DEFINING ATTORNEY-CLIENT PRIVILEGE FOR THE INDEPENDENT CONTRACTOR: A CASE FOR THE FUNCTIONAL EQUIVALENT DOCTRINE IN WASHINGTON

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Abstract: Corporations increasingly rely on independent contractors to fulfill basic organizational needs. This increased reliance has created a number of legal issues, one of which is the level of privilege extended to communications between contractors and legal counsel for the contracting corporation. This issue is particularly relevant for corporations in the "gig economy," like Uber, Lyft, and Postmates, which rely on independent contractors for fundamental business functions. Washington State courts have yet to decide whether independent contractors are entitled to attorney-client privilege regarding these conversations. Generally, Washington courts follow the U.S. Supreme Court's "*Upjohn* rule," which protects communications between corporate counsel and non-executive employees in certain, somewhat vague situations. The U.S. Court of Appeals for the Eighth Circuit and Colorado Supreme Court have adopted a practical legal test to address this issue, entitling a corporation's independent contractors to privilege with the corporation's counsel if they are "functionally equivalent to" or "indistinguishable from" the corporation's employees. This Comment argues that Washington State courts should adopt the Colorado Supreme Court's extension of the functional equivalent doctrine. Colorado's approach reflects the fluid state of twenty-first century employment relationships, which increasingly deviate from the traditional employer-employee model.

INTRODUCTION

According to an estimate by the U.S. Government Accountability Office, independent contractors make up more than forty percent of the American workforce.[1] This is in part due to the dynamic nature of modern industry and evolving working relationships, but it is also financially motivated. Employers, recognizing that traditional employees receive significant legal protections and tax benefits not afforded to independent contractors,[2] are increasingly misclassifying employees as

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1. U.S. GOV'T ACCOUNTABILITY OFFICE, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 4 (2015), http://www.gao.gov/assets/670/669766.pdf [http://perma.cc/C4TT-NVN3] ("Applying this broad definition to our analysis of data from the General Social Survey (GSS), we estimate that such contingent workers comprised 35.3 percent of employed workers in 2006 and 40.4 percent in 2010.").

2. *See id.* at 21–24.

independent contractors to skirt the payroll tax and avoid providing other legal and financial benefits to their workforce.[3]

In the realm of employment law, the blurring line between employees and independent contractors has made it difficult for courts and legislators to make a legal distinction between the two. While seemingly trivial in practice, the legal distinction can have broad consequences, especially in the context of litigation. Whether a court considers a worker an employee or a contractor has serious implications for that worker's liability exposure and right to labor protections, which are traditionally extended only to employees. Moreover, it affects the applicability of attorney-client privilege. Traditionally, only employees are covered by attorney-client privilege when communicating with their employer's attorneys, while independent contractors are not.[4] This Comment examines that tradition and identifies a growing consensus for change in courts around the country. This Comment proposes that Washington courts adopt a workable solution.

Part I of this Comment explores the history of the employee/contractor divide, including its evolution from medieval England to modern workplace relationships. Part II discusses the current state of the law surrounding attorney-client privilege, including the U.S. Supreme Court's "*Upjohn* rule." Part III traces the rise of the "functional equivalent" doctrine, from the creation of the Eighth Circuit's five-part test in *Diversified Indus., Inc. v. Meredith*[5] to its application to independent contractors in *In Re Bieter Co.*,[6] and the Colorado Supreme Court's refinement of the test in *Alliance Construction Solutions Inc. v. Dep't of Corrections.*[7] Part IV provides an overview of current Washington law on attorney-client privilege and argues that Washington courts should adopt the Colorado Supreme Court's extension of the *Bieter* rule, protecting communications between attorneys and independent contractors when: (a) the contractors have a "significant relationship" not only to the corporate entity but also to the matter that is the subject of the entity's need for legal services; (b) the communication

3. Robert Moskowitz, *IRS Cracking Down on Misclassified Employees*, INTUIT QUICKBOOKS, https://quickbooks.intuit.com/r/employees/irs-cracking-down-on-misclassified-employees/[https://perma.cc/AM3S-AYYH].

4. *See, e.g.*, Shere v. Marshall Field & Co., 327 N.E.2d 92, 94 (Ill. 1974) ("Safety and Claims Service is an independent contractor retained by both the defendant and by defendant's excess public liability insurer to investigate and adjust claims. . . . *The attorney-client privilege has never been extended to cover communications to such third parties*." (emphasis added)).

5. 572 F.2d 596, 601–02 (8th Cir. 1978).

6. 16 F.3d 929, 935 (8th Cir. 1994).

7. 54 P.3d 861, 868 (Colo. 2002).

was made for the purpose of seeking legal "assistance"; (c) the subject matter of the communication was within the scope of the independent contractors' duties; and (d) the communication was treated as confidential and only disseminated to those persons with a specific need to know its contents. In doing so, Washington courts can simultaneously settle this area of law and accomplish a number of desirable policy goals.

I. HISTORY OF THE LEGAL DISTINCTION BETWEEN EMPLOYEES AND CONTRACTORS

A. The Employee/Contractor Distinction Has Roots in Fourteenth Century England

Since the genesis of wage labor, which began to appear in fourteenth- and fifteenth-century England,[8] courts have struggled to define the exact bounds of the employer-employee relationship. The Statute of Laborers,[9] enacted in 1351 in response to a widespread labor shortage, was one of the earliest attempts to delineate between "hired servants"[10] and those working under contract.[11]

The distinction outlined in the Statute largely concerned the rights and obligations of hired servants and independent contractors in relation to their employers. A servant who "depart[ed] from . . . service before the end of the term agreed, without permission or reasonable cause" would face "the penalty of imprisonment."[12] Independent contractors (referred to in the Statute as tradesmen and "other artisans and labourers") meanwhile faced no such penalty.[13] Similarly, a servant's master was permitted to "use force to capture a servant who departed, or who, having been retained, never entered his service."[14] The Statute did not

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8. MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE 4 (1989).

9. *The Statute of Laborers 1315*, YALE L. SCH.: AVALON PROJECT, http://avalon.law.yale.edu /medieval/statlab.asp [http://perma.cc/C8NV-KA6F].

10. The term "hired servant" is commonly used in historical sources to refer to the traditional employer-employee relationship. JOHN OGILVIE, THE IMPERIAL DICTIONARY OF THE ENGLISH LANGUAGE: A COMPLETE ENCYCLOPEDIC LEXICON, LITERARY, SCIENTIFIC, AND TECHNOLOGICAL 924 (1851); Bruce P. Smith, *Imperial Borrowing: The Law of Master and Servant*, 25 COMP. LAB. L. & POL'Y J. 447, 450 (2004).

