn*'s subject matter test because it is "consistent with the purpose of the privilege to encourage communication without unduly inhibiting trial preparation in the special context of corporate activity."[98]

V. MODIFIED SUBJECT MATTER TESTS IN STATE COURTS

The problem with the Supreme Court's *Upjohn* decision was its failure to detail a list of factors that should be used in determining whether a communication falls within the subject matter test. As a result, even while some states have chosen to adopt the subject matter test as discussed above under *Upjohn*,[99] some states have adopted a

92. *Id.*
93. *Id.*
94. Hamilton, *supra* note 76, at 640–41
95. *Id.* at 633–39 (quoting the language of statutes from the eight states that have adopted the control group test).
96. *Id.* at 633-40.
97. *See* ALASKA CT. R. 503(a)(2); HAW. CT. R. 503(a)(2); ME. R. OF CT. 502(a)(2); N.H. R. OF CT. 502(a)(2); N.D. CENT. CODE CT. R. 502(a)(2); OKLA. STAT. ANN. tit. 12, § 2502(A)(4) (West 1993 & Supp. 2008); S.D. CODIFIED LAWS § 19-13-2(2) (1995); *see also* Hamilton, *supra* note 76, at 633–39.
98. N.H. R. Evid. 502(a)(2) advisory committee's notes.
99. Hamilton, *supra* note 76, at 633.

modified approach to this test.[100] The Supreme Court of Arizona, in *Samaritan Foundation v. Goodfarb*,[101] rejected an approach to attorney-client privilege as it relates to a corporation that turns on the communicator instead of the communication.[102] The court further rejected the control group test because there is a distinction between communications made as an individual and those made as an agent of the corporation.[103] The control group test was thought to be under-inclusive, as the focus is only on the communicator when there may be additional employees who hold relevant information; while the subject matter test was viewed as over-inclusive, as the focus is on the communication, regardless of who makes it, which may lead to employees who were merely witnesses to such conduct being included under the privilege.[104]

The *Goodfarb* court indicated that a more functional approach should be adopted.[105] Under this approach, attorney-client communication relates only to the employee's own actions that fall within the scope of their corporate responsibilities.[106] The court formulated the rule as follows:

> [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. This excludes from the privilege communications from those who, but for their status as officers, agents or employees, are witnesses.[107]

Thus, the Arizona court's holding attempts to balance the competing interests of the straight forward subject matter test and the control group test which was rejected by the *Upjohn* Court.[108]

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100. *See, e.g.*, Samaritan Found. v. Goodfarb, 862 P.2d 870, 874 (Ariz. 1993); S. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1382–83 (Fla. 1994) (Florida and Arizona are two states whose courts have adopted modified versions of the subject matter test).
101. 862 P.2d 870 (Ariz. 1993).
102. *Id.* at 874.
103. *Id.* at 875.
104. *Id.*
105. *Id.* at 874.
106. *Id.* at 878.
107. *Id.* at 880.
108. *Id.*

Another modified approach to the subject matter test was adopted in Florida.[109] The Florida Supreme Court showed a concern with the relationship difference between corporate clients and their legal counsel and regular individual clients and their attorneys.[110] As corporate legal counsel has continuing contact with their clients because they often sit in the same offices, etc., it is possible that the "zone of silence" as a result of attorney-client communications will be enlarged.[111] The court tried to balance the interests of encouraging employees of corporations to seek legal advice from their corporate attorneys while ensuring that discovery of relevant information is not compromised.[112]

As a result of the Florida Supreme Court's concerns, it arrived at the following application of the subject matter test:

> [T]he attorney-client privilege applies if: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties, and; (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[113]

The rules of the Arizona and Florida Supreme Courts appear to reach the same result, while at first glance they seem to have unique goals. The Arizona court's primary concern was ensuring that what employees see and hear as witnesses is not protected under the attorney client privilege as this would be an extension of what is covered under the attorney client privilege as it relates to individual clients.[114] The Florida Supreme Court was primarily concerned with the content of the communication between the client and the attorney in a corporate environment due to the closeness of their working relationship.[115] However, upon review of the rules laid out by each of the courts, the outcome appears to be extremely similar, except that the Florida rule requires the communication to be made at the

109. S. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1382–83 (Fla. 1994).
110. *Id.* at 1383.
111. *Id.*
112. *Id.*
113. *Id.*
114. Samaritan Found. v. Goodfarb, 862 P.2d 870, 878–79 (Ariz. 1993).
115. *S. Bell Co.*, 632 So. 2d 1377 at 1383.

direction of an employee's supervisor and the Arizona rule includes a stipulation that the communication cannot concern information obtained as a witness to an action.[116]

VI. WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

Even while there are many tests for the Maryland courts to analyze, there are additional considerations that the Maryland courts should consider. One additional consideration in choosing a test is the government's current push for waivers of the attorney-client privilege. Although it is primarily federal government agencies requesting these waivers, it is still necessary for the Maryland courts to consider these requests in deciding how the attorney-client privilege rules should be applied to corporations in Maryland.

