



**The Attorney-Client Privilege in the Corporate Setting:**  
*Potential Pitfalls When Speaking with a Client's Employees, Former Employees, Etc.*

Presented by: Larico Ream & Greg Hearing

**GORDON REES**  
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May 16, 2018



**An Overview of the Attorney-Client Privilege and its Applicability in the Corporate Setting**

**What is the Attorney-Client Privilege?**  
 The privilege is a common law doctrine that protects confidential communications between an attorney and a client from disclosure to third parties. It is a fundamental principle of the legal system that encourages clients to seek legal advice and allows attorneys to represent their clients effectively.

**When is the Privilege Applicable?**  
 The privilege applies to confidential communications between an attorney and a client for the purpose of seeking or providing legal advice. It is not applicable to communications that are not confidential, are not for the purpose of legal advice, or are made in the presence of third parties.

**Who is the Client?**  
 The client is the person or entity that seeks legal advice from the attorney. In the corporate setting, the client is typically the corporation, but it can also be an individual employee or former employee.

**The Extension of Upjohn**

**Upjohn v. United States**  
 In *Upjohn v. United States*, the Supreme Court held that the attorney-client privilege extends to communications between an attorney and a client's employees, provided that the communications are confidential and for the purpose of seeking or providing legal advice.

**Confidentiality**  
 The communications must be confidential, meaning they are not disclosed to third parties. This includes communications made in the presence of other employees or in a public setting.

**Purpose of Legal Advice**  
 The communications must be for the purpose of seeking or providing legal advice. This includes communications made in the course of an attorney's representation of the client.

**Former Employees?**

**Former Employees**  
 The attorney-client privilege extends to former employees of a client, provided that the communications were confidential and for the purpose of seeking or providing legal advice at the time they were made.

**Confidentiality**  
 The privilege applies to confidential communications, even if the employee is no longer with the client. This includes communications made in the presence of other employees or in a public setting.

**Purpose of Legal Advice**  
 The communications must be for the purpose of seeking or providing legal advice. This includes communications made in the course of an attorney's representation of the client.

**Maintaining the Privilege**

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 To maintain the attorney-client privilege, the communications must be confidential and for the purpose of seeking or providing legal advice. This includes communications made in the presence of other employees or in a public setting.

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**Questions? Comments?**



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# Presenters



Lance Ream



Greg Hearing

**GORDON&REES**  
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# An Overview of the Attorney-Client Privilege and its Applicability in the Corporate Setting

## The Basics of the Attorney-Client Privilege

- The attorney-client privilege dates back to Roman law and was recognized early in English common law.
- The privilege is recognized by rule, statute, or common law in all 50 states and by the federal courts.
- The attorney-client privilege extends to confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations. C.R.S. § 13-90-107(1)(b); *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187, 1198 (Colo. 2013).
- It is insufficient to show merely that the communication was from a client to a lawyer; there must be circumstances indicating that the lawyer or client intended the communication to be secret. *People v. Tucker*, 232 P.3d 194, 198 (Colo. App. 2009) (collecting cases).
- Communications between a lawyer and a client that are not confidential are not protected by the privilege. *People v. Tippett*, 733 P.2d 1183, 1192-93 (Colo. 1987).

## Extension of the Privilege to the Corporate Setting

- In 1981, the United States Supreme Court expressly recognized the application of the privilege in the context of a corporation in *Upjohn Company v. United States*, 449 U.S. 383 (1981). *Upjohn* concerned an internal investigation into certain "questionable payments" made to foreign governments by a subsidiary of Upjohn.
- Counsel for Upjohn conducted a series of investigations with company employees regarding the underlying facts and took various notes regarding the same. The IRS later sought to compel production of the notes.
- Both the district court and the Sixth Circuit Court of Appeals ordered the notes produced over Upjohn's objection.
- The Supreme Court reversed in a unanimous opinion.

## The *Upjohn* Decision

- Writing for the Court, Justice Rehnquist observed, "The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye towards the legally relevant." 449 U.S. at 390-91.
- The Court continued, "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." *Id.* at 393.
- In holding that the attorney-client privilege shielded the underlying communications from production, the Court concluded that the communications concerned matters within the employees' corporate duties and they were questioned in order to allow the corporation to receive legal advice. *Id.* at 394. The Court concluded that "[c]onsistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure." *Id.*
- In advocating for a broad and predictable privilege, the *Upjohn* Court specifically rejected the narrower "control group" test which restricted the corporate privilege to certain senior management officials and thereby failed to protect communications with rank and file employees.