11. LINDER, *supra* note 8, at 46.

12. *Statute of Laborers 1315*, *supra* note 9.

13. *See id.*

14. LINDER, *supra* note 8, at 46 (quoting 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 462–63 (4th ed. 1936)).

give the same rights to one who engaged an independent contractor.[15] Additionally, a master had rights "against other masters who persuaded his servant to depart, or who, having unknowingly engaged his servant, did not give him up when required to do so."[16] One who engaged an independent contractor had no such rights.[17]

Aside from accommodating the rise of contracted workers, the Statute also served as a codification of the common law.[18] Indeed, conditions of employment and the rights and duties of the parties "showed that [fourteenth century legislators] intended the relationship should preserve some of the characteristics of a [traditional master-servant relationship]."[19] From a more cynical perspective, the statute also attempted to preserve the class system—namely the ruling class's dominion over unskilled workers—by giving more rights to those involved in skilled trades. Regardless of the motivations of its drafters, the Statute of Laborers signified a shift in the way the English legal system categorized workers.

Moreover, the Statute represents the first in a path of legislation and case law that treated hired servants and independent contractors differently. This path eventually culminated in the passage of the Employers and Workmen Act of 1875 and the Truck Amendment Act of 1887.[20] These two Acts granted certain rights to a "workman," defined as:

> [A]ny person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labor, . . . has entered into or works under a contract with an employer, whether the contract . . . be a contract of service or a contract personally to execute any work or labour.[21]

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15. *See Statute of Laborers 1315*, *supra* note 9.

16. LINDER, *supra* note 8, at 46 (quoting 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 462–63 (4th ed. 1936)).

17. *Id.*

18. *See, e.g.*, *id.* ("The legislators of the fourteenth century aimed at obtaining the same results as those attained by the old customs and by-laws. These old customs and by-laws treated the relationship of master and servant as a status, and regulated it accordingly. The legislators of the fourteenth century recognized that the relationship had then come to be created by contract." (quoting 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 461 (4th ed. 1936))).

19. *Id.*

20. *Id.* at 105.

21. *Id.* (quoting 38 & 39 Vict., c. 90, § 10 (1875)). Notably, this provision excluded "domestic and menial servants." *Id.*

Despite the confusing use of the term "contract" in this context, these statutes were expressly designed to benefit "those who hire themselves to labour with their hands for daily or weekly wages,"[22] but not those who engage in a contract "not for labor but for the result of the labor. . . ."[23] In other words, the Employers and Workmen Act and the Truck Act were designed to protect employees, who required "state-enforced protection."[24] They did not protect independent contractors, who were considered "fledging entrepreneurs."[25]

B. The Development of the Employee/Contractor Distinction in America

In America, courts applied several approaches to distinguish between independent contractors and employees.[26] This issue most often arose in the context of tort claims in which a plaintiff attempted to hold a contractee responsible for the negligence of a contractor.[27]

Initially, state courts applied traditional agency principles to determine whether the contractee would be held liable. For example, in *Inhabitants of Lowell v. Boston & L.R. Corp.*,[28] a railroad corporation hired a contractor to construct a portion of a railroad across a public road.[29] Workers hired by the contractor removed protective barriers from the road that prevented travelers from falling into a ditch that had been cut into the road, in which the railroad would be placed.[30] At night, the plaintiffs drove a carriage into the ditch and were injured.[31] At trial, the jury found for the plaintiffs and held the railroad liable for their injuries.[32] On appeal, the Supreme Court of Massachusetts held that the

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22. *Id.* at 106.

23. *Id.* at 108.

24. *Id.* at 105–06.

25. *Id.* at 106.

26. *See, e.g.*, Hoatz v. Patterson, 5 Watts & Serg. 537, 538 (Pa. 1843) (contractor who furnished "nothing but his superintendence and skill as an undertaker" could not recover statutory construction lien).

27. *See, e.g.*, Inhabitants of Lowell v. Boston & L.R. Corp., 40 Mass. (1 Pick.) 24, 24 (1839) (plaintiff who rode carriage into ditch across a road attempted to hold a railroad company liable for negligence of a contractor and his hired workers); Barry v. St. Louis, 17 Mo. 121, 129–30 (1852) (plaintiff who fell into sewer trench attempted to hold city liable for negligence of contractor).

28. 40 Mass. (1 Pick.) 24 (1839).

29. *Id.* at 24.

30. *Id.* at 29.

31. *Id.*

32. *Id.* at 25.

railroad's liability turned on whether the workmen were deemed to be "servants or agents" of the railroad.[33] If they were, the railroad would be held liable; if they were not—and instead were recognized as employees of the independent contractor—the railroad would not be liable.[34] Ultimately, the court held that the workers, although they were employees of an independent contractor, were the "servants" of the railroad because their work was done for the railroad's benefit, "under [its] authority, and by [its] direction."[35] In essence, the contracted workers were stepping into the shoes of employment— serving as the functional equivalent of an employee. As a result, the railroad was held liable for the plaintiffs' injuries.[36]

More than a decade later, the U.S. Supreme Court appeared to adopt a different approach when it first addressed the distinction between employees and independent contractors in *Winder v. Caldwell*.[37] In *Winder*, the plaintiff, Caldwell, sued Winder to compel payment for construction work Caldwell had completed in the District of Columbia.[38] Winder argued that the underlying federal statute only protected workers hired directly by a builder– not general contractors.[39] The Court agreed, noting that the purpose of the statute was to protect those workers whose "personal labor" went into the building, not someone who contracts to do the work but then hires others to provide the labor.[40] The test was rudimentary: protecting a worker if they contributed "personal labor" to a building, but not if they were a contractor who simply contracted to complete the work and managed others in doing so. Nonetheless, *Winder* is notable because it represents the first case in which the U.S. Supreme Court tried to draw the line between the traditional employer-employee relationship and that of a contractor-contractee.

