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## The Attorney-Client Privilege and Former Employees

Douglas R. Richmond

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## The Attorney-Client Privilege and Former Employees

### Cover Page Footnote

Managing Director, Aon Professional Services, Overland Park, Kansas. J.D., University of Kansas. Opinions expressed here are solely those of the author.

# THE ATTORNEY-CLIENT PRIVILEGE AND FORMER EMPLOYEES

*Douglas R. Richmond*<sup>+</sup>

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The attorney-client privilege protects essential communications between clients and their lawyers from unwelcome and sometimes potentially ruinous exposure. Reflecting its importance, observers have described the attorney-client privilege as one of the legal profession’s “crown jewels.”<sup>1</sup> The attorney-client privilege applies to “(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.”<sup>2</sup> “Privileged persons” include the client or prospective client, the lawyer, agents of the client or prospective client and the lawyer who facilitate communications between them, and agents of the lawyer who assist in the client’s representation.<sup>3</sup>

Organizational clients, like individuals, are entitled to assert the attorney-client privilege concerning communications within its scope.<sup>4</sup> For example,

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<sup>+</sup> Managing Director, Aon Professional Services, Overland Park, Kansas. J.D., University of Kansas. Opinions expressed here are solely those of the author.

1. John M. Barkett, *Attorney-Client Privilege*, LITIG., Winter 2019, at 34, 34.

2. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. L. INST. 2000).

3. *Id.* § 70.

4. As countless courts have recited in opinions, the attorney-client privilege belongs to the client. *See, e.g.*, *Fiduciary Tr. Int’l of Cal. v. Klein*, 216 Cal. Rptr. 3d 61, 67 (Ct. App. 2017); *Ross v. Ill. Cent. R.R. Co.*, 129 N.E.3d 641, 653 (Ill. App. Ct. 2019); *Att’y Grievance Comm’n of Md. v. Powers*, 164 A.3d 138, 151 (Md. 2017); *Crossman v. Trs. of Fayetteville Tech. Cmty. Coll.*, 832 S.E.2d 223, 236 (N.C. Ct. App. 2019) (quoting *In re Miller*, 584 S.E.2d 772, 788 (N.C. 2003)); *Burnham v. Cleveland Clinic*, 89 N.E.3d 536, 541 (Ohio 2016); *Commonwealth v. McCullough*,

corporations can assert the privilege,<sup>5</sup> as can partnerships,<sup>6</sup> limited liability companies,<sup>7</sup> governmental bodies,<sup>8</sup> homeowners' associations and other private associations,<sup>9</sup> and trusts.<sup>10</sup> Assuming that a communication otherwise qualifies as privileged, it does not matter whether the lawyer involved is in-house or outside counsel.<sup>11</sup>

In the organizational context, a recurring problem is determining who among the entity's employees speaks on its behalf, such that communications between the entity's lawyers and those employees may be protected against discovery by

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201 A.3d 221, 242 (Pa. Super. Ct. 2018); *In re Mt. Hawley Ins. Co.*, 829 S.E.2d 707, 712 (S.C. 2019); *Arnoldy v. Mahoney*, 791 N.W.2d 645, 657 (S.D. 2010); *In re Cook*, 597 S.W.3d 589, 597 (Tex. App. 2020).

5. *Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 614 (Colo. App. 2019); *Nemours Found. v. Arroyo*, 292 So. 3d 6, 8 (Fla. Dist. Ct. App. 2019); *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 103 (Ga. 2013); *Harris Mgmt., Inc. v. Coulombe*, 151 A.3d 7, 15 (Me. 2016); *Frank v. Morgans Hotel Grp. Mgmt., LLC*, 116 N.Y.S.3d 889, 891 (App. Div. 2020) (quoting *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 704–05 (N.Y. 1989)); *Hermanson v. MultiCare Health Sys., Inc.*, 448 P.3d 153, 159 (Wash. Ct. App. 2019); *State ex rel. HCR ManorCare, LLC v. Stucky*, 776 S.E.2d 271, 282 (W. Va. 2015).

6. *See, e.g., In re Bieter Co.*, 16 F.3d 929, 930, 936, 939–40 (8th Cir. 1994) (applying the attorney-client privilege to communications with a partnership's independent consultant).

7. *See, e.g., Carpenters Pension Tr. v. Lindquist Fam., LLC*, No. C-13-01063 DMR, 2014 U.S. Dist. LEXIS 54335, at \*8–12 (N.D. Cal. Apr. 18, 2014) (applying corporate attorney-client privilege law to an LLC); *Montgomery v. eTreppid Techs., LLC*, 548 F. Supp. 2d 1175, 1179–87 (D. Nev. 2008) (reasoning that an LLC should be treated like a corporation for federal common law attorney-client privilege purposes); *In re Haynes*, 577 B.R. 711, 736–37 (Bankr. E.D. Tenn. 2017) (applying the subject matter test for the privilege to an LLC); *Fla. Marlins Baseball Club, LLC v. Certain Underwriters at Lloyd's London Subscribing to Policy No. 893/HC/97/9096*, 900 So. 2d 720, 721 (Fla. Dist. Ct. App. 2005) (upholding the privilege with respect to an LLC's in-house lawyer).

8. *See, e.g., Sandra T.E. v. S. Berywn Sch. Dist.* 100, 600 F.3d 612, 621 (7th Cir. 2010) (explaining the importance of recognizing the attorney-client privilege where government agencies are concerned); *Banks v. Off. of the Senate Sergeant-at-Arms*, 222 F.R.D. 1, 3 (D.D.C. 2004) (stating that there is “no doubt that government agencies” may invoke the attorney-client privilege); *Wood v. Superior Ct. of San Diego Cnty.*, 259 Cal. Rptr. 3d 798, 808 (Ct. App. 2020) (“It is well settled that a public entity enjoys an attorney-client relationship with its lawyers and the attorney-client privilege protects communications made in the course of that relationship.”); *Affiniti Colo.*, 461 P.3d at 614 (noting that the “privilege applies to . . . public entities”); *Suffolk Constr. Co. v. Div. of Cap. Asset Mgmt.*, 870 N.E.2d 33, 38 (Mass. 2007) (stating that qualifying communications between governmental entities and their counsel are protected under standard attorney-client privilege rules); *Nelson v. City of Billings*, 412 P.3d 1058, 1068 (Mont. 2018) (stating that the attorney-client privilege “protect[s] governmental agencies and employees like any other party to civil litigation”); *Paxton v. City of Dall.*, 509 S.W.3d 247, 260 (Tex. 2017) (explaining the importance of the privilege in the governmental context).

9. *See, e.g., Fouts v. Breezy Point Condo. Ass'n*, 851 N.W.2d 845, 849–50 (Wis. Ct. App. 2014).

10. *Snow, Christensen & Martineau v. Lindberg*, 299 P.3d 1058, 1066–67 (Utah 2013).

11. *FTC v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018); *Cormack v. United States*, 117 Fed. Cl. 392, 397 (Fed. Cl. 2014).

the organization's adversaries and other third parties.<sup>12</sup> And, of course, as organizations experience the inevitable turnover in their workforces, another issue surfaces: when, if ever, does the attorney-client privilege attach to communications between the organization's lawyers and *former employees* of the organization? This Article strives to answer that question.

Looking ahead, Part I of this Article outlines the tests that courts apply when analyzing attorney-client privilege claims involving organizational clients. These tests, which control the privilege determination when current employees of the organization communicate with lawyers for the organization, provide the foundation for analyzing privilege claims where former employees are concerned. Part II examines the three approaches that courts have taken when deciding whether lawyers' communications with a client's former employees should be protected by the attorney-client privilege. In doing so, it discusses the leading case supporting each approach. Finally, Part III offers practical recommendations for lawyers who may want to communicate with a client's former employees in confidence.

## I. ORGANIZATIONAL CLIENTS AND THE ATTORNEY-CLIENT PRIVILEGE

Courts have historically applied two tests to analyze organizational attorney-client privilege claims: the "control group" test and the "subject matter" test. Some courts have adopted a third test that closely tracks the subject matter test,<sup>13</sup> often called the "modified subject matter test."<sup>14</sup> The hierarchical control group test has largely been replaced by the subject matter tests, although a few courts do still employ the control group approach to the privilege.<sup>15</sup>

### A. The Control Group Test

Once a leading corporate attorney-client privilege test, the control group test appears to have crystallized in *City of Philadelphia v. Westinghouse Electric Corp.*<sup>16</sup> The *Westinghouse Electric* court reasoned that if the employee

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12. See, e.g., *Am. Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 88 (D. Del. 1962) ("While [attorney-client privilege] rules may be simply stated, the problem of applying them when a corporation is involved is quite difficult. . . . Who speaks for the corporation? Are the statements of all the employees the statements of the client?").

13. *In re Bieter Co.*, 16 F.3d 929, 935–36 (8th Cir. 1994).

14. See, e.g., *Baisley v. Missisquoi Cemetery Ass'n*, 708 A.2d 924, 931 (Vt. 1998) ("Following Upjohn, two tests have emerged to define the client in the corporate context: the subject-matter test, and the modified subject-matter test.").

15. See, e.g., *Langdon v. Champion*, 752 P.2d 999, 1002 (Alaska 1988) (referring to ALASKA R. EVID. 503(a)(2), which "adopt[ed] the 'control group' test"); *Caldwell v. Advoc. Condell Med. Ctr.*, 87 N.E.3d 1020, 1036 (Ill. App. Ct. 2017) ("In order to determine which employees of a corporation enjoy the attorney-client privilege when communicating with an attorney on behalf of the corporation, Illinois applies the control-group test."); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 646 (Tex. 1995) (referring to TEX. R. CIV. EVID. 503(a)(2), which implemented the control group test).