A. Government Waivers and How They Affect Corporate Employees

First, one must look at how government waivers came about and subsequently how these waivers affect the attorney-client privilege. In recent years, the Department of Justice has adopted guidelines indicating that a corporation will not be deemed "cooperative" in a federal government criminal investigation of corporate conduct if it does not waive the attorney-client privilege and work-product doctrines.[117] Additionally, the U.S. Sentencing Commission noted that waivers of the attorney-client privilege will be used to determine a corporation's "culpability score," which can in turn affect how corporate players are eventually sentenced.[118] As a result, corporations are more likely to waive the attorney-client privilege today than ever before.

After the Enron scandal[119] and the dismantling of the accounting giant Arthur Andersen,[120] it is understandable that corporations fear

116. *See supra* notes 106, 107, 113 and accompanying text.

117. Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 898 (2006).

118. *Id.*

119. Enron's stock, which traded at $85 per share, fell to $0.40 per share after the SEC began investigations into the company's questionable accounting practices. *See* Marianne M. Jennings, *A Primer on Enron: Lessons from a Perfect Storm of Financial Reporting, Corporate Governance and Ethical Culture Failures*, 39 CAL. W. L. REV. 163, 195 (2003).

120. *See* James Kelly, *The Power of Indictment and the Demise of Arthur Anderson*, 48 S. TEX. L. REV. 509, 515 (2006). Arthur Anderson was the independent auditor for Enron and was indicted for obstructing justice in regard to its involvement with the

for the future of their continuing operations and, therefore, are more likely to cooperate with federal prosecutors.[121] However, prosecutors are demanding that these corporations turn over information gained as a result of internal corporate investigations without regard for the attorney-client privilege and work-product doctrines.[122] In some instances, corporations are even agreeing to conduct internal investigations on behalf of, and for the benefit of, these government agencies.[123]

The Securities and Exchange Commission (SEC) has accomplished success in obtaining waivers and attempting to crack down on corporate scandals by passage of the Sarbanes-Oxley Act of 2002,[124] issuance of the "Seaboard Report" in 2001,[125] and the codification of the "Seaboard Report" in 2006.[126] The goal of the SEC in its adoption of the above is "easy access to all information, regardless of relevance, and the 'targeting' by private attorneys of corporate employees for the government investigators to focus upon."[127]

As a result of this increase in pressure by government agencies, employees of these corporations often face lose-lose situations. First, if the employee refuses to cooperate in the internal investigation, he will often face termination from his employment.[128] On the other hand, if he voluntarily works with corporate counsel, he risks that "not only will [his] statements be turned over to the government, but that any false statement or a failure to overtly implicate oneself will, in itself, lead to charges of 'obstruction of justice' or 'false statements.'"[129] As a result, it appears that a corporation and its

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Enron scandal. *Id.* at 512–13 (indicating that the indictment alone was enough "to wipe out one of the largest accounting firms in the nation").

121. Marvin G. Pickholz & Jason R. Pickholz, *Investigations Put Employees in Tough Spot*, N.Y.L.J., July 24, 2006, at 10–12.

122. *Id.*

123. *Id.*

124. William R. McLucas, Howard M. Shapiro & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 626–27, 635 (2006).

125. Pickholz & Pickholz, *supra* note 121, at 11. This report made "it clear that early 'cooperation,' often entailing waivers of the attorney-client privilege and attorney work product privileges . . . was expected." *Id.*

126. *Id.*; *see also* Press Release, Securities and Exchange Commission, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), *available at* http://www.sec.gov/news/press/2006-4.htm.

127. Pickholz & Pickholz, *supra* note 121, at 11.

128. *Id.* at 11–12.