Finally, consider *City of New York v. Bailey*.[41] In that case, New York State Water Commissioners built a municipal dam across the Croton River to supply the City of New York with water.[42] An unprecedented flood caused the dam to collapse, causing damage to plaintiffs'

33. *Id.* at 26.
34. *Id.*
35. *Id.* at 31.
36. *Id.* at 35.
37. 55 U.S. (1 How.) 434 (1852).
38. *Id.* at 434.
39. *Id.* at 435.
40. *Id.* at 445.
41. 2 Denio 433 (N.Y. 1845).
42. *Id.* at 436.

property.[43] Plaintiffs sued the City of New York, alleging negligence in the dam's construction and design.[44] The City of New York argued, and ultimately the court held, that the City could not be held liable under a master-servant theory for any negligence surrounding the dam's construction or design:

> The defendants below cannot be held responsible for any supposed negligence in the construction of the dam. They did not appoint the water commissioners or the engineers or agents who executed the work, and had no power to direct them as to the manner of doing it, or to remove them for unskillfulness or misconduct.[45]

Ultimately, the City was held liable under a premises liability theory.[46] But it is important to consider the court's primary rationale on the master-servant issue: in attempting to determine whether the workers fell under the umbrella of "master-servant," the court focused on the extent of control the City of New York possessed over the workers who designed and built the dam. Because the City exercised little control over the workers, the Court held that the workers were not the City's servants, and thus the City could not be held liable under such a theory.[47] This "right of control" test would prove to be the one adopted by the majority of jurisdictions in the country, including Washington State and the U.S. Supreme Court.[48]

C. *Modern Distinctions Between Employees and Contractors*

Today, the legal distinction between independent contractors, the self-employed, and traditional employer-employee relationships is far from clear.[49] Indeed, in the modern context, some question its usefulness

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43. *Id.*

44. *Id.* at 434.

45. *Id.* at 437.

46. *Id.* at 445.

47. *Id.* at 442–43.

48. *See e.g.*, NLRB v. United Ins. Co. of Am., 390 U.S. 254 (1968) (adopting common law right of control test in National Labor Relations Act (NLRA) cases); Larson v. Centennial Mill Co., 40 Wash. 224, 228, 82 P. 294, 295 (1905) (holding contractor could not be held liable for "independent" subcontractor's negligence because contractor had no right of control over subcontractor).

49. *See, e.g.*, NLRB. v. Hearst Publ'ns, 322 U.S. 111, 123–24 (1944) (holding common law right of control test for evaluating did not apply to NLRA), *superseded by statute*, The National Labor Relations Act, 29 U.S.C. § 151 (2012), *as recognized in*, *United Ins. Co. of Am.*, 390 U.S. at 254 n.1.

entirely.[50] This is largely because the definition of an "independent contractor" is nebulous. Depending on the context, it can include workers employed in a variety of relationships that deviate from the traditional employer-employee model, including agency temp workers, temporary contract workers, long-term contract workers, day laborers, on-call workers, and the self-employed.[51] Frequently, the distinction is nominal at best.

The issue is further complicated by the variety of definitions and protections for "employees" and "contractors" found in federal law. This includes statutes like the National Labor Relations Act,[52] the Civil Rights Act,[53] the Fair Labor Standards Act,[54] and the Employee Retirement Income Security Act.[55] It also extends to federal agencies, which frequently struggle to define the point at which an employee becomes a contractor. For example, the IRS applies a twenty-factor test to evaluate contractor status, taking into account the control the employer has over the prospective employee, among other things.[56] These varying definitions can lead to confusing results, with a worker being considered an employee under one evaluation scheme but a contractor under the next.[57] As a result, courts and employees are faced with an "unnecessarily complicated regulatory maze," through which they must find their way.[58]

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50. LINDER, *supra* note 8.

51. *Id.* at 3–4.

52. The NLRA expressly withholds its protections from "independent contractors," but does not expressly define the term. *See* 29 U.S.C. § 152(3).

53. The Civil Rights Act of 1964 only contemplates protections for the "employee." *See* 42 U.S.C. § 2000e(f) (2012); Murray v. Principal Fin. Grp., Inc., 613 F.3d 943 (9th Cir. 2010) (holding that the Civil Rights Act does not protect independent contractors).

54. U.S. DEP'T OF LABOR, FACT SHEET #13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2014), https://www.dol.gov/whd/regs/compliance/whdfs13.htm [http://perma.cc/8XTQ-BZLQ] (explaining FLSA protections do not apply to independent contractors).

55. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 318 (1992) (traditional agency law factors apply for identifying master-servant relationships).

56. J. COMM. ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO WORKER CLASSIFICATION FOR FEDERAL TAX PURPOSES 3–5 (2007).

57. Susan N. Houseman, *9.1 Who is an Employee? Determining Independent Contractor Status*, *in* U.S. DEP'T OF LABOR, A REPORT ON TEMPORARY HELP, ON-CALL, DIRECT-HIRE TEMPORARY, LEASED, CONTRACT COMPANY, AND INDEPENDENT CONTRACTOR EMPLOYMENT IN THE UNITED STATES (1999), http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/conference/staffing/9.1_contractors.htm [http://perma.cc/4EZY-NC4E].

58. U.S. DEP'T OF LABOR, V. CONTINGENT WORKERS, http://www.dol.gov/_sec/media/reports/dunlop/section5.htm [http://perma.cc/K4AY-9B2Y].

In Washington State, courts generally employ the traditional common law "right of control test"[59] to evaluate whether an individual is an employee or an independent contractor.[60] *Washington Practice* defines a "servant" as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is *subject to the other's control or right to control*."[61] In short, "the difference between an independent contractor and an employee is whether the employee can tell the worker how to do his or her job."[62]

II. THE LAW OF ATTORNEY-CLIENT PRIVILEGE

One of the legal protections generally possessed by corporate employees—but not independent contractors—is attorney-client privilege with the corporation's in-house attorneys. Generally, attorney-client privilege refers to a "client's right to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney."[63] The privilege is one of the oldest rights found in Anglo-American law,[64] and it is of such importance that it survives even the client's death.[65] The attorney cannot waive the privilege—that right belongs only to the client.

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59. *See supra* section I.B.

60. To evaluate the level of control exercised over a worker, Washington courts consider a number of factors, including:

> (a) [T]he extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

DAVID K. DEWOLF & KELLER W. ALLEN, 16 WASH. PRAC., TORT LAW AND PRACTICE § 4:3 (4th ed. 2017).

61. *Id.* at § 220(1) (emphasis added).

62. Kamla v. Space Needle Corp., 147 Wash. 2d 114, 119, 52 P.3d 472, 474 (2002).

63. *Privilege*, BLACK'S LAW DICTIONARY (10th ed. 2014).

64. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law.") (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)).

65. *See* Swidler & Berlin v. United States, 524 U.S. 399, 399 (1998) ("[I]t has been overwhelmingly, if not universally, accepted, for well over a century, that the privilege survives the client's death . . . .").

The purpose of attorney-client privilege is to "encourage full and frank communication between attorneys and their clients"[66] because both the quality of the attorney's legal advice and the public good are served by attorneys being fully informed by their clients.[67] Assuring clients that incriminating statements made to their attorneys will not be used against them encourages clients to "make full disclosure to their attorneys."[68] In the corporate context, the privilege shields qualifying communications between the employee and corporate counsel from disclosure to third-parties or at trial.[69] It is of critical importance when litigation occurs.