16. *City of Phila. v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962).

communicating with a corporation's lawyer is positioned "to control or even to take a substantial part in a decision about any action which the corporation may take" based on the lawyer's advice, "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 attorney-client privilege applies.<sup>17</sup> More succinctly, for a communication to be privileged under the control group test, it must be made by an employee who "has the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or is an authorized member of a group that has such power."<sup>18</sup> Only these employees qualify as the client for privilege purposes.<sup>19</sup> In short, the control group test as originally crafted essentially requires that the employee a lawyer communicates with be a member of senior management with ultimate decision-making authority for the communication to be privileged.<sup>20</sup>

Unfortunately, the control group test limits lawyers' ability to communicate candidly with mid- and low-level employees of the corporation or other organization, thereby restricting the lawyers' access to potentially valuable information.<sup>21</sup> These limitations, in turn, impair lawyers' ability to properly advise their clients.<sup>22</sup> In this way the control group test frustrates a key purpose of the attorney-client privilege.<sup>23</sup>

Some courts, correctly recognizing that organizational decision-making tends to be a process and is often collaborative, have relaxed the control group test. In *Caldwell v. Advocate Condell Medical Center*,<sup>24</sup> for example, the court explained that under Illinois law,

an employee whose advisory role to top management in a particular area is such that a final decision would not normally be made without his or her opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority, is properly within the control group.<sup>25</sup>

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17. *Id.* at 485.

18. *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968).

19. EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 189 (6th ed. 2017).

20. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257–58 (Ill. 1982); *see also* *Garrison v. Gen. Motors Corp.*, 213 F. Supp. 515, 518–19 (S.D. Cal. 1963) (determining that GMC's "officers, directors, [and] department heads" constituted the corporation's control group).

21. *See* *Upjohn Co. v. United States*, 449 U.S. 383, 391–92 (1981) (explaining the control group test's drawbacks).

22. *Id.*

23. *See* *State v. Robinson*, 209 A.3d 25, 46 (Del. 2019) ("The privilege was designed to encourage full disclosure by a client to his or her attorney in order to facilitate the rendering of legal advice."); *Neuman v. State*, 773 S.E.2d 716, 719 (Ga. 2015) ("The privilege allows for open communications between an attorney and his or her client . . . thereby enabling the attorney to gather complete and accurate information about the client's situation.").

24. *Caldwell v. Advoc. Condell Med. Ctr.*, 87 N.E.3d 1020 (Ill. App. Ct. 2017).

25. *Id.* at 1036 (citing *Consolidation Coal Co.*, 432 N.E.2d at 258).

Thus, under this formulation of the control group test, the control group may extend beyond the actual organizational decision-makers.<sup>26</sup> Even under this more liberal interpretation, however, the control group test does not protect as privileged lawyers' communications with employees who merely supply an organization's decision-makers with facts.<sup>27</sup>

### B. The Subject Matter Test

In comparison to the control group test, the subject matter test affords much broader privilege protection to corporate and other organizational clients. Under the subject matter test as originally conceived, a lawyer's communication with any employee may be privileged if (1) the lawyer is representing the corporation in his or her capacity as a lawyer; (2) the communication is intended to secure legal advice for the corporation; (3) the employee is communicating with the lawyer at a superior's request or direction; and (4) the employee's duties or responsibilities include the subject of the communication.<sup>28</sup> Applying this test, the employee's position or rank is irrelevant to the privilege analysis.<sup>29</sup> The Supreme Court embraced the subject matter approach in *Upjohn Co. v. United States*,<sup>30</sup> which is regarded as "the foundational case" on the attorney-client privilege in the organizational realm.<sup>31</sup> In *Upjohn*, the court rejected the control group test in favor of a subject matter approach essentially because, as noted earlier, the control group test "overlooks the fact that 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."<sup>32</sup>

Although the Supreme Court rejected the control group test in favor of some form of subject matter test for application of the attorney-client privilege in a corporate setting, the Court declined to formulate a specific test.<sup>33</sup> The Court's reluctance to do so has since led courts to reason that there are two forms of the

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26. See *Mlynarski v. Rush Presbyterian-St. Luke's Med. Ctr.*, 572 N.E.2d 1025, 1028 (Ill. App. Ct. 1991) ("Under the control-group test, there are two tiers of corporate employees whose communications with the corporation's attorney are protected. The first tier consists of the decision-makers, or top management. The second tier consists of those employees who directly advise top management, and upon whose opinions and advice the decision-makers rely.").

27. *Caldwell*, 87 N.E.3d at 1036; *Doe v. Twp. High Sch. Dist. 211*, 34 N.E.3d 652, 673 (Ill. App. Ct. 2015) (quoting *Consolidation Coal Co.*, 432 N.E.2d at 258).

28. See *Upjohn Co. v. United States*, 449 U.S. 383, 394–95 (1981) (sketching the circumstances of the communications to which the court applied the attorney-client privilege); see also EPSTEIN, *supra* note 19, at 192 (describing the subject matter test as it developed prior to *Upjohn* as including the third and fourth elements listed above).

29. EPSTEIN, *supra* note 19, at 189.

30. *Upjohn*, 449 U.S. at 394–95.

31. *In re Gen. Motors, LLC, Ignition Switch Litig.*, 80 F. Supp. 3d 521, 527 (S.D.N.Y. 2015).

32. *Upjohn*, 449 U.S. at 390.

33. *Id.* at 396.

subject matter test.<sup>34</sup> In any event, it is clear following *Upjohn* that under the subject matter test, however it is articulated, a lawyer's confidential communications with any employee are privileged when they concern matters within the scope of the employee's responsibilities and the employee is aware that the communications are intended to enable or facilitate the lawyer's representation of the corporation.<sup>35</sup> In this way, the subject matter test is a functional test with the fundamental goal of enhancing the flow of legally consequential or relevant information from knowledgeable people inside the organization to the organization's lawyers.<sup>36</sup>

The subject matter test is superior to the control group test because the subject matter test recognizes that employees outside the organization's control group may know facts that are essential to the organization's need for, or reliance on, legal advice. The subject matter test also "more realistically reflects the process of corporate information gathering and dissemination" and how corporations make decisions.<sup>37</sup> It is therefore understandable that the subject matter test has widely displaced the control group test.

### C. *The Modified Harper & Row Test, Diversified Industries Test, or Modified Subject Matter Test*

The third test, which was formulated before the Supreme Court embraced the subject matter approach in *Upjohn*, is often called the "modified *Harper & Row* test," or the "*Diversified Industries* test," after the federal cases from which it derives: *Harper & Row Publishers, Inc. v. Decker*,<sup>38</sup> and *Diversified Industries*,

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34. See, e.g., *Baisley v. Missisquoi Cemetery Ass'n*, 708 A.2d 924, 931 (Vt. 1998) ("Following *Upjohn*, two tests have emerged to define the client in the corporate context: the subject-matter test, and the modified subject-matter test.").

35. See, e.g., *Grand Canyon Skywalk Dev., LLC v. Cieslak*, Nos. 2:15-cv-01189-JAD-GWF, 2:13-cv-00596-JAD-GWF, 2015 U.S. Dist. LEXIS 107457, at \*21 (D. Nev. Aug. 13, 2015) ("*Upjohn* holds that the privilege applies to communications with corporate employees, regardless of their position, when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation."); *MGA Ent., Inc. v. Nat'l Prods. Ltd.*, No. CV 10-07083 JAK (SSx), 2012 U.S. Dist. LEXIS 108408, at \*6 (C.D. Cal. Aug. 2, 2012) ("According to the Supreme Court, the privilege applies to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation."); *United States v. Ghavami*, 882 F. Supp. 2d 532, 538-39 (S.D.N.Y. 2012) ("Within a corporation . . . the attorney-client privilege protects communications by corporate employees to counsel for the corporation who is acting as a lawyer, as long as the communications are made at the direction of corporate superiors in order to secure legal advice and the employees are aware that they are being questioned in connection with the provision of such advice.").

36. See John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 459 (1982) (discussing *Upjohn*).

37. EPSTEIN, *supra* note 19, at 191.

38. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970).

*Inc. v. Meredith*.<sup>39</sup> The *Harper & Row* and *Diversified Industries* courts were persuaded that the control group test was undesirable for at least two reasons. First, it inhibits the free flow of material information from employees to the corporation's lawyers and thereby defeats the purpose of the attorney-client privilege by impairing the lawyers' ability to marshal the facts necessary to properly advise their client.<sup>40</sup> Second, it potentially dissuades employees from speaking with corporate counsel "in a good faith effort to promote compliance with the complex laws governing corporate activity."<sup>41</sup> These courts favored "a more reasoned approach" to corporate attorney-client privilege questions that focused on "why an attorney was consulted, rather than with whom the attorney communicated."<sup>42</sup> The *Diversified Industries* court thus framed the corporate attorney-client privilege test preferably to be applied as follows:<sup>43</sup>

[T]he 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.<sup>44</sup>

The modified *Harper & Row* test or *Diversified Industries* test is essentially the subject matter test with the "need to know" element added,<sup>45</sup> hence the modified subject matter test description.<sup>46</sup> As should be apparent, the "need" refers to certain employees' need for the lawyer's advice to perform their duties or to act upon the lawyer's advice for the organization's benefit—not to the lawyer's need for the information known by the employees.<sup>47</sup>

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39. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978).