129. *Id.* at 12.

attorneys investigating a corporate legal issue are "acting under the 'color of law' during [their] employee interviews."[130]

As corporations are often acting in a position similar to that of the government itself, and the statements made to corporate attorneys may be indictable by government agencies, employees should be allowed to invoke their Fourth and Fifth Amendment rights or other rights provided under state law.[131]

As a result, the American Bar Association (ABA) is working in an attempt to further protect the attorney-client privilege and work-product doctrine while also working to protect the rights of corporations' employees.[132] The ABA indicated its concern that if the corporate attorney-client privilege is allowed to be eroded by the government, this could lead to its erosion from all criminal and civil litigation, including where the privilege is protecting individuals instead of corporations.[133] The ABA released a statement and:

> [E]xpressed support of the attorney-client privilege and the work-product doctrine as being essential to maintaining the confidential relationship between an attorney and client. It is the single tool that protects full and candid conversation about any given case. It aids in establishing advocacy, promotes civil functioning of the legal system and guarantees the client full and equal access to justice.[134]

The ABA has also shown concern with the current policies being followed by prosecutors as they have led to a "lack of accountability in the higher ranks of corporate operations."[135] As a result, corporate employees and "those least able to defend themselves end up being sacrificed to the system."[136]

The ABA "opposes policies, practices and procedures of governmental bodies that have the effect of [eroding] the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value[] of those

130. *Id.*
131. *Id.*
132. Mike Nixon, *Lawyers Adopt Decree Supporting Attorney-Client Privilege*, ST. LOUIS DAILY REC., Aug. 19, 2006, *available at* 2006 WLNR 14537069.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*

protections."[137] The ABA has also "voiced opposition" to the government seeking waivers of the attorney-client privilege or work-product doctrine through denying or granting benefits during a corporate investigation.[138] In an attempt to protect employees, the ABA has been in discussions with federal regulators and is also seeing more corporate attorneys protecting their clients.[139]

B. *How Waivers of the Attorney-Client Privilege Implicate the Choosing of a Test in Maryland*

The problem with the subject matter test is that it protects all communications between a corporation's attorneys and its employees as long as the subject matter of the communication is within the scope of the attorney's legal representation of the corporation.[140] Therefore:

> By narrowing the group of corporate representatives whose communications would be covered by the privilege to those who are capable of controlling or binding the entity in some fashion, the privilege is necessarily focused upon the type of information that would most be entitled to coverage under the individual attorney-client privilege.[141]

The subject matter test protects communications by employees at any level, while those with the ability to waive the privilege are those employees whom would fit within the traditional control group.[142]

Additionally, waiving the attorney-client privilege as to the government will unfortunately also waive the attorney-client privilege as to all other parties, including potential plaintiffs and their counsel.[143] The communications which are disclosed lose their "privileged" status; therefore, the communications would also be non-privileged if litigation is faced in another venue.[144]

In the *Upjohn* decision, the Supreme Court expressed its concerns with protecting employees, indicating the employees outside of the control group are often those most in need of legal advice from

137. *Id.* (quoting ABA Task Force on Attorney-Client Privilege, Recommendation 111 (Aug. 2005), *available at* http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf).

138. *Id.*

139. *Id.*

140. *See supra* note 8 and accompanying text.

141. *See* Brown, *supra* note 117, at 954–55.

142. *Id.* at 955.

143. *Id.* at 947.

144. *Id.*

corporate counsel.[145] However, as a result of the government requesting waivers of the corporate attorney-client privilege, employees believe their communications are protected as they fall under the subject matter test, but in reality, they are not receiving the protection the Supreme Court had hoped for under *Upjohn*. As such, the Supreme Court may again need to consider revising the test protecting communications under the corporate attorney-client privilege.

Regardless of if or when the federal courts make a change, the Maryland courts should consider the implications of these waivers and consider limiting the privilege to the control group, as only those who have the ability to waive the privilege should be protected by the privilege during a suit in a Maryland court.

C. *The Control Group Test: One Proposed Solution to Government Requested Waivers*

There is at least one scholar who has indicated that the attorney-client privilege needs to be reworked as a result of government waivers.[146] Professor Lonnie T. Brown, Jr. indicated in his article that: "[R]eform efforts should be directed towards defining the corporate attorney-client privilege in a manner that preserves the protection in its most fundamental form, and encouraging the pertinent government agencies to commit formally to seeking waiver of such a privilege only in very limited circumstances."[147] As such, Brown recommends the control group as a way of combating the issues resulting from waivers being requested by prosecutors.[148]

First, Brown defines who members of the control group shall include:

> A constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.[149]

As such, only communications between those individuals falling into the above description and corporate counsel "regarding the subject of