Generally, corporations enjoy fewer rights than individuals.[70] That said, it is generally well-recognized that corporations, despite being "artificial creature[s] of the law," are entitled to attorney-client privilege in certain circumstances.[71] Indeed, given that corporations are legal entities made up of people, it follows that those people should enjoy attorney-client privilege with the corporation's attorneys when they discuss corporate business.

At first, corporate attorney-client privilege only extended to those employees in the "control group" of the corporation.[72] Employees were considered to be in the "control group" if, while contacting the lawyer for legal advice, they were "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."[73] In that case, privilege would apply because they "[are] (or personif[y]) the corporation when [they]

66. *Upjohn*, 449 U.S. at 389.

67. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

68. Fisher v. United States, 425 U.S. 391, 403 (1976); *see also Hunt*, 128 U.S. at 470.

69. *Upjohn*, 449 U.S. at 397.

70. *See, e.g.*, Essgee Co. of China v. United States, 262 U.S. 151, 155 (1923) (holding corporations do not enjoy Fifth Amendment right against self-incrimination).

71. *Upjohn*, 449 U.S. at 389–90; *see also* United States v. Louisville & N.R., 236 U.S. 318, 336 (1915) (protecting corporate records from disclosure under attorney-client privilege); Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 323 (7th Cir. 1963) (overturning trial court's denial of attorney-client privilege to corporation); *id.* at 319 n.7 (collecting cases). However, the occasional court has held that only "natural persons" are protected by the privilege. *See, e.g.*, Radiant Burners, Inc. v. Am. Gas Ass'n, 207 F. Supp. 771, 773 (N.D. Ill. 1962), *adhered to*, 209 F. Supp. 321 (N.D. Ill. 1962), *and rev'd*, 320 F.2d 314 (7th Cir. 1963) (holding attorney-client privilege only attaches to "natural persons," not corporations).

72. Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).

73. *Id.*

make[] [their] disclosure to the lawyer."[74] The legal theory prevailed for nearly two decades.

A. The Demise of the "Control Group" Test in Upjohn

In 1981, the U.S. Supreme Court issued the governing case for corporate attorney-client privilege, *Upjohn Co. v. United States*.[75] *Upjohn* involved a pharmaceutical company, Upjohn, whose general counsel sent a questionnaire to "all foreign managers seeking detailed information" about certain questionable payments that had been made to foreign governments "to secure government business."[76] The general counsel then conducted detailed interviews with the foreign managers. Later, the IRS discovered the payments and demanded the company produce the questionnaires and the notes from the interviews.[77] Upjohn's general counsel refused to produce the documents, claiming they were both protected by attorney-client privilege and also work product in preparation for litigation.[78] The IRS subsequently filed suit, and the district court ordered Upjohn to produce the documents.[79] The Court of Appeals for the Sixth Circuit, applying the "control group test," held attorney-client privilege did not apply to "[t]o the extent that the communications were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'"[80]

The Supreme Court, however, overruled the court of appeals, holding that the communications between the company's general counsel and its employees were protected by attorney-client privilege.[81] It reasoned that the "control group" test was a flawed method of analysis for a number of reasons. First, the Court noted that the test "discourag[es] the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[82] "The control group test overlooks the fact that such privilege exists to protect not only the giving of professional advice to those who can act on it but

74. *Id.*
75. 449 U.S. 383 (1981).
76. *Id.* at 383.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* (quoting United States v. Upjohn Co., 600 F.2d 1223, 1225 (6th Cir. 1979)).
81. *Id.* at 383–84.
82. *Id.* at 392.

also the giving of information to the lawyer to enable him to give sound and informed advice."[83] To that end, the Court noted that while corporate decisions are typically made by high-level executives, it is often lower-level employees who possess information relevant to corporate liability:

> While in the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same, in the corporate context it will frequently be employees beyond the control group . . . who will possess the information needed by the corporation's lawyers. 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.[84]

Second, the Court found that the "control group" test also makes it more difficult for low-level employees to enact corporate policy as advised by corporate counsel because the advice given by counsel is not "full and frank," as it would be if protected by privilege.[85] Third, the test, as applied, often had unpredictable results, largely because determining which corporate executives are in the "control group" is an inherently subjective inquiry.[86] Lastly, by leaving unprotected conversations by employees not in the control group, the test may make it more likely for corporations and their employees to inadvertently violate the law:

> In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," . . . particularly since compliance with the law in this area is hardly an instinctive matter, see, *e. g.*, *United States v. United States Gypsum Co.*, 438 U.S. 422, 440–441

83. *Id.* at 384.

84. *Id.* at 390–91.

85. *Upjohn*, 449 U.S. at 392; *see also* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D.S.C. 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it.").

86. *Compare* Hogan v. Zletz, 43 F.R.D. 308, 315–16 (N.D. Okla. 1967) (control group includes assistant managers and members of corporate patent committee), *with* Congoleum Indus., Inc. v. GAF Corp., 49 F.R.D. 82, 83–85 (E.D. Pa. 1969) (a "control group includes only division and corporate vice presidents, and not two directors of research and vice president for production and research"). *Upjohn*, 449 U.S. at 393.

> (1978) ("the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct").[87]

In Upjohn's case, the Court explained that the communications were made (1) by Upjohn employees to counsel acting within the scope of their employment, (2) at the direction of corporate superiors, and (3) for the purpose of seeking legal advice.[88] The questionnaire was clearly addressed from Upjohn's General Counsel, and a memo accompanying the questionnaire clearly gave legal advice to the managers receiving the questionnaire.[89] Because these communications were "[c]onsistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure."[90]

Besides these three factors, the Court gave no guidance as to what other types of corporate communications are privileged.[91] As is often the case, it was up to the lower courts to draw the lines.

III. THE RISE OF THE FUNCTIONAL EQUIVALENT DOCTRINE

While the various Circuit Courts attempted to resolve the post-*Upjohn* ambiguity in a variety of ways,[92] the Eighth Circuit Court of Appeals has provided the clearest and most concrete test for applying attorney-client privilege to communications from independent contractors. As a starting

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87. *Upjohn*, 449 U.S. at 392–93 (citations omitted).

88. *Id.* at 394.

89. *Id.* at 395 (stating that "Upjohn will comply with all laws and regulations" and that payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal").

90. *Id.* Although the court of appeals was concerned that extending attorney-client privilege beyond the control-group test would complicate discovery and create a "broad 'zone of silence' over corporate affairs," *id.*, the Supreme Court dismissed its concerns:

> Application of the attorney–client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.

Id.

