Some States Still Haven't Decided Between
the "Control Group" Standard and the Upjohn Standard

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In his May 22, 2013 “Privilege Points” release, Tom Spahn discusses the “control group” and “Upjohn” standards for corporate communications.

Before 1981, most states applied what is called the "control group" privilege standard for corporate communications -- extending privilege protection only to communications between the company's lawyer and members of upper management who act on the lawyer's advice. In that year, the United States Supreme Court took a totally different approach. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the court interpreted federal common law as extending privilege protection to communications between a company's lawyer and any level of employee, if that employee has facts the lawyer needs when advising the corporate client.

Most states have moved to the *Upjohn* standard. Illinois is the chief remaining proponent of the "control group" standard. Remarkably, some states have still not decided which approach to take. In *Maxtena, Inc. v. Marks*, the federal district court explained that "[t]he Maryland Court of Appeals has not yet delineated a precise test for determining the applicability of the attorney-client privilege 'in the corporate context.'" Civ. A. No. DKC 11-0945, 2013 U.S. Dist. LEXIS 42332, at *17 (D. Md. Mar. 26, 2013) (citation omitted). The court found it unnecessary to predict which standard Maryland's highest court would chose.

Ironically, the *Upjohn* case itself recognized that "[a]n uncertain privilege . . . is little better than no privilege at all." 449 U.S. at 393. Some states' continuing uncertainty about the privilege's applicability in the corporate setting highlights the wisdom of this principle.