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# The Extension of Upjohn

## Upjohn's Impact

- Following *Upjohn*, corporate counsel afforded with additional latitude to interview employees with relevant information as part of litigation or corporate investigations.
- Upjohn waivers became commonplace.
- Communications no longer limited to control group and managerial equivalents.

## Upjohn's Extension to Other Parties

- Following *Upjohn*, courts throughout the country have faced questions of applicability of the attorney-client privilege to various corporate contexts.
- Such extensions are consistent with the *Upjohn* Court's goal of avoiding an uncertain privilege.

## Subsidiaries and Interrelated Companies

- Communications with subsidiaries and interrelated companies have been recognized as privileged under the rationale of *Upjohn*. See *GSI Commerce Solutions, Inc. v. BabyCenter LLC*, 618 F.3d 204, 210 (2d Cir. 2010); *Teleglobe Commc'ns Corp. v. BCE, Inc.* (*In re Teleglobe Commc'ns Corp.*), 493 F.3d 345, 372 (3d Cir. 2007) (recognizing joint-client privilege).
- Comports with the reality of medium and large business which may have multiple subsidiaries, sister companies, or operating and service companies.
- The more common the ownership, the more likely they will be viewed as a single entity.
- But even separate entities may still invoke the joint-client and/or common-interest privilege, so long as their interests are sufficiently aligned.

## Independent Contractors

- Courts have applied the corporate attorney-client privilege to independent contractors working for the corporate client. See *In re: Bieter, Co.*, 16 F.3d 929 (8th Cir. 1994); see also *Alliance Constr. Solutions, Inc. v. Dept of Corr.*, 54 P.3d 861 (Colo. 2002).
- Courts recognize that independent contractors may possess important information needed by the attorney to provide effective representation.
- Colorado Supreme Court has articulated a four-factor test regarding application of the privilege to independent contractors:
  - (1) The information must come from an employee, agent, or independent contractor who has a significant relationship to the business and the transaction that is the subject of the legal services; (2) the communication must be made for the purpose of seeking or providing legal assistance; (3) the subject matter of the communication must be within the scope of the work provided by the employee, agent, or independent contractor; and (4) the communication must be treated as confidential.

## Functional Equivalent of Employees

- Privilege may extend to consultants or other third-parties utilized by the corporate client.
- Courts have extended the privilege to the "functional equivalent" of employees under the three-factor test articulated in *Export-Import Bank v. Asia Pacific Pulp & Paper Co. Ltd.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005). Test can be difficult to satisfy.
- Other courts apply a "broad practical approach."

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# Former Employees?

## Former Employees

- Recently, the Washington Supreme Court departed from the flexible framework specified by *Upjohn* and drew a bright-line distinction between current and former employees, holding that the latter are not encompassed within the attorney-client privilege. *Newman v. Highland School Dist. No. 203*, 381 P.3d 1188, 1190 (Wash. 2016).
- In *Newman*, the Washington Supreme Court certified the issue of "whether postemployment communications between former employees and corporate counsel should be treated the same as communications with current employees for purposes of applying the corporate attorney-client privilege."
- Case involved the investigation of an injury suffered by a high school football player
- Court focused on absence of agency relationship post-employment.

## Former Employees

- One treatise contends that the attorney-client privilege does not reach post-employment communications on the basis that an agency relationship no longer exists between the corporation and the former employee. Epstein, Edna, *The Attorney-Client Privilege and Work-Product Doctrine*, 222 (6th Ed. 2017). This conclusion is based upon the Restatement (Third) of Law Governing Lawyers § 123, which focuses on the termination of the agency relationship created by employment.
- It does note an exception for employees with a continuing duty to the corporation, including those who were privy to privileged communications during their employment.
- While termination of employment does end the agency relationship, this does not consider that the post-employment communications generally center upon the employee's conduct or observations during their employment and may implicate issues such as *respondeat superior*.