91. In fact, it expressly "decline[d] to lay down a broad rule . . . to govern all conceivable future questions [of corporate attorney-client privilege]." *Id.* at 386.

92. *See In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 361 (3d Cir. 2007) ("Thus, following *Upjohn*'s lead in not applying the privilege mechanically does not counsel in favor of applying the privilege anytime it might increase the flow of information; rather, *Upjohn* counsels a more nuanced inquiry into whether according a type of communication protection is likely to encourage *compliance-enhancing* communication that makes our system for resolving disputes more operable."); *In re* John Doe Corp. 675 F.2d 482, 488 (2d Cir. 1982) ("The Upjohn privilege is clearly limited to communications made to attorneys solely for the purpose of the corporation seeking legal advice and its counsel rendering it.").

point, the court adopted a basic legal framework for determining which communications from a traditional employee to corporate counsel are privileged.[93] Under the so-called "*Diversified* test," a communication between an employee and an employer's legal counsel is privileged if it satisfies five elements:

> (1) [T]he 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; (5) and the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[94]

While this test primarily provided much-needed clarity to employee communications in the wake of *Upjohn*, it also laid a solid foundation upon which the Eight Circuit has successfully built a doctrine governing the application of attorney-client privilege to independent contractors.

A. The Eighth Circuit's Adoption of the Functional Equivalent Doctrine in Bieter

In addition to adopting a concrete analytical framework to evaluate attorney-employee privilege, the Eighth Circuit has also established precedent under which independent contractors, in certain cases, can be entitled to attorney-client privilege.[95] Under the aptly-named "functional equivalent" doctrine, the court found that communications with an independent contractor are protected by privilege if that contractor is "indistinguishable from" or the "functional equivalent" of an employee.[96]

The Eight Circuit first adopted this stance in *In re Bieter Co*.[97] In that case, Bieter Co. was a partnership formed by two businessmen to develop a parcel of farm land in Eagan, Minnesota.[98] Citing a "lack of cooperation from local government" and difficulties with competing

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93. The court adopted a modified version of the Seventh Circuit's "Harper & Row" test. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971).

94. *Diversified*, 572 F.2d at 609.

95. *See In re* Bieter Co., 16 F.3d 929 (8th Cir. 1994).

96. *Id.* at 938.

97. *Id.* at 935.

98. *Id.* at 930.

developers, Bieter Co. sued the developers in federal court.[99] Bieter Co. alleged violations of the Racketeer Influenced and Corrupt Organizations Act.[100]

As part of discovery, the defendant developers requested communications and documents between Bieter Co. and its counsel.[101] Bieter Co. argued these documents were protected by attorney-client privilege.[102] The developers brought a motion to compel discovery and a magistrate judge ruled the material in question was not protected because it had been disclosed to an independent contractor who had worked closely with Bieter Co. in its development attempts.[103] Bieter Co. appealed, petitioning the Eighth Circuit for a writ of mandamus against the district court.[104]

The contractor, Dennis Klohs, had assisted Bieter Co. throughout the entire attempted acquisition.[105] He and one of Bieter Co.'s business partners worked out of an office together and, although Klohs's retention agreement clearly stated he was to be an independent contractor, he was "intimate[ly] involve[d]" with the attempts to develop the parcel.[106] He worked with "architects, consultants, and counsel," appeared at public hearings before the municipal council and planning commission, and spoke with the media regarding the proposed development.[107] All viewed him as a representative of Bieter Co.[108] His contributions were so vital to the company he was hired as an employee after four years of contracting with Bieter Co.[109]

In its opinion, the *Bieter* Court cited an article written by John Sexton discussing the status of post-*Upjohn* corporate attorney-client privilege.[110] Sexton's article hypothesizes that "at times there will be potential information-givers who are not employees of the corporation but who are nonetheless meaningfully associated with the corporation in

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99. *Id.*

100. *Id.*

101. *Id.* at 931.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 933.

106. *Id.*

107. *Id.* at 934.

108. *Id.*

109. *Id.*

110. *Id.* at 936; John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443 (1982).

a way that makes it appropriate to consider them 'insiders' for the purposes of the privilege."[111] He encourages the reader to consider a contracted in-house accountant at a corporation currently undergoing an IRS audit and subsequent tax indictment issues:

> As the accountant, he has an insider's knowledge of the corporation's operations that few people even on the corporation's payroll have . . . . Clearly, the accountant has knowledge of extraordinary importance to the attorney's investigation of the tax matter. And, equally clearly, the logic of *Upjohn* commands that the mere fact that the accountant was not an employee of the corporation should not preclude application of the privilege. There is no reason to differentiate between an accountant-employee and a regularly retained outside accountant when both occupy the same extremely sensitive and continuing position as financial adviser, reviewer, and agent: both possess information of equal importance to the lawyer.[112]

Sexton also noted that "a literalistic extension of the privilege only to persons on the corporation's payroll would invariably prevent a corporation's attorney from engaging in a confidential discussion with a corporation's regular independent accountant, no matter how important the accountant's information would be to the attorney."[113]

The *Bieter* Court agreed with Sexton's logic and said it would be "inappropriate to distinguish between" those on payroll and those employed as independent contractors.[114] Such a distinction would interfere with corporate counsel's ability to confer confidentially with independent contractors that may "possess the very sort of information that the privilege envisions flowing most freely."[115] As a result, contractors who possess a "significant relationship" with the client and the client's "involvement in the transaction" should be protected by the privilege.[116] Klohs was involved on a daily basis with Bieter Co., and he interacted externally on its behalf.[117] The Eighth Circuit said there was "no principled basis to distinguish [his] role from that of an employee" and that his involvement in development, the subject of the litigation, made him "precisely the sort of person with whom a lawyer would wish

111. Sexton, *supra* note 110, at 498.

112. *Id.*

113. *Id.*

114. *Bieter*, 16 F.3d at 937.

115. *Id.* at 938.

116. *Id.* at 937; Sexton, *supra* note 110, at 498.