40. *Id.* at 609.

41. *Id.*

42. *Id.* (referring to the *Harper & Row* test).

43. As noted earlier, some courts describe the *Harper & Row* test or the *Diversified Industries* test as the modified subject matter test even though the test pre-dates the Supreme Court's decision in *Upjohn*. See, e.g., *Baisley v. Missisquoi Cemetery Ass'n*, 708 A.2d 924, 931 (Vt. 1998) (combining the *Harper & Row* and *Diversified Industries* tests).

44. *Diversified Industries*, 572 F.2d at 609.

45. See *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 n.10 (Fla. 1994) (explaining that the *Diversified Industries* court "modified the subject matter test in an effort to focus on why the attorney was consulted and to prevent the routine channeling of information through the attorney to prevent subsequent disclosure").

46. Of note, one court has credited the *Harper & Row* court with formulating the subject matter test, and stated that the modified subject matter test originated with the *Diversified Industries* court. See *Keefe v. Bernard*, 774 N.W.2d 663, 671–72 (Iowa 2009) (discussing the various attorney-client privilege tests).

47. See *Diversified Industries*, 572 F.2d at 610–11 (noting that the corporation carefully avoided disseminating the information at issue beyond those employees immediately concerned

## II. THE PRIVILEGE AND FORMER EMPLOYEES OF AN ORGANIZATIONAL CLIENT

### A. Background and Overview

Courts formulated the control group, subject matter, and modified subject matter tests for the privilege with organizations' current employees in mind. The extension of an organization's attorney-client privilege to former employees is generally traced to Chief Justice Burger's concurring opinion in *Upjohn*.<sup>48</sup> As noted earlier, the Supreme Court in *Upjohn* declined to formulate a specific privilege test, and it also passed on deciding whether the attorney-client privilege should attach to the *Upjohn* lawyers' communications with former employees regarding activities that occurred while they were employed by the corporation.<sup>49</sup> Chief Justice Burger argued that the Supreme Court should have created a clear standard for applying the attorney-client privilege in the corporate context, and he would have extended that standard to corporate counsel's communications with former employees.<sup>50</sup> If Chief Justice Burger would have had his way, the Court would have established

[A] general rule [that] 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 . . . (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.<sup>51</sup>

Of course, Chief Justice Burger did not get his way in *Upjohn*. In the years since, courts have somewhat inconsistently extended the attorney-client

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with the matter); *United States v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603, 620 (D.D.C. 1979) ("The privilege applies to the communication only if the employee is the source of the information going to the attorney or is a regular conduit for such information, or, in response, if the information is revealed in the attorney's advice and the employee to whom the information is disclosed has a 'need to know' the information to carry out his own duties.").

48. See *Cool v. BorgWarner Diversified Transmission Prods., Inc.*, No. IP 02-960-C(B/S), 2003 U.S. Dist. LEXIS 20137, at \*3-5 (S.D. Ind. Oct. 29, 2003) (discussing Chief Justice Burger's concurrence in *Upjohn*).

49. *Upjohn Co. v. United States*, 449 U.S. 383, 394 n.3 (1981) ("Petitioners argue[ ] that the privilege should nonetheless apply to communications by these former employees concerning activities during their period of employment. Neither the District Court nor the Court of Appeals had occasion to address this issue, and we decline to decide it without the benefit of treatment below.").

50. See *id.* at 402-03 (Burger, C.J., concurring) ("I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.").

51. *Id.* (emphasis added).

privilege to lawyers' communications with clients' former employees.<sup>52</sup> This is particularly true when you factor in control group jurisdictions, where former employees, by definition, cannot be part of an organization's control group.<sup>53</sup>

In many jurisdictions, courts reason that lawyers' communications with former employees concerning events or matters that occurred while the former employees worked for the organization are privileged if they otherwise satisfy the subject matter test or modified subject matter test.<sup>54</sup> The privilege generally

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52. See *infra* notes 53–58 (collecting cases).

53. See, e.g., *Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515, 518 (N.D. Ill. 1990) (applying Illinois law and refusing to extend the privilege to former employees).

54. See, e.g., *In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997) (stating that the *Upjohn* analysis “applies equally to former employees”); *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (quoting *In re Coordinated Pretrial Proc.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981)) (applying the privilege to “ex-employees”); *Jacobs v. Alam*, No. 15-10516, 2020 U.S. Dist. LEXIS 100618, at \*17 (E.D. Mich. June 9, 2020) (applying the attorney-client privilege to a former city employee); *Hairston v. Royal Bldg. Prods., Inc.*, No. 1:18cv00003, 2019 U.S. Dist. LEXIS 63776, at \*2–3 (W.D. Va. Feb. 15, 2019) (following *In re Allen*, 106 F.3d at 606); *Subramanian v. Lupin Inc.*, No. 17-CV-5040 (RA) (KHP), 2019 U.S. Dist. LEXIS 68776, at \*5–8 (S.D.N.Y. Apr. 23, 2019) (recognizing the attorney-client privilege in the former client context, but noting that in the absence of a privilege log or the submission of particular communications, it could not rule); *MF Glob. Holdings Ltd. v. PricewaterhouseCoopers LLP*, 232 F. Supp. 3d 558, 569 (S.D.N.Y. 2017) (quoting *Indergrit v. Rite Aid Corp.*, No. 08-cv-9361, 2016 U.S. Dist. LEXIS 150565, at \*3 (S.D.N.Y. Oct. 31, 2016)); *Hanover Ins. Co. v. Plaquemines Parish Gov’t*, 304 F.R.D. 494, 498–500 (E.D. La. 2015) (predicting how the Louisiana Supreme Court would rule); *Goswami v. DePaul Univ.*, No. 12 C 7167, 2014 U.S. Dist. LEXIS 44249, at \*2 (N.D. Ill. Mar. 31, 2014) (explaining that the Illinois control group test did not apply, and federal law controlled the privilege question); *Gary Friedrich Enters., LLC v. Marvel Enters., Inc.*, No. 08 Civ. 1533 (BSJ) (JCF), 2011 U.S. Dist. LEXIS 54154, at \*16–17 (S.D.N.Y. May 20, 2011) (applying the attorney-client privilege where the former employee was deposed regarding his work while employed by the defendant); *New York v. Salazar*, No. 6:08-CV-0644(LEK/DEP), 2011 WL 13205947, at \*5 (N.D.N.Y. June 23, 2011) (“Cason’s discussions with counsel for the DOI that occurred during the course of his employment with DOI and those of whose ‘nature and purpose’ was for the DOI’s counsel to learn facts related to this lawsuit that the defendant Cason was aware of as a result of his employment, regardless of when they occurred, are privileged.”); *Weber v. FUJIFILM Med. Sys. U.S.A.*, No. 3:10 CV 401 (JBA), 2011 U.S. Dist. LEXIS 82340, at \*25 (D. Conn. July 27, 2011) (refusing to reconsider an earlier decision recognizing the privilege); *In re Flonase Antitrust Litig.*, 723 F. Supp. 2d 761, 765 (E.D. Pa. 2010) (“Because [the witness’s] testimony concerned matters within the scope of her former responsibilities with [the] defendant corporation and because her conversations with defense counsel may be relevant to [the] defendant’s legal strategy, her communications with defense counsel fall within the attorney-client privilege.”); *Fisher v. Halliburton*, Nos. H-05-1731, H-06-1971, 2009 U.S. Dist. LEXIS 14736, at \*10 (S.D. Tex. Feb. 25, 2009) (“Richard’s deposition testimony and preparation for deposition almost exclusively concern[ed] events within the scope of his duties while working for defendants. . . . Therefore, . . . all communications between Richard and the defendants’ counsel are protected as privileged provided they relate to events concerning Richard’s duties while employed by defendants.”); *Misner v. Potter*, No. 2:07-CV-0330 TS, 2008 U.S. Dist. LEXIS 136920, at \*5 (D. Utah June 19, 2008) (“[U]nder . . . *Upjohn* and its progeny, the attorney-client privilege applies to confidential communications concerning matters within the scope of the employee’s corporate duties whether or not they are currently employed.”); *City of N.Y. v. A-1 Jewelry & Pawn, Inc.*, No. 06 CV 2233 (JBW), 2007 U.S. Dist. LEXIS 117698, at \*23 (E.D.N.Y. Dec. 10, 2007) (“[T]he attorney-client privilege applies to communications between in-

does not, however, protect communications between organizations' lawyers and former employees concerning matters or issues that occurred or arose after the former employees left the organization.<sup>55</sup> In the latter instance, courts treat former employees like any other third-party fact witness.<sup>56</sup> Other courts hold that former employees generally should be treated like any other third-party fact witness, while recognizing that unusual factual circumstances may compel a different result.<sup>57</sup> Still other courts flatly decline to recognize the attorney-client privilege where lawyers for a corporation or other organization communicate with former employees.<sup>58</sup>

### B. Recognizing the Privilege in the Former Employee Context

Although only a district court decision, and thus lacking precedential value,<sup>59</sup> *Peralta v. Cendant Corp.*<sup>60</sup> is generally regarded as the leading case on the application of the attorney-client privilege to former employees. In that case,

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house counsel for a company and that company's former employee."); *Export-Import Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 112 (S.D.N.Y. 2005) ("Virtually all courts hold that communications between company counsel and former company employees are privileged if they concern information obtained during the course of employment."); *Cool v. BorgWarner Diversified Transmission Prods., Inc.*, No. IP 02-960-C(B/S), 2003 U.S. Dist. LEXIS 20137, at \*5-6 (S.D. Ind. Oct. 29, 2003) (citing *In re Allen*, 106 F.3d at 606); *Miramar Constr. Co. v. Home Depot, Inc.*, 167 F. Supp. 2d 182, 184-85 (D.P.R. 2001) (applying Puerto Rico law and reasoning that applying the privilege to communications with former employees was consistent with the underlying purposes of the attorney-client privilege, but declining to stretch the privilege to apply to a former independent contractor of the defendant); *E.I. DuPont de Nemours & Co. v. Medtronic Vascular, Inc.*, No. N10C-09-058 JRS CCLD, 2012 Del. Super. LEXIS 129, at \*18-20 (Del. Super. Ct. Mar. 13, 2012) (enforcing Medtronic's privilege because the communications with the former employee "relate[d] directly to 'knowledge obtained or conduct that occurred'" while she worked for Medtronic); *Radovic v. City of N.Y.*, 642 N.Y.S.2d 1015, 1017 (Sup. Ct. 1996) (reasoning that the witness's status as a former city employee was of "no consequence" from a privilege perspective); *Morris v. Scenera Rsch., LLC*, No. 09 CVS 19678, 2011 NCBC LEXIS 34, at \*17 (N.C. Super. Ct. Aug. 26, 2011) (relying on *In re Allen*, 106 F.3d at 606).