145. *See supra* note 66 and accompanying text.
146. *See* Brown, *supra* note 117, at 952–53.
147. *Id.* at 952.
148. *See id.*
149. *Id.* at 953 (quoting MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2004)).

the representation should be protected by the corporate attorney-client privilege."[150] The communications "with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts [that are] at issue . . . or who have authority on behalf of the corporation to make decisions about the course of the [representation]" would be protected under the control group test.[151]

Many corporate employees likely believe that their communications with corporate counsel will be protected under the corporate attorney-client privilege as they fall within the protections afforded by the subject matter test,[152] not knowing that the privilege can be waived by those employees who fall within the control group.[153] As such, protection under the attorney-client privilege should likely be limited to those who have the ability to waive the privilege, i.e. those belonging to the control group; and therefore, as a result of the government requesting waivers of the attorney-client privilege, the resurrection of the control group test may be imminent.

VII. ARGUMENTS FOR DENYING THE ATTORNEY-CLIENT PRIVILEGE TO CORPORATIONS ALTOGETHER

Although it is now clear that the attorney-client privilege applies to corporations, prior to *Upjohn*, there were some scholars and even courts which argued that the privilege should not apply to corporations at all, limiting it solely to individuals.[154] As such, this argument must also be considered for a comprehensive analysis of the corporate attorney-client privilege. For example, in *Radiant Burners, Inc. v. American Gas Association*,[155] the United States District Court, Northern District of Illinois stated that as there are thousands of persons with access to corporate information, the attorney-client privilege cannot reasonably be expanded to corporations.[156]

Additionally, it has been argued that the expansion of the attorney-client privilege to corporate clients is too complex and confusing, and

150. *Id.*
151. *Id.* at 953 (alterations in original) (quoting Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll., 764 N.E.2d 825, 833 (Mass. 2002)).
152. *See id.* at 955.
153. *See id.*
154. *Id.* at 924.
155. 207 F.Supp. 771 (N.D. Ill. 1962).
156. *Id.* at 775.

therefore, it should not be adhered to in the corporate context.[157] Drawing a line between legal advice and business advice is often difficult to do, and as only legal advice falls within the privilege, the privilege is difficult to apply.[158]

Another consideration in the applicability of the attorney-client privilege in the corporate context is the difficulty of knowing in advance where an issue may be litigated.[159] As corporate transactions often occur across multiple venues, and as different federal and state courts apply different tests, the law to be applied, and ultimately which test will be applied, can be difficult if not impossible to predict.[160]

Other reasons for abandoning the attorney-client privilege in corporations have also been noted. First, employees and officials often believe that the privilege is designed to protect them as individuals;[161] however, this is dangerous as in reality it is only an "illusion."[162] A corporation will likely protect itself ahead of an employee, thereby waiving the attorney-client privilege, which could in turn incriminate the employee.[163] The privilege also comes from the right to individual autonomy, however, corporations are not persons and are not protected by the same rights; therefore, the argument has been made that the privilege should not be expanded to protect corporations.[164]

While questioning the continuation of the application of the attorney-client privilege to corporations has been discussed and analyzed, "[t]he legal community has overwhelmingly answered the question of whether the privilege should be recognized in the corporate context with a resounding 'yes.'"[165] Even in the Supreme Court's *Upjohn* decision, the importance of the corporate attorney-client privilege was discussed.[166] The Supreme Court noted that "[t]he privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the

157. *See generally* Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157 (1993).
158. *Id.* at 167.
159. *Id.* at 170.
160. *Id.* at 170–71.
161. *See id.* at 173–74.
162. *Id.* at 174.
163. *See id.* at 173–74.
164. *Id.* at 183–85.
165. Brown, *supra* note 117, at 924.
166. Upjohn Co. v. United States, 449 U.S. 383, 389–90 (1981).

lawyer's being fully informed by the client."[167] Additionally, the Court acknowledged:

> [C]omplications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but [the] Court . . . assumed that the privilege applie[d] when the client is a corporation . . . .[168]

Instead of contemplating the denial of applying the privilege in the corporate context, the bigger "concern has been with regard to the proper scope and characteristics" of the privilege.[169] As a result, the corporate attorney-client privilege is likely to continue in the future.

VIII. CURRENT STATUS OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE IN THE STATE OF MARYLAND

In addition to the adoption of various versions of the subject matter test by various states, the control group test by others, and the demand of waivers of the privilege by government agencies, there is additional history regarding the attorney-client privilege within Maryland that must be considered for Maryland courts to best decide which test should be applied.