117. *Bieter*, 16 F.3d at 938.

to confer confidentially."[118] For these reasons, the Court held that Klohs was functionally the equivalent of an employee at Bieter Co. and therefore had the same rights as an employee to attorney-client privilege.[119] The Eighth Circuit went on to apply its *Diversified* test to Klohs, ultimately finding that his communications with Bieter Co.'s attorney were privileged.[120]

B. *The Ninth Circuit's Adoption of the Functional Equivalent Doctrine in* Graf

Recently, in *United States v. Graf*,[121] the Ninth Circuit expressly adopted the Eighth Circuit's "functional equivalent" doctrine.[122] In that case, the defendant, James Graf, operated an insurance brokerage, Employers Mutual, as an independent contractor.[123] He did so to avoid California's banning of Graf from insurance work as a punishment for previous misconduct.[124] The lawsuit initially arose because Employers Mutual refused to pay out over $20 million in medical claims, instead funneling customer premiums to a shell corporation in Colombia.[125] Graf used the money from Employers Mutual to purchase jewelry, a sports car, and a house.[126] This conduct caught the eye of the Department of Labor (DOL), which began investigating the company. Graf obstructed the DOL investigation by knowingly providing false documents and information to investigators in an effort to impede the investigation.[127] After discovering his duplicity, the DOL filed a civil suit in the District of Nevada, seeking to remove Graf from the company, to install an independent fiduciary to operate the company, and to freeze Graf's assets.[128]

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118. *Id.*

119. *Id.*

120. *Id.* For a discussion of other approaches to the independent contractor privilege problem, see Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727 (2009).

121. 610 F.3d 1148 (9th Cir. 2010).

122. *Id.* at 1158.

123. *Id.* at 1153.

124. *Id.*

125. *Id.* at 1154.

126. *Id.*

127. *Id.*

128. *Id.*

A few years after the civil suit was filed, Graf was indicted for his role in the Employers Mutual fraud.[129] In spite of his status as an independent contractor, "[e]vidence at trial nonetheless showed Graf was heavily involved in all facets of the corporation's operations."[130] Mr. Graf regularly communicated with insurance brokers and others on Employers Mutual's behalf, marketed the company's insurance plans, managed its employees, and was the company's primary agent in its communications with counsel.[131] At his criminal trial, the government introduced testimony from Employers Mutual's general counsel, which on appeal, Graf argued was privileged.[132]

In an opinion drafted by Judge Richard Tallman, the Ninth Circuit adopted the *Bieter* test, noting that several district courts in the Ninth Circuit had already applied *Bieter*'s analysis to independent contractor privilege scenarios and had found its reasoning persuasive.[133] The court also noted it had previously said in dicta that "[a]s fictitious entities, corporations can seek and receive legal advice and communicate with counsel only through individuals empowered to act on behalf of the corporation."[134] Regardless of his purported status as an independent contractor, Mr. Graf was empowered to act on behalf of the corporation. The court indicated the above facts illustrated that in essence, his role was that of a "functional employee." Accordingly, his communications with Employers Mutual's general counsel that corresponded to that role were entitled to attorney-client privilege.[135]

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129. *Id.*

130. *Id.* at 1153.

131. *Id.* at 1157.

132. *Id.* at 1152.

133. *Id.* at 1158; *see also, e.g.*, Kelley v. Microsoft Corp., No. C07–475 MJP, 2009 WL 168258, at *2–3 (W.D. Wash. Jan. 23, 2009) (considering and ultimately rejecting Microsoft's claim that a consultant was the functional equivalent of an employee under *Bieter*); ASU Students for Life v. Crow, No. CV–06–1824–PHX–MHM, 2007 WL 2725252, at *3 (D. Ariz. Sept. 17, 2007) (adopting *Bieter* and applying it to extend attorney-client privilege to communications between attorneys and all members of student groups that were "directly involved" in the relevant project); Memry Corp. v. Ky. Oil Tech., N.V., No. C04–03843 RMW (HRL), 2007 WL 39373, at *2–3 (N.D. Cal. Jan.4, 2007) (adopting *Bieter* and finding that communications between an advisor/agent to the company and corporate counsel were covered by the company's attorney-client privilege); Residential Constructors, LLC v. Ace Prop. & Cas. Ins. Co., No. 2:05–cv–01318–BES–GWF, 2006 WL 3149362, at *12–16 (D. Nev. Nov. 1, 2006) (applying *Bieter* test to find attorney-client privilege protected communications between insurer and independent insurance adjuster).

134. *Graf*, 610 F.3d at 1159 (quoting Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz., 881 F.2d 1486, 1492 (9th Cir. 1989)).

135. *Id.* at 1159.

C. *The Colorado Supreme Court's Extension of the Functional Equivalent Doctrine in* Alliance Construction

Few other courts have addressed when, if ever, independent contractors should be entitled to attorney-client privilege with their contracting corporation's attorneys. When faced with the issue, the Colorado Supreme Court adopted a broader iteration of *Bieter*'s "functional equivalent" doctrine.[136] In *Alliance Construction*, Alliance Construction Solutions made discovery requests for communications made between an attorney for the Colorado Department of Corrections (DOC) and an employee of a DOC contractor.[137] On appeal, the Colorado Supreme Court held that the communications in question were protected by attorney-client privilege.[138] In doing so, the Court relied heavily on the reasoning of *Bieter* and adopted a similar, but not identical, test to determine whether communications between corporate counsel and an independent contractor are protected by attorney-client privilege.

First, the party seeking to protect the communications between an independent contractor and corporate counsel must show the contractor had a "significant relationship" not only to the corporate entity but also to the matter that is the subject of the entity's need for legal services.[139] The relationship between the contractor and the corporate entity should be "closely analyzed" to determine this part of the test.[140] Second, the party must demonstrate the communication was made for the purpose of seeking legal "assistance."[141] Third, the party must show the subject matter of the communication was within the scope of the independent contractors' duties.[142] Finally, the party must show the communication was treated as confidential and only disseminated to those persons with a specific need to know its contents.[143]

Although the *Alliance Construction* test has gone relatively unnoticed compared to the *Bieter* test, it provides a broader, more flexible tool for courts to determine whether a communication between an independent contractor and corporate counsel is protected by attorney-client

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136. *See* All. Constr. Sols., Inc. v. Dep't of Corr., 54 P.3d 861 (Colo. 2002).

137. *Id.* at 862.

138. *Id.* at 871.

139. *Id.* at 862–63.

140. *Id.* at 869.

141. *Id.*

142. *Id.*

143. *Id.* at 870.

privilege. Specifically, while the *Bieter* test applies the standard established in *Diversified*[144]—that the communication in question is made for the purpose of seeking legal "advice" from an attorney—the *Alliance Construction* Court preferred the term "assistance," believing that "advice" could be interpreted too narrowly.[145] Additionally, the Colorado Supreme Court combined two elements of *Bieter*—that a party made the communication at the direction of a supervisor and that the supervisor requested legal advice—into a broader factor, that the subject matter of the communication was within the contractor's scope of duties.[146] Again, it believed the *Bieter* court's factors were too restricting and could potentially discourage independent contractors from contacting corporate counsel or would penalize contractors who were contacted directly by a corporate attorney.[147] While Colorado's approach is not as detailed, it provides courts the authority and flexibility to rule justly in the vast majority of cases involving independent contractors.