55. See, e.g., *Salazar*, 2011 WL 13205947, at \*5 ("[C]ommunications between [corporate] counsel and [the former employee] which bear on or otherwise potentially affect the [sic] his testimony, like facts of which he had no prior knowledge but was informed of by counsel and advice on how to handle deposition questioning, are not privileged . . ."); *City of N.Y. v. Coastal Oil N.Y., Inc.*, No. 96 Civ. 8667 (RPP), 2000 U.S. Dist. LEXIS 1010, at \*5-6 (S.D.N.Y. Feb. 8, 2000) (declining to recognize the privilege where the plaintiffs wanted to inquire whether the defendants' former employee had his memory refreshed by the defendant's in-house counsel in preparation for his deposition).

56. See THOMAS E. SPAHN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE: A PRACTITIONER'S GUIDE* 126 (3d ed. 2013).

57. See, e.g., *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (expressing the narrower general rule and then identifying possible exceptions).

58. See, e.g., *Newman v. Highland Sch.* Dist. No. 203, 381 P.3d 1188, 1193-94 (Wash. 2016) (limiting the scope of the attorney-client privilege to the duration of the employment relationship).

59. See *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 648 F. Supp. 2d 226, 231 (D. Mass. 2009) ("As Judges Posner and Easterbrook have repeatedly and accurately observed, with characteristic bluntness, district court decisions are neither authoritative nor precedential.").

60. *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999).

Ramon Peralta sued Cendant for employment discrimination.<sup>61</sup> His lawyer deposed Peralta's former supervisor, Randi Klaber, who no longer worked for Cendant.<sup>62</sup> Peralta's lawyer asked Klaber if she had discussed the deposition with anyone.<sup>63</sup> Klaber said that she had spoken with Cendant's lawyer, Maureen Bresnan.<sup>64</sup> Peralta's lawyer asked Klaber about that conversation, but "Bresnan objected and instructed [Klaber] not to answer the question."<sup>65</sup> After taking a break, Peralta's lawyer "asked [Klaber] what, if anything, she had discussed with [Bresnan] during the break. [Bresnan] again objected, and instructed her not to answer."<sup>66</sup> The parties then involved the court in the dispute.<sup>67</sup>

In a quick telephone hearing, Bresnan stated that she had a "two-way discussion" with Klaber in preparation for the deposition.<sup>68</sup> Klaber reportedly talked about the facts of the case, and Bresnan told Klaber "about 'the defendant's position.'"<sup>69</sup> According to Klaber, their conversation during the deposition break "involved her request for 'guidance on how to answer a line of inquiry that she perceived may cause her problems or may be unclear.'"<sup>70</sup> The parties finished Klaber's deposition and submitted letter briefs to the court.<sup>71</sup>

The *Peralta* court concluded that, under federal law, "any privileged information" Klaber obtained while employed by Cendant, including "any information conveyed" by Cendant's counsel during that time, remained privileged even after she left Cendant.<sup>72</sup> That conclusion did not, however, fully resolve the parties' dispute over communications between Klaber and Bresnan after Klaber left Cendant.<sup>73</sup> Thus, the court went on to explain:

To the extent that conversations between Ms. Bresnan and Ms. Klaber went beyond Ms. Klaber's knowledge of the circumstances of [Peralta's] employment and termination, and beyond Ms. Klaber's other activities within the course of her employment with the defendant, such communications, if any, have not been shown to be entitled to defendant's attorney-client privilege. If, for example, Ms. Bresnan informed Ms. Klaber of facts developed during the litigation, such as testimony of other witnesses, of which Ms. Klaber would not have had prior or independent personal knowledge, such

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61. *Id.* at 39.

62. *Id.*

63. *Id.*

64. *Id.* (noting that Bresnan only represented Cendant, and did not also represent Klaber).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 41.

73. *Id.*

communications would not be privileged, particularly given their potential to influence a witness to conform or adjust her testimony to such information, consciously or unconsciously. Although it is not clear from the record of the oral argument what Ms. Bresnan meant by ‘defendant’s position,’ to the extent these communications exceeded the boundaries discussed above, they are not covered by Cendant’s attorney-client privilege. Further, with respect to the inquiry into Ms. Bresnan and Ms. Klaber’s discussions during the break as to how a question should be handled, they have not been shown to be entitled to any privilege, and opposing counsel has the right to ask about matters that may have affected or changed the witness’s testimony.<sup>74</sup>

The court reasoned that it should be relatively easy to distinguish between lawyers’

privileged and non-privileged communications with former employees . . . if the essential point is kept in mind: did the communication relate to the former employee’s conduct and knowledge, or communication with [the organization’s] counsel, during his or her employment? If so, such communication is protected from disclosure by [the organization]’s attorney-client privilege under *Upjohn*.<sup>75</sup>

In extending the attorney-client privilege to former employees, the *Peralta* court might be criticized for having overlooked the *Upjohn* requirement that employees be acting at their superiors’ direction when speaking with the company’s lawyers for the privilege to enclothe those communications.<sup>76</sup> But the *Peralta* court did, in fact, take *Upjohn*’s managerial direction requirement into account in holding as it did. The *Peralta* court specifically noted that “wholesale application of the *Upjohn* principles to former employees as if they were no different than current employees” was not justified by *Upjohn*’s underlying rationale because, as a former employee, Klaber was not speaking with Bresnan at the direction of Cendant’s management, and she had no duty to furnish the information sought in her deposition.<sup>77</sup> It was principally for this reason that the court limited the reach of corporations’ attorney-client privilege to communications that “relate to the former employee’s conduct and knowledge, or communications with [corporate] counsel, during his or her employment[.]”<sup>78</sup> So, while it certainly is fair to disagree with the *Peralta* court’s conclusion, it is not reasonable to criticize the court for supposedly overlooking one of *Upjohn*’s essential principles.

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74. *Id.*

75. *Id.*

76. *See* *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 305 (E.D. Mich. 2000).

77. *Peralta*, 190 F.R.D. at 40–41.

78. *Id.* at 41.

Many courts follow *Peralta*.<sup>79</sup> Other courts, however, draw the privilege lines more narrowly than the *Peralta* court did.<sup>80</sup> And, as noted earlier, still other courts have simply refused to recognize the privilege in connection with former employees.<sup>81</sup>

*C. A Narrower View of the Privilege's Application to Former Employees*

*Infosystems, Inc. v. Ceridian Corp.* is the best-known case taking a narrower view of an organization's extension of its attorney-client privilege to former employees.<sup>82</sup> *Infosystems* involved defendant Sarla Software's objection to the deposition of a former employee, Jay Raghvandaran.<sup>83</sup> The subpoena for his deposition commanded him to bring various documents reflecting his communications with Sarla's lawyers.<sup>84</sup> Sarla argued that Raghvandaran's communications with its lawyers were privileged.<sup>85</sup> Relying on *Peralta*, Sarla asserted that a company's attorney-client privilege covers communications between the company's counsel and a former employee where the communications (1) concern knowledge obtained or conduct that occurred during the former employee's employment with the company; or (2) relate to privileged communications that occurred during the employment relationship.<sup>86</sup> Sarla contended that it was thus entitled to a protective order concerning Raghvandaran's deposition.<sup>87</sup> The *Infosystems* court was underwhelmed by Sarla's argument.

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79. See, e.g., *Jacobs v. Alam*, No. 15-10516, 2020 U.S. Dist. LEXIS 100618, at \*16–17 (E.D. Mich. June 9, 2020) (following the *Peralta* court's reasoning in applying the attorney-client privilege to a former employee); *Winthrop Res. Corp. v. CommScope, Inc. of N.C.*, No. 5:11-CV-172, 2014 U.S. Dist. LEXIS 158413, at \*9-10 (W.D.N.C. Nov. 7, 2014) (discussing *Peralta* and concluding that it “govern[ed] the current discovery dispute”); *Gioe v. AT&T, Inc.*, No. CV 09-4545 (LDW) (AKT), 2010 U.S. Dist. LEXIS 99066, at \*4–5 (E.D.N.Y. Sept. 20, 2010) (quoting *Peralta*, 190 F.R.D. at 41–42); *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004) (discussing and adopting the *Peralta* court's privilege test for former employees).