## Authorities Split

- *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999), which specifically resolved "whether, under federal law, counsel for an employer can claim a privilege as to its attorney's communications in preparing an unrepresented former employee for deposition by opposing counsel, and/or such attorney's communications during the deposition about her testimony in that deposition." *Id.* at 40. The court concluded that communications with a former employee about their deposition were privileged and akin to those addressing the "underlying facts in this case." *Id.* at 41. As for other communications, the court concluded that conversations that went beyond the former employee's knowledge of the circumstances of the plaintiff's employment and termination and beyond the former employee's other activities within the course of her employment with the defendant were not protected. *Id.*
- *Peralta* provides the essential point to determine the application of the attorney-client privilege as to a former employee: "did the communication relate to the former employee's conduct and knowledge, or communication with defendant's counsel, during his or her employment? If so, such communication is protected from disclosure by defendant's attorney-client privilege under *Upjohn*. As to any communication between defendant's 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." *Id.*

## Authorities Split

- *In re Allen*, 106 F.3d 582 (4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit held that "[t]he analysis applied by the Supreme Court in *Upjohn* to determine which employees fall within the scope of the privilege applies equally to former employees." *Id.* at 606.
- The United States Court of Appeals for the Ninth Circuit addressed the issue in *Admiral Ins. Co. v. U.S. Dist. Court for Dist. Of Ariz.*, 881 F.2d 1486 (9th Cir. 1989) and concluded that communications with a former employee are "privileged if the employee possesses information critical to the representation of the parent company and the communications concern matters within the scope of employment." *Id.* at 194, n.6.
- Several district courts have similarly concluded that the privilege generally applies to post-employment communications between counsel and former employees. See *Command Transp., Inc. v. Y.S. Line (USA) Corp.*, 116 F.R.D. 94, 95-7 (D. Ma. 1987); *In re General Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 531 (S.D.N.Y. 2015); *Hanover Ins. Co. v. Plaquemines Parish Gov't*, 304 F.R.D. 494, 499 (E.D. LA 2015).
- These courts generally cite to *Upjohn* and the need for counsel to have access to the employee's information.

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# Maintaining the Privilege

## Spot Privilege Issues Early

- For corporate entities and their counsel, the application of the attorney-client privilege poses a number of potential issues.
- Identify witnesses who are not direct employees and assess the applicability of the privilege: Applies to contractors, consultants and employees of subsidiaries or related companies.
- While courts have traditionally extended the privilege to post-employment communications, a minority of courts, led most recently by the Washington Supreme Court, have held otherwise. This poses potential challenges for in house and outside counsel as they attempt to fully investigate legal issues and properly advise their business clients.
- Subsidiaries and sister corporations can be sold or spun-off. If their interests are no longer aligned, previously privileged communications can become discoverable.

NY CLE Code: GR0518

## Conflicts of Laws

- Practitioners should be aware that the applicable law may change depending upon the location where the communication takes place. Restatement of Conflict of Law, Section 139 Cmt. (e) provides that the law of the state where the communication occurred will generally control however, many communications may be interstate in nature. As a result, the privilege could apply to a communication in one jurisdiction and not apply in another.
- In our increasingly mobile society, with employees commonly working remotely and telecommuting, this adds a layer of complication, particularly for corporations with multiple locations. More so, many states have yet to address the issue of the privilege's extension to former employees, contractors, consultants, etc. which makes application of the privilege uncertain despite case law from other jurisdictions. Additionally, while Fed. R. Evid. 502 should, in theory, provide for uniform application of the privilege in federal courts, that has not been the case with district courts reaching different outcomes under *Upjohn*.

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## Proactive Steps

- Counsel can take certain steps to proactively protect communications with former employees. For example, there is no dispute that the privilege attaches to communications that are made during the employment period. Accordingly, counsel may wish to take steps to bring communications within the employment relationship. This includes exit interviews with employees that are leaving the company and who may have material information regarding a pending or anticipated claim.
- In cases where litigation is anticipated or where an investigation is already underway, these exit interviews can also include an emphasis on ensuring that all relevant documents and communications have been identified and properly preserved.

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- When the need to interview a former employee arises, counsel may wish to qualify communications with former employees by emphasizing that they only wish to discuss actions or conduct by the employee during their employment.
- In addition to defining the scope of the communications, they should include an emphasis on confidentiality and privilege to at least give the best indicia that this was the intent of the parties.
- To the extent privilege will not apply, counsel should be cautious to reveal any information to a former employee regarding case strategy or other materials beyond what is needed. Finally, it is important to remember that work product protection remains applicable and applies to counsels' notes, mental impressions, etc. that stem from such communications.

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