A. A Brief Overview of the Attorney-Client Privilege as Applied by the Maryland Courts

A discussion of the rationale for the different attorney-client privilege tests may be of significant importance in Maryland in the future. However, before the Maryland courts are to choose a test, the courts must consider how the attorney-client privilege has been applied in Maryland up to today. In *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*,[170] the Court of Appeals of Maryland noted "we decline to adopt a particular set of criteria for the application of the privilege in the corporate context until we are required to do so."[171] As such, the rules set out by the courts above are all possible outcomes if, or more likely when, the Maryland courts are forced to choose between the tests and establish a clear test to determine what communications are covered under the corporate attorney-client privilege.

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167. *Id.* at 389.
168. *Id.* at 389–90; *see also* United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915).
169. Brown, *supra* note 117, at 924–25.
170. 391 Md. 396, 718 A.2d 1129 (1998).
171. *Id.* at 421, 718 A.2d at 1141.

Maryland's current statute on attorney-client privilege is very broad, generic in scope, and reads as follows: "A person may not be compelled to testify in violation of the attorney-client privilege."[172] Outside of this statute, all other attorney-client privilege guidance has been developed through case law. The Court of Appeals of Maryland developed the following definition of the attorney-client privilege in *Harrison v. State*:[173]

> (1) Where legal advice of kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[174]

In *E.I. du Pont de Nemours & Co.*, the Court of Appeals of Maryland compared the attorney-client privilege to the work-product doctrine, noting that the attorney-client privilege is to be narrowly construed while the work-product doctrine is to be broadly construed.[175] The court indicated that the rationale behind narrowly construing the privilege is because its application may have the effect of withholding information from the finder of fact.[176] Additionally, "[c]ommunications [with in-house counsel] with regard to business advice are unprotected. When the attorney-client privilege is invoked with regard to communications with in-house counsel, the courts will look particularly closely at whether counsel was providing business advice, rather than legal advice or services."[177]

Accordingly, in *E.I. du Pont de Nemours & Co.*, the communications were examined according to the above outlined rules.[178] In this case, Dupont argued that its communications with Kaplan & Kaplan (Kaplan) in regard to debt collection efforts were covered under the attorney-client privilege as Kaplan was serving as

172. MD. CODE ANN., CTS. & JUD. PROC. § 9-108 (LexisNexis 2006).

173. 276 Md. 122, 345 A.2d 830 (1975).

174. *Id.* at 135, 345 A.2d at 838 (quoting 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA § 2292 (3d ed. 1940)).

175. *E.I. du Pont de Nemours & Co.*, 351 Md. at 406, 718 A.2d at 1134 (citing Leonen v. Johns-Manville, 135 F.R.D. 94, 96 (D.N.J. 1990)).

176. *Id.* at 415, 718 A.2d at 1138.

177. *Id.* at 422, 718 A.2d at 1142 (alterations in original) (quoting 5 LYNN MCLAIN, MARYLAND EVIDENCE § 503.9, at 493 (1987)).

178. *Id.*

an agent of the Dupont legal department.[179] However, the Court of Appeals of Maryland held that Dupont hired Kaplan to act in a "business capacity" as opposed to a "legal capacity," and therefore, the attorney-client privilege was not applicable.[180] As such, the Court of Appeals of Maryland declined to adopt a test (either the control group or the subject matter test) as the communications being considered in this case were not protected under the privilege as they were made in merely a business capacity.[181] Since this decision, there have been no other Maryland decisions discussing the application of the various corporate attorney-client privilege tests.

B. A Discussion of the Policy Goals of Discovery and the Attorney-Client Privilege in Maryland

In an effort to determine which test, the subject matter or the control group, should be applied by the Maryland courts, Maryland's policy goals of discovery and the attorney-client privilege should be examined. The Court of Appeals of Maryland also discussed the goals of Maryland's discovery rules in *E.I. du Pont de Nemours & Co.*[182] According to the court, Maryland's discovery rules "are premised on a philosophy encouraging liberal disclosure."[183] The court also noted that the "discovery rules are deliberately designed to be broad, comprehensive in scope and liberally construed."[184]

The Court of Appeals of Maryland stated the following in *Klein v. Weiss*:[185]

> One of the fundamental and principal objectives of the discovery rules is to require disclosure of facts by a party litigant to all of his adversaries, and thereby to eliminate, as far as possible, the necessity of any party to litigation going to trial in a confused or muddled state of mind, concerning the facts that give rise to the litigation.[186]