80. See, e.g., *United States v. Philip Morris USA, Inc.*, No. 99-2496 (GK), 2005 WL 8156890, at \*3 (D.D.C. Jan. 21, 2005) (explaining that the attorney-client privilege did not apply because the former employee was not, nor could have been, required to meet with the defendant's lawyers); *Infosystems*, 197 F.R.D. at 305–06 (reasoning that the attorney-client privilege applies only where the former employee spoke with a lawyer at management's direction while working for the organization, the former employee has a “present connection or agency relationship” with the organization, or the communication concerns a “confidential matter that was uniquely within the knowledge of the former employee when [s]he worked for the” organization).

81. See, e.g., *Newman v. Highland Sch.* Dist. No. 203, 381 P.3d 1188, 1192–94 (Wash. 2016) (limiting the attorney-client privilege to the duration of the employment relationship).

82. *Infosystems*, 197 F.R.D. at 306.

83. *Id.* at 304.

84. *Id.*

85. *Id.*

86. *Id.* at 305.

87. See *id.* at 304 (identifying the motions before the court).

Addressing Sarla's second point first, the *Infosystems* court acknowledged that privileged communications between an employee and a company's lawyer do not automatically lose their protected status when the employee leaves the company.<sup>88</sup> But, that principle was irrelevant here because the subpoenaed materials did not encompass privileged communications that occurred while Raghvandaran worked at Sarla.<sup>89</sup> With respect to Raghvandaran's communications with Sarla's lawyers concerning his activities or knowledge acquired during his employment with Sarla, the court reasoned that "the ruling in *Peralta* sweeps too broadly."<sup>90</sup>

The *Infosystems* court explained that in ruling as it did, the *Peralta* court relied heavily on the principles underlying the subject matter test in *Upjohn* and on Chief Justice Burger's concurring opinion in *Upjohn*.<sup>91</sup> In extending the attorney-client privilege to former employees, the *Peralta* court skipped the *Upjohn* requirement that an employee must be speaking at the direction of management for the privilege to apply, which Chief Justice Burger included in his proposed extension of the privilege to former employees.<sup>92</sup> Absent this element, the *Infosystems* court observed, former employees do not qualify as the corporate lawyer's client, they share no interest with the corporation or other organization in the outcome of the litigation, and their willingness to furnish information to the lawyer for the corporation or other organization is not directed by the entity's management, but is instead purely voluntary.<sup>93</sup> That being the case, it is nearly impossible to distinguish a former employee from any other third party who might have pertinent information about an organizational litigant.<sup>94</sup>

The *Infosystems* court concluded that a lawyer's "communications with a former employee of the client corporation generally should be treated no differently from communications with any other third-party fact witness."<sup>95</sup> To be sure, the court noted, "there are exceptions to this general rule."<sup>96</sup> For example, and as the court had previously observed, privileged communications that took place while the former employee worked for the organization do not lose their privileged status upon the former employee's departure.<sup>97</sup> There also may be cases where a former employee maintains an agency or consulting

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88. *Id.* at 305.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* (quoting *Clark Equip. Co. v. Lift Parts Mfg. Co.*, No. 82 C 4585, 1985 U.S. Dist. LEXIS 15457, at \*5 (N.D. Ill. Sept. 30, 1985)).

95. *Id.* at 306.

96. *Id.*

97. *Id.* (citing *Valassis v. Samelson*, 143 F.R.D. 118, 124 (E.D. Mich. 1992); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999)).

relationship with an organization, or where a communication between corporate counsel and a former employee after the former employee has left the corporation “concerns a confidential matter that was uniquely within the knowledge of the former employee when he worked for the . . . corporation,” such that the lawyer’s communications with the former employee “must be cloaked with the privilege in order for meaningful fact-gathering to occur.”<sup>98</sup>

Because Sarla claimed the privilege, it had to demonstrate that the lawyers’ communications with Raghvandan were meaningfully different from those “with any other third-party witness.”<sup>99</sup> Unfortunately for Sarla, it made no such showing, nor did it submit the subpoenaed materials to the court for *in camera* review; rather, it simply stood on its blanket claim of privilege regarding Raghvandan’s documents consistent with the holding in *Peralta*.<sup>100</sup> That approach did not satisfy the *Infosystems* court, which ordered the production of Raghvandan’s documents in connection with his deposition.<sup>101</sup>

As explained earlier, the *Peralta* court did not overlook the *Upjohn* requirement that an employee must be speaking at the direction of management for the privilege to apply, which Chief Justice Burger included in his proposed extension of the privilege to former employees.<sup>102</sup> On that point the *Infosystems* court was mistaken.

The *Infosystems* court also too casually analogized former employees to third-party fact witnesses. In rejecting the control group test for the attorney-client privilege, the *Upjohn* Court recognized that employees outside the corporate control group could, through actions or decisions within the course and scope of their employment, expose the corporation to liability.<sup>103</sup> It is for this reason that corporate counsel must be able to speak candidly with employees who have relevant knowledge of the events that gave rise to the matter at hand.<sup>104</sup> An employee’s departure from the corporation does not diminish her knowledge or corporate counsel’s need to speak frankly with her to appropriately advise the corporation. Nor does the employee’s separation from the corporation change

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98. *Id.* (citing *Valassis*, 143 F.R.D. at 123; *Peralta*, 190 F.R.D. at 40; *City of N.Y. v. Coastal Oil N.Y., Inc.*, No. 96 Civ. 8667 (RPP), 2000 U.S. Dis. LEXIS 1010, at \*2 (S.D.N.Y. Feb. 8, 2000)); *see, e.g.*, *Hanover Ins. Co. v. Plaquemines Parish Gov’t*, No. 12-1680, 2014 U.S. Dist. LEXIS 199405, at \*24–25 (E.D. La. Nov. 6, 2014) (citing *Infosystems*, 197 F.R.D. at 306) (upholding the attorney-client privilege in this context).

99. *Infosystems*, 197 F.R.D. at 306 (citing *Valassis*, 143 F.R.D. at 125).

100. *Id.*

101. *Id.* at 307. The court also rejected Sarla’s claim that the documents at issue were protected from discovery by the work product doctrine. *Id.* at 306–07.

102. *See supra* notes 76–78 and accompanying text.

103. *See Upjohn Co. v. United States*, 449 U.S. 383, 391–92 (1981) (“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.”).

104. *Id.*

the legal import or effect of her actions or decisions while she was still employed there. On the other hand, mere third-party fact witnesses never could have exposed the organization to liability, and there is no need to protect their communications with corporate counsel as privileged. Given that the attorney-client privilege endorsed in *Upjohn* and subsequently embodied in the subject matter test is “a corporate privilege, not a witness privilege,” and therefore demands an agency or other close relationship between the corporation and the person from whom information is sought, it necessarily distinguishes employees from third-party fact witnesses.<sup>105</sup> Extending the privilege to communications with former employees in specified circumstances does not alter that differentiation.

#### *D. Rejecting the Privilege in the Former Employee Context*

The *Infosystems* court is not the only court to look askance at attorney-client privilege claims asserted with respect to communications with an organization’s former employees. The Washington Supreme Court’s 2016 decision in *Newman v. Highland School District No. 203*<sup>106</sup> is the most negative decision in this line of authority.

A high school football player, Matthew Newman, sued Highland School District No. 203 (Highland) for negligence after he sustained a serious brain injury during a game.<sup>107</sup> During discovery, Newman’s lawyers deposed all of the football coaches on staff at the time of Newman’s injury, including coaches who were no longer employed by Highland.<sup>108</sup> Highland’s lawyer stated at the depositions that he had previously interviewed the former coaches and that he was representing them at their depositions.<sup>109</sup> After losing a battle to have Highland’s lawyer disqualified on conflict of interest grounds, Newman sought to discover the communications between Highland’s lawyer and its former coaches.<sup>110</sup> Highland moved for a protective order based on the attorney-client privilege which the trial court generally denied, although it did allow Highland to retain the privilege during the time that its lawyer represented the former coaches in connection with their depositions.<sup>111</sup> The trial court otherwise ordered Highland to respond to Newman’s discovery requests.<sup>112</sup> After failing to persuade the Washington Court of Appeals to review the trial court’s order, Highland won discretionary review of the order by the Washington Supreme Court, which ordered a temporary stay of discovery.<sup>113</sup>

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105. Sexton, *supra* note 36, at 496–97.

106. *Newman v. Highland School District No. 203*, 381 P.3d 1188 (Wash. 2016).

107. *Id.* at 1189–90.

108. *Id.* at 1190.

109. *Id.*

110. *Id.*

111. *Id.* at 1191, 1191 n.1.

112. *Id.* at 1190.

113. *Id.* at 1190–91.

In the Washington Supreme Court, Highland argued that the flexible *Upjohn* approach to an organization's attorney-client privilege justified extending the privilege to its lawyer's post-employment communications with the former coaches, but the court disagreed.<sup>114</sup> Consequently, the court affirmed the trial court's denial of Highland's motion for a protective order and re-opened discovery.<sup>115</sup>

In reaching its decision, the *Newman* court explained that while it had "embraced *Upjohn*'s flexible approach to applying the attorney-client privilege in the corporate client context," it had never analyzed whether *Upjohn* supported expanding the scope of the privilege to include counsel's communications with an organization's former non-managerial employees.<sup>116</sup> The court reasoned that the "flexible approach articulated in *Upjohn* presupposed attorney-client communications taking place within the corporate employment relationship," inasmuch as the privilege is intended "to encourage full and frank communication between attorneys and their clients."<sup>117</sup> In comparison, it made no sense to expand the attorney-client privilege "to communications outside the employer-employee relationship because former employees [are] categorically differ[ent] from current employees with respect to the concerns identified in *Upjohn*" and other Washington Supreme Court cases toeing the *Upjohn* line.<sup>118</sup> The court further explained the difference between current and former employees with respect to the privilege:

A school district, like any organization, can act only through its constituents and agents. Corporate attorney-client privilege may arise when "the constituents of an organizational client communicate[ ] with the organization's lawyer in that person's organizational capacity." An organizational client, including a governmental agency, can require its own employees to disclose facts material to their duties (with some limits not relevant here) to its counsel for investigatory or litigation purposes.