IV. WASHINGTON SHOULD ADOPT THE COLORADO SUPREME COURT'S BROADER FORM OF THE FUNCTIONAL EQUIVALENT DOCTRINE

A. The Colorado Supreme Court's Extension of the Functional Equivalent Doctrine Is a Logical Extension of Washington Law on Privilege and Independent Contractors

Washington Revised Code (RCW) 5.60.060(2)(a) explains the general rule of attorney-client privilege in Washington: "[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment."[148] The statute, like many vague statutory bases for attorney-client privilege, fails to define what constitutes a "client."[149] In accordance with the U.S. Supreme Court's guidance in *Upjohn*, Washington courts have muddled through issues of privilege—including who or what qualifies as a

144. *In re* Bieter Co., 16 F.3d 929, 931 (8th Cir. 1994).

145. *All. Constr. Sols.*, 54 P.3d at 869.

146. *Id.*

147. *Id.*; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 2000) (delineating the general attorney-client privilege and stating that for it to apply the communication must be "(2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client").

148. WASH. REV. CODE. § 5.60.060 (2016).

149. *See supra* Part II (discussion of difficulty of defining a "client").

"client"—on a case-by-case basis as they arise.[150] However, they have yet to adopt any clarifying factors like the Eighth Circuit's five-part *Diversified* test.[151]

Accordingly, the applicability of attorney-client privilege to independent contractors is an issue of first impression for Washington courts. With the increasing reliance of Washington's economy on innovative technology companies like Zillow, Expedia, Microsoft, and Amazon,[152] it seems likely that this issue will arise sooner rather than later. When the issue does arise, Washington courts should adopt the analysis used by the Eighth Circuit and the Colorado Supreme Court—that an independent contractor who is the "functional equivalent" of an employee can be equally entitled to attorney-client privilege, provided certain conditions are met.[153]

Specifically, it should adopt the Colorado Supreme Court's four-part test, outlined in *Alliance Construction*.[154] To reiterate, under this approach, a party wishing to protect a communication must show: (a) the contractor had a "significant relationship" not only to the corporate entity but also to the matter that is the subject of the entity's need for legal services; (b) "the communication was made for the purpose of seeking or providing legal assistance;" (c) "the subject matter of the communication was within the scope of the [independent contractors'] duties"; and (d) "the communication was treated as confidential and only disseminated to those persons with a specific need to know its contents."[155]

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150. *See, e.g.*, Youngs v. Peacehealth, 179 Wash. 2d 645, 651, 316 P.3d 1035, 1038 (2014) (reasoning that *Upjohn*'s emphasis on the lawyer's "investigative abilities" supports privileged nature of corporate counsel's ex parte interview with plaintiff's treating physician); Sherman v. State, 128 Wash. 2d 164, 190, 905 P.2d 355, 370 (1995) (citing *Upjohn* for the principle that corporate attorney-client privilege might shield certain correspondence from discovery); Wright v. Grp. Health Hosp., 103 Wash. 2d 192, 202, 691 P.2d 564, 570 (1984) ("In enunciating a flexible 'control group' test, the *Upjohn* Court was expanding the definition of 'clients' so the laudable goals of the attorney client privilege would be applicable to a greater number of corporate employees.").

151. *See supra* Part III (discussion of *Diversified* test).

152. Emily Parkhurst, *Washington State's $600 Billion IT Industry: Study Shows Tech Jobs Drive Economic Growth*, PUGET SOUND BUS. J. (Mar. 2, 2015), http://www.bizjournals.com/seattle/morning_call/2015/03/washington-states-600-billion-it-industry-study.html[https://perma.cc/CGA5-TP3U].

153. *See In re* Bieter Co., 16 F.3d 929 (8th Cir. 1994); All. Const. Sols., Inc. v. Dep't of Corr., 54 P.3d 861 (Colo. 2002).

154. *All. Const. Sols.*, 54 P.3d at 862–63.

155. *Id.*

As discussed above,[156] this test differs from the Eighth Circuit's approach in *Bieter* and *Diversified* in two significant ways: it extends privilege to communications made for the purpose of acquiring legal "assistance" instead of legal "advice," and it removes the requirement that the employee sought assistance "at the direction of a supervisor." This extension of the *Bieter* rule is desirable because it broadens the class of contractors that will be protected by the doctrine and avoids arbitrary lines by which a party may be unprotected. For example, if a contractor, of her own volition, consulted with corporate counsel, that communication would not be protected under the *Bieter* rule, but it would be under the Colorado Supreme Court's broader rule.

Adopting the Colorado Supreme Court's four-part test would logically extend Washington's existing jurisprudence concerning attorney-client privilege and the rights of independent contractors. First, it would continue Washington's general trend of extending attorney-client privilege to individuals not in the "control group" of a corporation, in accordance with the U.S. Supreme Court policy guidance in *Upjohn*.[157] Second, it would complement the protections already afforded to independent contractors in the context of workers' compensation. Washington courts have repeatedly held that a "worker" for purposes of workers' compensation may be either an employee or an independent contractor: "[a] covered worker may be an employee *or* an independent contractor so long as the statutory test is met."[158] In one case, the Supreme Court of Washington State articulated a rationale strikingly similar to the author's:

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156. *See supra* section III.C (discussion of *Alliance Construction*).

157. *See, e.g.*, Youngs v. Peacehealth, 179 Wash. 2d 645, 651, 316 P.3d 1035, 1038 (2014); Sherman v. State, 128 Wash. 2d 164, 190, 905 P.2d 355, 370 (1995) (citing *Upjohn* for the principle that corporate attorney-client privilege might shield certain correspondence from discovery); Wright v. Grp. Health Hosp., 103 Wash. 2d 192, 202, 691 P.2d 564, 570 (1984) ("In enunciating a flexible 'control group' test, the *Upjohn* Court was expanding the definition of 'clients' so the laudable goals of the attorney client privilege would be applicable to a greater number of corporate employees.").

158. Dep't of Labor & Indus. v. Lyons Enter., Inc., 186 Wash. App. 518, 528 n.5, 347 P.3d 464, 469 n.5 (2015); *see also* Norman v. Dep't of Labor & Indus., 10 Wash. 2d 180, 184, 116 P.2d 360, 362 (1941) (a contractor is entitled to receive worker's compensation "if the essence of the work he is performing is his personal labor"); Jamison v. Dep't of Labor & Indus., 65 Wash. App. 125, 130, 827 P.2d 1085, 1088 (Wash. Ct. App. 1992). Indeed, Washington has considered this the employee/contractor distinction as far back as 1929: "[w]e confess that the question here is a most difficult one. The distinction between an employee, or servant, and an independent contractor, has been considered by the courts in numberless cases; but no statement of the rule has yet been made which perfectly fits every case." Burchett v. Dep't of Labor & Indus., 146 Wash. 85, 88–89, 261 P. 802, 803–04 (1927).