Additionally, in another case, the same court also indicated the following purposes in allowing for pretrial discovery: "(i) [T]o acquire accurate and useful information with respect to testimony

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179. *Id.* at 403–04, 718 A.2d at 1132–33.
180. *Id.* at 422, 718 A.2d at 1142.
181. *Id.* at 421–22, 718 A.2d at 1141–42.
182. *See id.* at 405–06, 718 A.2d at 1133–34.
183. *Id.* at 405, 718 A.2d at 1133; *see also* Balt. Transit v. Mezzanotti, 227 Md. 8, 13, 174 A.2d 768, 771 (1961).
184. *E.I. du Pont de Nemours*, 351 Md. at 405, 718 A.2d at 1133.
185. 284 Md. 36, 395 A.2d 126 (1978).
186. *Id.* at 55, 395 at 137; *see also Balt. Transit*, 227 Md. at 13, 174 A.2d at 771.

which is likely to be presented by an opponent, (ii) to obtain information which appears reasonably calculated to lead to the discovery of admissible evidence, and (iii) to use as an aid in cross-examining the opponent's witnesses."[187]

The Maryland courts have also held that a party resisting a discovery request by asserting a privilege, such as the attorney-client privilege, "bears the burden of establishing its existence and applicability."[188] Additionally, the Maryland courts have noted that the attorney-client privilege is to be narrowly construed.[189]

Although the Maryland courts have specifically declined to choose a test, the policies outlined in Maryland case law may serve as clues that indicate what choice the Maryland courts would make if faced with such a decision in the future. Maryland's policy goals of the attorney-client privilege combined with the decisions in other states and the current concerns of forced waivers of the privilege may provide the necessary clues in predicting how the Maryland courts will apply the attorney-client privilege in the future.

IX. THE FUTURE OF THE ATTORNEY-CLIENT PRIVILEGE IN MARYLAND—IS THE CONTROL GROUP TEST ONCE AGAIN DESTINED TO BECOME THE TEST OF THE FUTURE?

As discussed above, the Maryland courts have numerous choices and much scholarly material to comb through once they are forced to decide how to go forth in applying the attorney-client privilege to corporations. The courts will need to decide if they will choose to follow the subject matter test that has been recommended and applied by the Supreme Court since the *Upjohn* decision,[190] another version of the subject matter test that has been followed by a federal court or a various state court,[191] or the control group test.[192]

First, Maryland's discovery goals as well as its policies in relation to the attorney-client privilege must be compared to the goals of the varying tests. Maryland promotes liberal discovery and designs rules

187. Kelch v. Mass Transit Admin., 287 Md. 223, 231, 411 A.2d 449, 454 (1980).

188. *E.I. du Pont de Nemours*, 351 Md. at 406, 718 A.2d at 1134; *see also* Maxima Corp. v. 6933 Arlington Dev. Ltd. P'ship, 100 Md. App. 441, 456, 641 A.2d 977, 984 (1994); *In re* Criminal Investigation No. 1/242Q, 326 Md. 1, 11, 602 A.2d 1220, 1225 (1992).

189. *E.I. du Pont de Nemours*, 351 Md. at 406, 718 A.2d at 1134.

190. Upjohn Co. v. United States, 449 U.S. 383 (1981); *see* discussion *supra* Part III.

191. *See supra* Part IV.

192. *See supra* Part III.

to promote broad discovery.[193] Additionally, Maryland courts have indicated that the attorney-client privilege should be narrowly construed.[194] Therefore, Maryland courts are likely to choose a test that allows discovery to be broad and keeps the attorney-client privilege narrow.

Based on these Maryland discovery policy goals, the Maryland courts will likely follow in the footsteps of the Illinois Supreme Court, which chose to follow the control group test, even post-*Upjohn*,[195] as this test was chosen to further promote Illinois' goals of broad discovery.[196] The control group test is narrow in scope and offers the benefits of broad discovery and predictability of application,[197] while the subject matter test provides broader protection of attorney-client communications while further promoting these communications as they are protected.[198]

Although Maryland's discovery goals likely lead to the application of the control group test, today's corporate environment and the demanding of waivers of the attorney-client privilege even further promote the control group test. One concern with the granting of waivers of the attorney-client privilege to government prosecutors is that this is leading to a lack of accountability amongst senior management of large corporations.[199] As a result, lower level employees are being sacrificed and turned over to prosecutors while upper level management is not held accountable for their role or lack thereof in the matter.[200] A similar concern was voiced with regard to the subject matter test in the original *Upjohn* decision by the U.S. Court of Appeals for the Sixth Circuit when it applied the control group test in favor of the subject matter test, in that the subject matter test causes senior management to ignore information gained in an attempt to place the employee in a situation where they must communicate with corporate counsel.[201] As such, the subject matter test, in combination with the government attorney-client privilege waivers, seems to provide unprecedented protection to senior management while leaving lower level employees out in the cold