But everything changes when employment ends. When the employer-employee relationship terminates, this generally terminates the agency relationship. As a result, the former employee can no longer bind the corporation and no longer owes duties of loyalty, obedience, and confidentiality to the corporation. Without an ongoing obligation between the former employee and employer that gives rise to a principal-agent relationship, a former employee is no different from

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114. *Id.* at 1191.

115. *Id.*

116. *Id.* at 1192.

117. *Id.*

118. *Id.* (referring to *Youngs v. PeaceHealth*, 316 P.3d 1035, 1043 (Wash. 2014)).

other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party.<sup>119</sup>

Highland argued that the court should extend the attorney-client privilege to its communications with the former coaches because the former coaches might possess vital information about the case, and that their conduct while still coaching in the district might open Highland to vicarious liability.<sup>120</sup> However valid these concerns might be, they did not, in the *Newman* court's eyes, rationalize stretching the attorney-client privilege beyond its underlying purpose of fostering full and frank communications between the lawyer and the client.<sup>121</sup> In the corporate or other organizational context, that purpose is achieved by confining the privilege to the period of the employer-employee relationship.<sup>122</sup> In contrast, an organization's and a former employee's interests may diverge when their employment relationship ends.<sup>123</sup> But regardless of any relationship between the organization and the former employee, the privilege belongs solely to the organization, which alone may waive or assert its protections—even to the former employee's detriment.<sup>124</sup>

The court further reasoned that declining to extend the organizational attorney-client privilege articulated in *Upjohn* beyond the employment relationship would ensure “a predictable legal framework.”<sup>125</sup> The predictability of the privilege's application—which was an important consideration for the *Upjohn* court<sup>126</sup>—was especially vital in *Newman*, where the issue was the point at which the privilege ceases to apply vis-à-vis organizational clients and their employees.<sup>127</sup> The *Newman* court observed that, while everyone “agree[s] that it cannot extend forever and that it cannot encompass every communication between corporate counsel and former employees,” it was “difficult to find any principled line of demarcation that extends beyond the end of the employment relationship.”<sup>128</sup> Ultimately, the court decided that it could adequately protect the interests served by the privilege by holding that communications between

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119. *Id.* at 1192–93 (alterations in original) (footnotes and citations omitted).

120. *Id.* at 1193.

121. *Id.*

122. *Id.* (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(2) (AM. L. INST. 2000)).

123. *Id.*

124. *Id.*

125. *Id.*

126. See *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (“[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”).

127. *Newman*, 381 P.3d at 1193.

128. *Id.*

lawyers for an organization and employees during the period of employment remain privileged after the employment relationship concludes.<sup>129</sup>

In sum, the trial court correctly rejected Highland's argument that its attorney-client privilege applied equally to its lawyers' communications with current and former employees.<sup>130</sup> Highland could "assert its attorney-client privilege over communications with the former coaches only [while its lawyer] purportedly represented them at their depositions."<sup>131</sup>

Justice Wiggins dissented.<sup>132</sup> He understandably reasoned that former employees, like current employees, may have relevant information concerning events that occurred during their tenure that the organization's lawyer must know to appropriately advise her client.<sup>133</sup> After all, relevant knowledge that employees gain while working for an organization does not become irrelevant merely because their employment ended.<sup>134</sup> According to Justice Wiggins, the majority's dismissal of Highland's related argument reflected a misreading of *Upjohn*.<sup>135</sup> Indeed, the enablement of "the flow of relevant and necessary information from lower-level employees to counsel" was a key reason that the *Upjohn* Court discarded the control group test and extended the attorney-client privilege to lawyers' communications with mid- and low-level corporate employees.<sup>136</sup>

Justice Wiggins favored the "simple test" employed by the *Peralta* court: "Did the communications with the former employee, whenever they occurred, 'relate to the former employee's conduct and knowledge, or communication with defendant's counsel, during his or her employment?'"<sup>137</sup> If they do, the communications are protected against disclosure by the organization's attorney-client privilege in accordance with *Upjohn*.<sup>138</sup>

The importance of the decision in *Newman* is debatable. First, the case articulates a clear minority rule and includes a lengthy and well-reasoned dissent. Although many of the opinions upholding the privilege will not bind other courts, that does not change the fact that *Newman* is against the weight of the case law.<sup>139</sup>

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129. *Id.* at 1193–94.

130. *Id.* at 1194.

131. *Id.*

132. *Id.* at 1194–1202 (Wiggins, J., dissenting).

133. *Id.* at 1197 (Wiggins, J., dissenting) (quoting *In re Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981)).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 1198 (Wiggins, J., dissenting) (quoting *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999)).

138. *Id.*

139. *See, e.g.*, cases cited *supra* note 54.

Second, although the court probably discounted *Upjohn*'s need-to-know aspect too deeply, the privilege has never been held to prevent the discovery of facts known by an employee or former employee.<sup>140</sup> In many cases involving organizational litigants—perhaps even most such cases—communications between the organization's lawyer and former employees are focused on facts known to the former employees from their period of employment. Thus, the inapplicability of the privilege to former employees under *Newman* is likely to come into play in relatively few cases.

Third, under the inclusive *Peralta* test, the attorney-client privilege still attaches only to post-employment communications that relate to former employees' conduct and knowledge, or to communication with the organization's lawyers, during their employment.<sup>141</sup> Communications between an organization's lawyer and a former employee concerning events that occurred after the employee left the organization are not privileged.<sup>142</sup> Similarly, if a lawyer informs a former employee of new facts or facts previously unknown to the former employee, those conversations are not privileged.<sup>143</sup> Therefore, much of the back-and-forth between a lawyer and a former employee that typically occurs in, for example, deposition preparation, is not protected from discovery even in jurisdictions that are arguably more enlightened than Washington.<sup>144</sup>

Fourth, even if the attorney-client privilege does not cloak a lawyer's communications with a former employee, those communications may well be shielded from disclosure by the lawyer's work product immunity.<sup>145</sup> The protection afforded by work product immunity is broader than that conferred by the attorney-client privilege in terms of the array of information it shields from

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140. See *SodexoMAGIC, LLC v. Drexel Univ.*, 291 F. Supp. 3d 681, 685 (E.D. Pa. 2018) (“[T]he privilege only protects communications from discovery. Facts are discoverable, even if discussed in privileged communications.”); *Ex parte Alfa Ins. Corp.*, 284 So. 3d 891, 907 (Ala. 2019) (“[A]ttorney-client communications themselves are not discoverable. Discovery is allowed, however, as to the otherwise discoverable facts that may have been included in the communications . . . .”); *Newman*, 381 P.3d at 1191 (“The attorney-client privilege does not shield facts from discovery, even if transmitted in communications between attorney and client.”); EPSTEIN, *supra* note 19, at 116 (“Facts remain discoverable regardless of to whom they have been conveyed.”).

141. *Peralta*, 190 F.R.D. at 41.

142. *Id.*

143. *GlobalRock Networks, Inc. v. MCI Commc'ns Servs., Inc.*, No. 1:09-CV-1284 (MAD/RFT), 2012 U.S. Dist. LEXIS 200814, at \*12 (N.D.N.Y. May 7, 2012).

144. See *Peralta*, 190 F.R.D. at 41–42 (“As to any communication between . . . counsel and a former employee whom counsel does not represent, which bear on or otherwise potentially affect the witness's testimony, consciously or unconsciously, no attorney-client privilege applies.”).

145. See, e.g., *Gary Friedrich Enters., LLC v. Marvel Enters., Inc.*, No. 08 Civ. 1533 (BSJ) (JCF), 2011 U.S. Dist. LEXIS 54154, at \*19 (S.D.N.Y. May 20, 2011) (“Although there are some aspects of attorney communications with former employees that are carved out of the attorney-client privilege, many of these communications are nevertheless protected under the aegis of the work product doctrine.”); *Gioe v. AT&T Inc.*, No. CV 09-4545 (LDW) (AKT), 2010 U.S. Dist. LEXIS 99066, at \*8 (E.D.N.Y. Sept. 20, 2010) (“[T]o the extent that communications between [d]efense counsel and [the former employee] are specifically counsel's conclusions or opinions, they may be covered by work product protection under Rule 26.”).

discovery. Most obviously, work product immunity is not limited, as is the privilege, to confidential communications between an attorney and a client.<sup>146</sup> Work product immunity is not necessarily waived by the disclosure of confidential information to a third-party.<sup>147</sup> Rather, for disclosure to a third-party to waive work product protection, the third-party must be an adversary or a conduit to an adversary.<sup>148</sup> Former employees generally do not fit this description and, thus, lawyers' communications with them that otherwise satisfy the requirements for work product immunity are typically off-limits to an opposing party.<sup>149</sup>

In terms of protection against discovery, tangible work product immunity is extraordinarily difficult to overcome.<sup>150</sup> A lawyer's opinion work product presents an even higher hurdle. Opinion work product generally enjoys almost

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146. *Reg'l Airport Auth. v. LFG, LLC*, 460 F.3d 697, 713 (6th Cir. 2006).