> We conclude that the statutory provision with which we are here concerned was intended to protect workmen . . . in those situations where the work could be done on a regular employer-employee basis but where, because of the time, place, manner of performance, and basis of payment, it could be urged that the workman was an independent contractor rather than employee. Prior to the 1937 enactment, the independent contractor, when injured, was not entitled to the protection of the workmen's compensation act. . . . It was felt to be desirable, and rightly so, to eliminate the technical issue of whether the workman was an employee or an independent contractor by giving him protection in either situation.[159]

Those who oppose Washington's adoption of the functional equivalent doctrine may cite a recent case where the Washington State Supreme Court declined to extend attorney-client privilege to communications between a former employee and corporate counsel.[160] In *Newman v. Highland School District*,[161] parents and a student-athlete filed a negligence suit against Highland School District after the student suffered a permanent brain injury at a football game.[162] The parents sought discovery of communications between coaches and school district after the coaches were no longer employed by the school district.[163]

On appeal, the Washington State Supreme Court held that these kind of post-employment communications were not protected.[164] The Court noted the clean nature of limiting the privilege to current employees and seemed concerned that allowing former employee privilege would open the floodgates to protect far too many communications.[165]

Newman is clearly distinguishable from the case of the independent contractor. In fact, the *Alliance Construction* test squares with the *Newman* Court's concerns. The *Alliance Construction* test, while retaining the flexibility needed in these cases, provides a clean, predictable framework for courts to apply. Its prescriptions concerning the "significant relationship" between the parties and the purpose, scope, and subsequent treatment of the relevant communications impose clear

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159. White v. Dep't of Labor & Indus., 48 Wash. 2d 470, 474, 294 P.2d 650, 653 (1956).

160. Newman v. Highland Sch. Dist., 186 Wash. 2d 769, 381 P.3d 1188 (2016).

161. 186 Wash. 2d 769, 381 P.3d 1188 (2016).

162. *Id.* at 774, 381 P.3d at 1189.

163. *Id.* at 775, 381 P.3d at 1190.

164. *Id.* at 780–81, 381 P.3d at 1192–93.

165. *Id.* at 782, 381 P.3d at 1193.

limits on any potential application of the privilege. There is little risk the doctrine would open the floodgates to claims from former employees; it would only allow contractors currently serving as the functional equivalent of employees to enjoy the same legal protections as those employees.[166]

B. There Are Significant Policy Reasons Supporting Washington's Adoption of the Functional Equivalent Doctrine

Setting aside the legal arguments, there are several policy reasons why Washington State would benefit from the adoption of the functional equivalent doctrine. This Comment considers three: equity, efficiency, and economics.

1. Equity

The first policy reason Washington should adopt the functional equivalent doctrine is equity. Black's Law Dictionary defines equity as "fairness," "impartiality," and "evenhanded dealing."[167] Because the distinction between an employee and a contracted worker is relatively arbitrary in nature—the former receives a wage in exchange for labor, and so does the latter—differences in rights based on the distinction are fundamentally unjust and inequitable.[168] This includes providing attorney-client privilege protections for communications made by an employee, but not by a contractor acting as the functional equivalent of an employee.

2. Efficiency

The second policy reason Washington should adopt the functional equivalent doctrine is efficiency—in other words, the ease of disposition for courts and administrative agencies. Adopting an approach identical to the Colorado Supreme Court or the Eighth Circuit's *Bieter* rule would provide Washington courts a deep and valuable source of law from other jurisdictions with identical rules, of which there are several. This would help streamline the resolution of cases as well as allow courts to observe and avoid the shortcomings in other states' jurisprudence. Moreover,

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166. *See generally* All. Const. Sols., Inc. v. Dep't of Corr., 54 P.3d 861 (Colo. 2002).

167. *Equity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

168. *See* U.S. CONST. amend. XIV, § 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws"); *Equity*, *supra* note 167 ("[t]he body of principles constituting what is fair and right; natural law").

adopting the rule would provide valuable predictability for attorneys and corporations utilizing independent contractors, who are currently in the dark as to whether communications between corporate counsel and contractors would be privileged.[169]

3. *Economics*

Lastly, Washington should adopt the functional equivalent doctrine to benefit the State's economy. As discussed in detail above, labor relationships have drastically evolved since even *Upjohn* was decided. Independent contractors are an increasingly relevant component of the American workforce: recent estimates from the Government Accountability Office suggest that "contingent" workers comprised more than 40% of the workforce in 2010, up from 35.3% in 2006.[170] With the rise of companies like UberX[171] and the increasing proliferation of contract employment, depriving attorney-client privilege to contractors serving as the functional equivalent of employees would no doubt stifle economic growth.

CONCLUSION

Like many facets of our modern world, labor relationships have grown increasingly "gray" in recent history. This ambiguity is reflected in the greater participation of independent contractors in the workforce, a trend that will likely continue. Courts have struggled to determine what types of protections traditionally provided to employees apply to their contracted equivalents. In the context of attorney-client privilege, the Eighth Circuit properly identified in *Bieter* that when a contractor is serving as the "functional equivalent" of a worker in a traditional employer-employee relationship, communications between the contractor and counsel for the contracting corporation should be protected. Several years later, the Colorado Supreme Court applied a broader test that extended protections to contractors acting outside of the relatively narrow test applied by the Eighth Circuit in *Bieter*.

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169. *See supra* section IV.D (discussion that this is an issue of first impression for Washington courts).

170. *See* GOV'T ACCOUNTABILITY OFFICE, *supra* note 1 ("Applying this broad definition to our analysis of data from the General Social Survey (GSS), we estimate that such contingent workers comprised 35.3 percent of employed workers in 2006 and 40.4 percent in 2010.").

171. *See generally How Does Uber Work?*, UBERESTIMATE, http://uberestimate.com/about-uber/#how-it-works [https://perma.cc/6DGF-YZUG].

Washington courts have yet to consider the issue of attorney-client privilege specifically in the context of independent contractors. However, there is no doubt that the issue will eventually appear in our State, particularly considering the increasing presence of technology companies. When faced with this issue, Washington courts should apply the four-part test conceptualized by the Colorado Supreme Court in *Alliance Construction*. The test represents the cleanest and most protective solution to the contractor-privilege problem. Its adoption is a natural extension of Washington case law on privilege and would complement the protections already afforded to independent contractors in the context of worker's compensation. Finally, adopting the test would advance desirable policy goals, including equity, efficiency, and economics.