193. *See supra* notes 183–84 and accompanying text.
194. *See supra* note 189 and accompanying text.
195. *See supra* note 83 and accompanying text.
196. *See supra* note 86 and accompanying text.
197. *See supra* notes 35, 89 and accompanying text.
198. *See supra* note 39 and accompanying text.
199. *See supra* note 135 and accompanying text.
200. *See supra* note 136 and accompanying text.
201. *See supra* notes 51–53 and accompanying text.

when they believe their communications with counsel are protected, only for "control group" members to later waive the privilege.

In an attempt to counter these government requested waivers, bar associations of numerous states are fighting back.[202] Maryland is one state included in a group of states, along with Arkansas, Florida, Illinois, Massachusetts, Michigan, and New York, pushing for the revocation of these waiver requests,[203] To prevent the requests of these waivers, states are doing such things as changing their Rules of Professional Conduct "to prohibit government attorneys practicing [in the state] from requesting that companies waive their attorney-client privilege to prove they are cooperating with the government probe" in an effort to protect the attorney-client privilege.[204]

The problem with the attorney-client privilege and the information obtained through internal corporate investigations is that employees "may have no idea that they are providing information likely to go to federal prosecutors, or that they may be forfeiting the Fifth Amendment's protection against self-incrimination by providing information to counsel conducting the interviews" as the privilege can be waived by the corporation as it belongs to the corporation, which is the client, and not to the employee.[205] As such, employees are more likely to provide information to their employer or a corporation's attorney due to "an employee's sense of duty or loyalty to her employer, her relationship to attorneys she either knows or knows to be representing her employer, or the absence of admonitions so commonly associated with questioning that may lead to arrest or other law enforcement consequences," so they often provide the requested information freely with little questioning.[206] After obtaining such information, a corporation may choose to waive the attorney-client privilege, providing prosecutors with "all kinds of information—including potentially incriminating statements—from people who might otherwise decline to speak with prosecutors, FBI agents, or other government investigators."[207] As such, "[t]here is no reason to believe that employees at any level understand without

202. Sheri Qualters, *State Fight Attorney-Client Waivers*, FULTON COUNTY DAILY REPORT, Nov. 15, 2006.

203. *Id.*

204. *Id.*

205. Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 911 (2003).

206. *Id.* at 912.

207. *Id.*

explanation that lawyers working for their employer . . . may readily metamorphose into de facto government agents."[208]

Counsel is only required to inform employees of who in fact is the client during an internal investigation "*when it is apparent* that the organization's interests are adverse to those of the [employee]."[209] Additionally, it is often difficult for counsel to know if the employees' interests are adverse to the corporation's until after the investigation and communication has begun; therefore, counsel will not likely reveal to employees that they are not the client until after incriminating information is revealed.[210]

Another potential issue is that even if an attorney tries to communicate to an employee that he is not the client, employees "may be anxious to appear knowledgeable, or erroneously believe that they understand counsel's role" and "[on] the basis of past experience they may believe that counsel will seek to protect both the individual and the corporation."[211] As such, some now believe that counsel should be required to provide employees with pre-interview statements to ensure that they understand the attorney's role, similar to "*Miranda* warnings in the law enforcement context."[212]

As employees often believe that a corporate attorney represents them as an individual, they, therefore, are of the belief that their communications to the attorney are protected under the attorney-client privilege. One way to prevent this belief would be to scale back the attorney-client privilege in the corporate context and again follow the control group test. Under this test, only those employees who have the authority to obligate the corporation, act in a supervisory capacity, or regularly consult with legal counsel are protected.[213] As such, everyday, average employees would not be of the belief that their communications with counsel are protected under the attorney-client privilege. Ultimately, application of the control group test, coupled with a pre-interview statement indicating that the employees' statements are not protected under the privilege would best protect employees and their rights against self-incrimination.

The control group test also better allows the corporate attorney-client privilege to resemble the individual attorney-client privilege.[214]

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208. *Id.*

209. *Id.* at 938 (emphasis added) (alteration in original) (quoting MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 11 (2003)).

210. Duggin, *supra* note 205, at 938.

211. *Id.* at 939.