147. *See, e.g., Blattman v. Scaramellino*, 891 F.3d 1, 5 (1st Cir. 2018) (noting this principle); *In re Grand Jury Matter #3*, 847 F.3d 157, 165 (3d Cir. 2017) (waiving the attorney-client privilege by forwarding an e-mail message to a third party did not also waive work product immunity); *In re Lake Lotawana Cmty. Improvement Dist.*, 563 B.R. 909, 922 (Bankr. W.D. Mo. 2016) (asserting that "[m]ere disclosure to a third party does not waive the work product" immunity and concluding that a party did not waive work product protection through disclosure to a mediator); *BouSamra v. Excela Health*, 210 A.3d 967, 979 (Pa. 2019) ("Attorney work product need be kept confidential only from the adversary.").

148. *Ayers Oil Co. v. Am. Bus. Brokers, Inc.*, No. 2:09 CV 02 DDN, 2009 U.S. Dist. LEXIS 111928, at \*8 (E.D. Mo. Dec. 2, 2009); *O'Boyle v. Borough of Longport*, 94 A.3d 299, 313 (N.J. 2014); *BouSamra*, 210 A.3d at 978; *State v. Lead Indus. Ass'n*, 64 A.3d 1183, 1196 (R.I. 2013); *Kittitas Cnty. v. Allphin*, 416 P.3d 1232, 1241 (Wash. 2018).

149. *See, e.g., Gavin v. Liberty Mut. Grp. Inc.*, No. 11-cv-159-LM, 2012 U.S. Dist. LEXIS 109416, at \*15–17 (D.N.H. Aug. 6, 2012) (ruling that a lawyer's communications with a former employee were protected by the work product doctrine); *Trudeau v. N.Y. State Consumer Prot. Bd.*, 237 F.R.D. 325, 338 (N.D.N.Y. 2006) ("[T]he exchange of [work product] with those whose expertise and knowledge of certain facts can help the attorney in the assessment of any aspect of the litigation does not invoke a waiver of the [work product] doctrine."); *Export-Import Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 112 (S.D.N.Y. 2005) ("Pre-deposition conversations may also be work product; to the extent [the plaintiff's] attorneys communicated their legal opinions and theories of the case [to the former employee], their conversations are immune from discovery."). *But see SEC v. Gupta*, 281 F.R.D. 169, 173 (S.D.N.Y. 2012) ("When an attorney discloses work product to prepare a non-party witness for a deposition, and that witness does not share a common interest with the attorney's client, there has been a deliberate, affirmative and selective use of work product that waives the privilege.").

150. *See, e.g., FED. R. CIV. P. 26(b)(3)(A)* (requiring a showing of "substantial need" and "undue hardship" to discover "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative").

impenetrable protection against discovery—yielding only in isolated and exceptional situations<sup>151</sup>—and in some states is unassailable.<sup>152</sup>

### III. RECOMMENDATIONS FOR LAWYERS

Lawyers for corporations or other organizational clients who are grappling with the application of the organization's attorney-client privilege to their communications with former employees must first be sure to check the controlling jurisdiction's law. If the case is in federal court on diversity jurisdiction grounds, the court is bound to apply the forum state's law.<sup>153</sup> If the forum state is one of the handful of states that still applies the control group test when evaluating organizational clients' privilege claims, the privilege simply will not attach to communications with former employees.<sup>154</sup> If the forum state employs the subject matter or modified subject matter test, on the other hand, there is hope. Unfortunately, reported state court decisions addressing the

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151. *Drummond Co. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1335 (11th Cir. 2018) (quoting *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994)); *Smith v. Scottsdale Ins. Co.*, 621 F. App'x 743, 746 (4th Cir. 2015) (quoting *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999)); *Republic of Ecuador v. Mackay*, 742 F.3d 860, 869 n.3 (9th Cir. 2014) (quoting *United States v. Deloitte LLP*, 610 F.3d 129, 135 (D.C. Cir. 2010)); *Deloitte*, 610 F.3d at 135 (quoting *Dir., Off. of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997)); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003) (quoting *In re Ford Motor Co.*, 110 F.3d 954, 962 n.7 (3d Cir. 1997)); *United States v. All Assets Held at Bank Julius Baer & Co., Ltd.*, 270 F. Supp. 3d 220, 223 (D.D.C. 2017) (quoting *Dir., Off. of Thrift Supervision*, 124 F.3d at 1307); *Entergy Ark., Inc., v. Francis*, 549 S.W.3d 362, 371 (Ark. Ct. App. 2018).

152. *See, e.g., Chua v. Johnson*, 784 S.E.2d 449, 454 (Ga. Ct. App. 2016) ("Unlike the qualified privilege afforded other work product, opinion work product is entitled to an absolute privilege and is therefore absolutely protected from disclosure."); *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 995 (Ind. 2014) (discussing the proper interpretation of Indiana Trial Rule 26(B)(3)); *Dubois v. Off. of the Att'y Gen.*, 185 A.3d 734, 741 (Me. 2018) (stating that a party is "not entitled to [discover] records that contain an attorney's mental impressions, conclusions, opinions, or legal theories concerning the litigation"); *State ex rel. Malashock v. Jamison*, 502 S.W.3d 618, 620 (Mo. 2016) ("The work product doctrine precludes discovery of the mental impressions, conclusions, opinions, or legal theories . . . created or commissioned by counsel in preparation for possible litigation.") (citing *State ex rel Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. 2004) (en banc)); *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 399 P.3d 334, 347 (Nev. 2017) (quoting *Wardleigh v. Second Jud. Dist. Ct.*, 891 P.2d 1180, 1189 (Nev. 1995)); *Henderson v. Newport Cnty. Reg'l YMCA*, 966 A.2d 1242, 1247 (R.I. 2009) ("[O]pinion work product qualifies for absolute immunity from discovery and under no circumstance may another party obtain, through discovery methods, an attorney's recorded thoughts and theories."); *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 803–04 (Tex. 2017) (stating that "[c]ore work product" is not discoverable).

153. *See, e.g., Barr v. Ewing*, 774 F. App'x 547, 551 (11th Cir. 2019) ("Because state law supplies the rule of decision in this case, we must apply Florida attorney-client privilege principles to determine whether the district court erred here."); *In re Mt. Hawley Ins. Co.*, 736 F. App'x 392, 394 (4th Cir. 2018) ("Because this is a diversity action involving claims for which South Carolina law provides the rule of decision, South Carolina's law of attorney-client privilege applies.").

154. *See, e.g., Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515, 518 (N.D. Ill. 1990) (applying Illinois law and refusing to extend the privilege to former employees under the control group test).

privilege's application to lawyers' communications with organizational clients' former employees are few and far between; many states have apparently not decided the issue. In most diversity cases, then, lawyers will be left to argue for the application of the privilege based on the persuasive force of the multiple federal court decisions on the subject. That said, state courts regularly look to well-reasoned federal decisions for guidance when deciding cases<sup>155</sup>—especially when the state case involves issues of first impression.<sup>156</sup> Where federal law controls the question, lawyers have ample authority to support a privilege argument,<sup>157</sup> although many of the cases are district court decisions and therefore are persuasive authority rather than precedential.<sup>158</sup>

When asserting the privilege, the lawyers for the organization must remember that there is no blanket privilege covering all attorney-client communications.<sup>159</sup> This is as true where former employees are concerned as it is anywhere else.<sup>160</sup> The party asserting the attorney-client privilege must establish that the privilege applies to each communication sought to be withheld.<sup>161</sup> The form of the communication between the former employee and the lawyer is irrelevant to the attorney-client privilege analysis as long as the communication otherwise qualifies as privileged. For example, the privilege attaches to telephone calls,

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155. See, e.g., *In re Am. Int'l Grp., Inc. Consol. Derivative Litig.*, 976 A.2d 872, 882 (Del. Ch. 2009) (“In applying Delaware law, I look, as courts often do, to well-reasoned precedent from federal courts, courts of our sister states, and our Anglo-American jurisprudential tradition.”).

156. See, e.g., *Ferra v. Loews Hollywood Hotel, LLC*, 253 Cal. Rptr. 3d 798, 805 (Cal. Ct. App. 2019) (quoting *Futrell v. Payday Cal., Inc.*, 119 Cal. Rptr. 3d 513, 524 n.6 (Ct. App. 2010)); *Wills v. Bd. of Regents of the Univ. of N.M.*, 357 P.3d 453, 457 (N.M. Ct. App. 2015) (quoting *CIT Grp./Equip. Fin., Inc. v. Horizon Potash Corp.*, 884 P.2d 821, 823 (N.M. Ct. App. 1994)).

157. See cases cited *supra* note 54.

158. See *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 648 F. Supp. 2d 226, 231 (D. Mass. 2009) (“As Judges Posner and Easterbrook have repeatedly and accurately observed, with characteristic bluntness, district court decisions are neither authoritative nor precedential.”); see also *Kremers v. Coca-Cola Co.*, 714 F. Supp. 2d 912, 917 (S.D. Ill. 2009) (citations omitted) (“While the Court is perfectly well aware that . . . the opinions of district courts are not precedents, decisions of coordinate courts are entitled to this Court’s respectful attention and to such weight as their persuasive value commands.”).

159. *In re LeFande*, 919 F.3d 554, 563 (D.C. Cir. 2019) (quoting *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998)); *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187, 1199 (Colo. 2013) (quoting *In re Grand Jury Subpoena (Mr. S)*, 662 F.3d 65, 72 n.3 (1st Cir. 2011)); *Maldonado v. Kiewit La. Co.*, 152 So. 3d 909, 927 (La. Ct. App. 2014) (citing *Cacamo v. Liberty Mut. Fire Ins. Co.*, 798 So. 2d 1210, 1216 (La. Ct. App. 2001)).

160. See, e.g., *In re Morning Song Bird Food Litig.*, No. 3:12-cv-01592, 2017 U.S. Dist. LEXIS 198109, at \*7–8 (S.D. Fla. Nov. 29, 2017) (rejecting blanket privilege assertions with respect to a former employee’s deposition preparation); *Misner v. Potter*, No. 2:07-CV-0330 TS, 2008 U.S. Dist. LEXIS 136920, at \*5 (D. Utah June 19, 2008) (agreeing with the “plaintiff that [d]efendant [could] not assert a ‘blanket privilege’” regarding communications with former employees).

161. *In re Grand Jury Proc.*, 616 F.3d 1172, 1183 (10th Cir. 2010) (quoting *In re Grand Jury Subpoena Duces Tecum Issued on June 9, 1982*, 697 F.2d 277, 279 (10th Cir. 1983); *In re Foster*, 188 F.3d 1259, 1264 (10th Cir. 1999)); *Sapia v. Bd. of Educ. of the City of Chi.*, 351 F. Supp. 3d 1125, 1132 (N.D. Ill. 2019); *Slaven v. Great Am. Ins. Co.*, 83 F. Supp. 3d 789, 796 (N.D. Ill. 2015).

personal conversations, letters, notes, text messages, and e-mail messages.<sup>162</sup> Nonverbal communications—such as nods, shakes of the head, gestures, winks, and even silence—may also be privileged.<sup>163</sup>

Lawyers must also properly perform the ministerial acts that accompany the assertion of the privilege. For example, lawyers must ensure that they timely prepare privilege logs that satisfy local court rules lest they waive the privilege through their failure to comply.<sup>164</sup> Courts' privilege log requirements may be onerous. For instance, a Kansas federal court explained that a privilege log must: (1) describe the document (such as an e-mail message, letter, or memorandum); (2) identify the date the document was prepared; (3) list the date of the document if it differs from the date the document was prepared; (4) identify who prepared the document; (5) identify the person or people for whom the document was prepared, as well as those to whom the document was directed; (6) state the purpose for which the document was prepared; (7) give the document's length in page numbers; (8) state whether the document is being withheld based on the attorney-client privilege or work product immunity; and (9) furnish any other information necessary to establish the elements of the privilege or work product doctrine.<sup>165</sup> With respect to element (5), the court explained that a log requires "an evidentiary showing based on competent evidence supporting any assertion" that a lawyer supervised the document's creation.<sup>166</sup> In connection with element (6), the court stated that a privilege log must include an evidentiary showing, based on competent evidence, that the document meets the work product doctrine's anticipation of litigation requirement.<sup>167</sup>

Regardless of whether the privilege attaches to a lawyer's communications with a former employee, the lawyer should also analyze whether the communication enjoys work product immunity.<sup>168</sup> "As with the attorney-client privilege, an assertion that a document [or other information] is protected by the work product doctrine must be established by specific facts and not conclusory statements."<sup>169</sup> Again, as with the privilege, the party asserting work product immunity bears the burden of showing that the doctrine applies to the information in question.<sup>170</sup> Furthermore, documents or other information or materials sought to be withheld from discovery as work product must be listed

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162. See EPSTEIN, *supra* note 19, at 89 (stating that a "communication may be oral or written").

163. *Id.*

164. *Id.* at 1527.

165. *In re Universal Serv. Fund Tel. Billing Pracs. Litig.*, 232 F.R.D. 669, 673 (D. Kan. 2005).

166. *Id.*

167. *Id.*

168. See *Schoenmann v. FDIC*, 7 F. Supp. 3d 1009, 1014 (N.D. Cal. 2014) (holding that a bankruptcy trustee's e-mail messages to and from the former CEO of a failed bank, as well as draft documents attached to those messages, constituted work product and consequently were protected from disclosure).

169. *Adair v. EQT Prod. Co.*, 285 F.R.D. 376, 382 (W.D. Va. 2012).

170. *Gillespie v. Charter Commc'ns*, 133 F. Supp. 3d 1195, 1201 (E.D. Mo. 2015); *Kannaday v. Ball*, 292 F.R.D. 640, 644 (D. Kan. 2013).

and suitably described on a party's privilege log to preserve related immunity claims.<sup>171</sup>

Some lawyers for organizational litigants may be tempted to additionally represent former employees to create an attorney-client relationship and thereby shield their communications as privileged, either in connection with the former employees' depositions—as the defense lawyer in *Newman* did—or more broadly.<sup>172</sup> There is much not to like about this strategy. First, it is not guaranteed to succeed. The lawyer's voluntary representation of a former employee will not shield information that does not independently qualify for protection under the attorney-client privilege.<sup>173</sup> Second, the opposing party could argue that a claimed attorney-client relationship is a sanctionable ruse intended to unlawfully obstruct that party's access to evidence.<sup>174</sup> An argument along those lines may find traction with a court in some circumstances. Third, and depending on the facts, a lawyer who accepts a former employee's representation (even for the limited purpose of a deposition) may unwittingly create a concurrent conflict of interest with the lawyer's organizational client.<sup>175</sup> Again depending on the facts, such a conflict of interest may or may not be curable by informed consent.<sup>176</sup>

Finally, and fundamentally, lawyers should be very circumspect about what they say to former employees of an organizational client. Even in jurisdictions that recognize the attorney-client privilege in the former employee context, the privilege does not attach to communications between a lawyer for the organization and a former employee whom the lawyer does not represent, “which bear on or otherwise potentially affect” the former employee's testimony, whether “consciously or unconsciously.”<sup>177</sup> Thus, and by way of

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171. FED. R. CIV. P. 26(b)(5)(A)(ii).

172. *Newman v. Highland Sch. Dist.* No. 203, 381 P.3d 1188, 1190, 1194 (Wash. 2016).

173. See *Wade Williams Distrib., Inc. v. Am. Broad. Cos.*, No. 00 Civ. 5002 (LMM), 2004 U.S. Dist. LEXIS 12152, at \*3–4 (S.D.N.Y. June 30, 2004) (citing *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999)).

174. See generally MODEL RULES OF PRO. CONDUCT r. 3.4(a) (AM. BAR ASS'N 2020) (stating that “a lawyer shall not: (a) unlawfully obstruct another party's access to evidence”).

175. See *id.* r. 1.7(a) (outlining concurrent client conflicts of interest).

176. See *id.* r. 1.7(b) (specifying the requirements for consent to a concurrent conflict of interest).

177. *Peralta*, 190 F.R.D. at 42; see, e.g., *In re Morning Song Bird Food Litig.*, No. 3:12-cv-01592, 2017 U.S. Dist. LEXIS 198109, at \*7 (S.D. Fla. Nov. 29, 2017) (adopting this approach); *Mattel, Inc. v. MGA Ent., Inc.*, No. CV 04-9049 DOC (RNBx), 2010 U.S. Dist. LEXIS 101641, at \*26–27 (C.D. Cal. Aug. 3, 2010) (quoting *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 25 (N.D. Cal. 1985)) (noting that “Federal Rule of Evidence 612 renders discoverable ‘[documents] reviewed prior to a deposition’” and that “[a]ny privilege or work product protection against disclosure is deemed waived as to those portions so reviewed[.]” and ordering the production of all privileged documents that the witness reviewed “to refresh her recollection prior to her deposition”); *Schaffrath v. Hamburg Twp.*, No. 07-14909-CV, 2009 U.S. Dist. LEXIS 1354, at \*4–6 (E.D. Mich. Jan. 8, 2009) (granting the plaintiff's motion to re-depose the defendant's former employee “for the purposes of inquiring into conversations he had with [d]efense [c]ounsel in

example, a lawyer's efforts to refresh a former employee's recollection before the former employee's deposition likely will be discoverable. As explained earlier, communications between an organization's lawyer and a former employee concerning events that occurred after the employee left the organization are not privileged, nor are communications in which the lawyer informs the former employee of new facts or facts that were previously unknown to the former employee.<sup>178</sup> In summary, the safest approach for lawyers is to assume that communications with former employees who they do not represent *will not be* privileged and proceed accordingly.

#### IV. CONCLUSION

Under what may fairly be characterized as the majority approach, courts that apply the subject matter or modified subject matter tests when deciding whether a lawyer's communications with a current employee of an organizational client are protected by the organization's attorney-client privilege extend the privilege to communications with former employees in certain circumstances. To be privileged, a communication must relate to the former employee's conduct and knowledge, or communications with the organization's lawyers, during the person's employment by the organization. In contrast, communications between an organization's lawyer and a former employee about events that occurred after the employee left the organization are not privileged. This is a sound approach that recognizes the underlying purposes of the attorney-client privilege while, at the same time, reasonably allowing opposing parties access to relevant evidence. For lawyers who are nonetheless concerned about the potential application of the privilege to their communications with former employees of their organizational clients, salvation may lie in the work product doctrine, which does not require the existence of an attorney-client relationship to protect information as confidential and applies to a wider array of information and materials. Of course, cautious lawyers may simply assume that communications with former employees who they do not represent will not be privileged or otherwise shielded from disclosure and conduct themselves accordingly.

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anticipation of his deposition testimony" that may have influenced his testimony, including "induc[ing] him to conform his testimony to the other witnesses in the case who had already been deposed").

178. See *supra* notes 141–143 and accompanying text.