212. *Id.* at 940.

213. *See supra* note 149 and accompanying text.

214. Brown, *supra* note 117, at 927.

Historically there has been some concern that the corporate attorney-client privilege expands the rights afforded to individuals as clients.[215] Some have noted concern that the subject matter test protects corporate employees who are not involved with the underlying cause of action but serve merely as fact witnesses.[216] As facts surrounding litigation are not covered under the individual client privilege, it is desirable to choose a test that limits the protection of facts surrounding litigation, precisely what the subject matter test threatens to protect.[217] As such, adopting a control group test that is expanded to include employees whose actions may be imputed on the corporation in a suit[218] will best protect the corporate attorney-client privilege from being expanded above and beyond the individual attorney-client privilege while preventing protection of communications between counsel and mere fact witnesses that limit discovery.

One last consideration that should point courts, not only in Maryland but also in federal and other state courts, towards once again adopting the control group test is the issue of cross-jurisdictional practice and a corporation's multi-jurisdictional presence. As corporations cross state borders, and as one lawsuit can lead to another, the issue of multiple tests in regard to the attorney-client privilege in the corporate environment becomes even more difficult.[219] Today, some states continue to apply the control group test, while others follow the U.S. Supreme Court's lead in *Upjohn* in applying the subject matter test. As such, there is a "lack of uniformity between the states in this regard [that] poses a major problem for national corporations with presences in various jurisdictions."[220] There is even concern in the federal courts as to which rule applies. As the "federal courts must apply state privilege rules in a diversity case based on state law, the corporate attorney may not know which test will be applied to the communication."[221] Therefore, for corporations to ensure that the communications will be protected in each and every venue where a case could arise, they

215. *Id.* at 955.
216. *Id.*
217. *Id.*
218. *See supra* note 151 and accompanying text.
219. *See supra* notes 159–60; Bufkin Alyse King, *Preserving the Attorney-Client Privilege in the Corporate Environment*, 53 ALA. L. REV. 621, 635 (2002).
220. Brown, *supra* note 117, at 934.
221. King, *supra* note 219, at 635.

should follow the narrowest test, the control group test.[222] The *Upjohn* Court indicated the need to ensure the predictability of whether or not a communication will be protected when it chose the subject matter test;[223] however, application of the narrowest test helps to ensure predictability of what communications will be protected, as attorney can only ultimately ensure communications will be protected if they follow the more narrow control group approach. As a result, if Maryland follows this recommendation and applies the control group test, the courts will be protecting not only attorneys, but corporate employees and their beliefs as to which communications are protected by applying a more narrow test which the corporation may alternatively face in another jurisdiction.

X. CONCLUSION

Although the United States Supreme Court held that the subject matter test should be used for analyzing the attorney-client privilege when it involves corporations, a bright-line rule was not provided.[224] As such, federal courts are left to interpret the ruling as they see fit. Additionally, the Supreme Court's ruling is not binding on individual states; therefore, a variety of rules in this area of law have been established, including continued adherence to the control group test that was rejected in *Upjohn* and the adoption of various forms of the subject matter beyond the test adopted by the *Upjohn* Court. As Maryland courts have yet to decide which rule to apply, any of the above options could be applied and adopted by the Maryland courts in the future.

However, the control group test seems to provide the most protection of corporate employees, while promoting Maryland's policy goals surrounding pre-trial discovery. After the corporate scandals of recent years, the SEC and other government agencies are requiring that corporations waive the attorney-client privilege in order for the corporation to receive favorable treatment during an investigation.[225] As a result, employees may be under a false sense of protection under the subject matter test while providing information to legal counsel, whom employees often believe will protect them as they are their co-workers and friends, during corporate investigations.[226] As such, the control group test is more likely to

222. *Id.*

223. *See supra* note 68 and accompanying text.

224. Upjohn Co. v. United States, 449 U.S. 383, 394–97 (1981) (rejecting the control group test and adopting the subject matter test on a case-by-case basis.).

225. *See supra* notes 117–23 and accompanying text.

226. *See supra* notes 128–32, 206–08 and accompanying text.

protect employees as their communications would normally not be covered under this test to begin with; therefore, employees will be more inclined to protect themselves against self-incrimination during corporate investigations. The Maryland courts should adopt the control group test as federal law related to the attorney-client privilege is flawed—government agencies are requesting too many waivers of the privilege, the subject matter test provides too much protection of senior management, and the subject matter test too strictly restrains discovery in violation of Maryland's policy goals.

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